IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE
CASE NO. 3392/2008

In the matter between:

CHRISTIAAN JURIE ELS	**APPLICANT**
And	
ESMARÉ WEIDEMAN	**1ST RESPONDENT**
MEDIA 24 BEPERK	**2ND RESPONDENT**
IZELLE VENTER	**3RD RESPONDENT**

Coram	**:**	**DLODLO, J**
Judgment by	**:**	**DLODLO, J**
For the Applicant	**:**	**ADV. D. DÖRFLING (Johannesburg)** **TEL. NO. (011) 895 9000**
Instructed by	:	Du Plessis & Assoaciates 242 Oak Avenue, Ferndale RANDBURG c/o De Klerk & Van Gend Inc. 3rd Floor, Absa Bank building 132 Addereley Street, CAPE TOWN TEL. NO. (021) 424 9200
For the Respondents	**:**	**ADV. A.M BREITENBACH (SC)** **TEL. NO. (021) 424 3906**
Instructed	:	JAN S DE VILLIERS 18TH Floor, 1 Thibault Square CAPE TOWN TEL. NO. (021) 405 5100
Date(s) of Hearing	**:**	**12 FEBRUARY 2009**
Judgment delivered on	**:**	**18 MARCH 2009**

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE
CASE NO. 3392/2008

In the matter between:

CHRISTIAAN JURIE ELS	**APPLICANT**
And	
ESMARÉ WEIDEMAN	**1ST RESPONDENT**
MEDIA 24 BEPERK	**2ND RESPONDENT**
IZELLE VENTER	**3RD RESPONDENT**

JUDGMENT DELIVERED ON 18 MARCH 2009

DLODLO, J

INTRODUCTION

[1] On 13 February 2008 the Witwatersrand Local Division of the High Court (per Sutherland AJ) granted the Applicant an order against the present Second Respondent (as First Respondent) and the present Third Respondent (as Second Respondent). The order included the following interim interdict:

"An interim interdict shall issue immediately against the first and Second Respondents from publishing the article of which a copy was annexed as "A" to the Notice of Motion, pending the institution of an application for final relief by the Applicant within 10 Days hereof."

Mr. Dörfling and Mr. Breitenbach (SC) appeared before me for the Applicant and Respondents respectively. It is convenient to refer to

the said article as 'Annexure A' and the interim interdict as 'the Order', as Mr. Breitenbach (SC) did.

[2] Annexure A was a draft article which, earlier that day, the Third Respondent ('Ms Venter') had sent to the Applicant for his comments, if any, prior its pending publication in Huisgenoot and You. It was based on and quoted detailed allegations by one Robbie Klay, who it described as a twenty one (21) year old musician and actor and former child star, that the Applicant, who it described as one of the most popular Afrikaans singers in South Africa, had sexually molested Klay over a seven (7) year period from the age of ten (10) years to seventeen (17) years. Huisgenoot and You are magazines edited by the First Respondent ('Ms Weideman') and owned and published by the Second Respondent ('Media 24'). At the time, Ms Venter was the editorial head of the Johannesburg office of the magazines.

[3] The 21 February 2008 editions of the magazines each contained matter which the Applicant alleges, constitute Annexure A. In the case of each magazine the Applicant identifies the matter in question as:

(a) The front cover;

(b) The contents page;

(c) The editorial;

(d) An article entitled 'MY JARE in GESENSOR! Se kloue' (Huisgenoot) and 'CENSORED! Molested me SEXUALLY' (You); and

(e) A further article in the 'advice' section entitled 'INSTINK WAT JOU KIND KAN RED' (Huisgenoot) and 'HOW THE ABUSE BEGINS' (You).

The Applicant alleges that Ms Weideman, Media 24 and Ms Venter published Annexure A intentionally and in bad faith. The Applicant alleges that in the alternative that Ms Weideman and Media 24 were negligent and that negligence is sufficient to sustain their conviction for contempt of court because they are, respectively, the editor and owner of the magazines.

[4] The Applicant asks for orders convicting Ms Weideman, Media 24 and Ms Venter of contempt of court, sentencing Ms Weideman to imprisonment, sentencing Media 24 to a fine, and sentencing Ms Venter to a period of imprisonment (suspended) and directing them to pay the costs, jointly and severally. In their Answering Affidavit (by Ms Weideman) the Respondents have opposed the relief sought by the Applicant on a number of grounds, including the following grounds:

(a) The Respondents assert, *in limine*, that this Court does not have jurisdiction to hear this application for their conviction and punishment for acting in contempt of the Order because it was made by the Witwatersrand Local Division of the High Court ('the WLD') and not by this Court;

(b) The Respondents deny that the matter published in the 21 February 2008 editions of the magazines constitutes Annexure A or that for another reason its publication was prohibited by the Order;

(c) The Respondents assert that Ms Weideman, not Ms Venter, took the decision to publish; and

(d) Ms Weideman denies that she intended to act in contempt of the Order and acted in bad faith.

[5] It was contended by Mr. Breitenbach (SC) that the Applicants are not permitted to rely on negligence as an alternative basis for the conviction of Ms Weideman and Media 24, because it was not raised in the Applicant's Founding papers and that by raising it for the first time in the Applicant's heads of argument, Ms Weideman and Media 24 have been denied the opportunity to place facts before Court to disprove the allegation that they acted negligently. According to Mr. Breitenbach (SC), in any event, wilfulness and *mala fide* (not negligence), are the *mens rea* requirements for the offence of contempt of Court committed by disobeying or failing to comply with a Court Order. Mr. Breitenbach (SC) further pointed out that it is not possible to find on the Affidavits alone that Ms Weideman's stance was wilful and *mala fide*. He accused the Applicant that he has not applied for a referral of the matter to oral evidence or to trial and in his view, there is a real possibility that if the Applicant had sought such referral the Court hearing the evidence might accept Ms Weideman's version or at least find that there is a reasonable doubt as to whether her decision to publish was wilful and *mala fide*. If convicted, pointed out Mr. Breitenbach (SC), none of the Respondents should be sentenced without being afforded the opportunity of presenting evidence in mitigation. This matter will be dealt with under

these aspects highlighted by Mr. Breitenbach (SC) because these were equally mentioned by Mr. Dörfling.

***IN LIMINE*:** JURISDICTION

[6] Mr. Dörfling approached the question of whether or not this Court has jurisdiction to hear this matter *inter alia* by submitting that:

"Die Applikant sal aanvoer dat die publikasie van die gewraakte artikels binne die jurisdiksiegebied van hierdie Agbare Hof plaasgevind het en dat daardie feit alleen 'n genoegsame basis daarstel vir hierdie Agbare Hof om die aansoek aan te hoor. Die feit dat 'n publikasie in die Kaap sou plaasvind blyk uit die redes vir die uitspraak van Sutherland WnR."

Importantly, Mr. Dörfling maintained that the principal place of business (hoofplek van besigheid) of the Second Respondent is situated at Heerengracht 4 in Cape Town within the jurisdiction of this Court. In his submissions this Court has jurisdiction to hear this matter. Mr. Dörfling also contended that the question of jurisdiction must be determined on the basis that an offence was committed within the jurisdiction of this Court. Mr. Dörfling relied on Section 19 (1) (a) of the Supreme Court Act 59 of 1959 and submitted as follows:

"Dit word namens die Applikant aangevoer dat die kwessie van jurisdiksie ter sprake kom, nie binne die konteks van die vraag of die regshulp wat aangevra word, beregbaar is in die Hof waarin die aansoek gebring word. Die feit dat die voormelde twee howe dus twee verskillende areas van jurisdiksie het, is met respek nie die relevante vraag vir oorweging nie. Die vraag vir oorweging is of

hierdie Agbare Hof jurisdiksie het om 'n minagtingsaansoek van 'n bevel van die Hooggregshof aan te hoor."

[7] The fact of the matter is that the WLD and this Court are two (2) separate High Courts each with its own area of jurisdiction. See: **Sections 166 (c)** and **169 of the Constitution of the Republic of South Africa 108 of 1996** ('the Constitution'); **items 16 (1)** and **(4) of Schedule 6 to the Constitution; sections 2, 3, 4 and 6 of the Supreme Court Act 59 of 1959** ('the Supreme Court Act'); **Schedule 1 of the Supreme Court Act; sections 2** and **4 of the Interim Rationalisation of Jurisdiction of the High Courts Act 41 of 2001**, read with **GNR 937** of 27 June 2003, GN 1650 of 14 November 2003 and **GN 3440** of 23 December 2003. See generally Erasmus, **Superior Court Practice** at A1-106 to A1-106C.

[8] It is perhaps prudent to quote some of the authorities mentioned above. Section 166 (c) of the Constitution deals with Judicial systems and it provides that the High Courts, include any High Court of appeal that may be established by an Act of Parliament to hear appeals from High Courts. Schedule 16 (4) (a) provides as follows:

"A provincial or local division of the Supreme Court of South Africa or a Supreme Court of a homeland or a general division of such a Court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in sub-item (6). It is common cause that the contemplated rationalization took place and the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001 was

promulgated. The latter Act repealed subsections (1) and (4) of Section 6 of, and the First Schedule to, the Supreme Court Act. Section 3 of the Rationalisation of Jurisdiction of High Court provides for the transfer of proceedings from one High Court to another. It specifically provides as follows:

"3 (1) If any civil proceedings have been instituted in any High Court, and it appears to the Court concerned that such proceedings –

(a) Should have been instituted in another High Court; or

(b) Would be more conveniently or more appropriately heard or determined in another High Court, the Court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that High Court.

(2) *An order for removal under subsection (1) must be transmitted to the registrar of the High Court to which the removal is ordered, and upon receipt of such order that Court may hear and determine the proceedings in question."*

[9] I agree with Mr. Breitenbach (SC) that an application for committal for contempt of court has to be made to the Court which made the order that the Respondent is alleged to have wilfully disobeyed. In ***Komsane v Komsane*** 1962 (3) SA 103 (C), Herbstein J faced with a situation similar to the present reasoned as follows:

"The question arises whether this Court has jurisdiction to grant the order prayed for. The Southern Native Divorce Court was established in terns of Sec. 10 (1) of Act 9 of 1929 as amended and

Procs. 3 and 4 of 1953. In terms of Sec. 27 of Act 56 of 1949 such Court has:

"jurisdiction to hear and determine suits of nullity, divorce and separation between natives domiciled within (its) area of jurisdiction in respect of marriages and to decide any question arising therefrom."

Sec. 10 (7) provides specifically that nothing in Sec. 10 *"shall be construed as in any matter divesting the Supreme Court of jurisdiction in respect of any matter specified in sub-sec. (1)."*

It is clear that divorce proceedings could be instituted in either Court. The Plaintiff would be *dominus litis* and could elect in which Court to proceed. What is now in issue is whether once the Plaintiff has made such an election any subsequent proceedings in enforcement of the judgment must be taken in the same Court or whether he has the right to proceed in the other Court. If the Applicant had asked only for the committal of the Respondent for contempt of court there would have been no doubt as to the answer. For insofar as the contempt consisted in a wilful disobedience of a Court's order, it is to that Court that application would have to be made. (See **Herbstein & Van Winsen, Civil Practice of Superior Courts**, p.513 and decisions cited under Note 7). In sofar as the present application can be construed as one, per se, for the Respondent's committal because of her alleged contempt it must be noted that she is not in contempt of this Court. In the present matter the Applicant, however, seeks from this Court initially an order on the Respondent to hand over the children and in the event of a wilful disobedience of that order, then an order of committal. It is thus necessary to determine whether this

Court has jurisdiction to grant the first prayer. In ***James v Lunden***, 1918 WLD 88, it was held that an application to commit for contempt for the wilful disobedience of an order to pay maintenance was not a new proceeding but merely a continuation or portion of the proceedings in which the judgment was originally given. The present application does not constitute a new proceeding but is, in truth, no more than a step in the execution of the judgment of the Native Divorce Court. In my opinion that judgment must be enforced in that Court. Though the Supreme Court, if action had initially been instituted there, would have had jurisdiction to grant the present relief, it has no power to enforce the order granted by the Native Divorce Court. There will, therefore, be no order on the present application."

[10] I cannot but fully associate myself with the above exposition of our law by Herbstein J. I hasten to add that despite the passage of time this still remains good law. The late Louis De Villiers Van Winsen, Andries Charl Cilliers and Cheryl Loots, present authors of **Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa** (1997 edition) are also in agreement with the conclusion reached by Herbstein J in ***Komsane*** matter *supra*. On page 819 of their work they deal with jurisdiction in contempt of Court matters. They make it clear that application should be brought in the Court that made the order which the Respondent is alleged to be disobeying. They go so far as to stipulate that this rule holds good even if the Respondent is no longer residing within the jurisdiction of that Court. It has been held in ***Cats v Cats*** 1959 (4) SA 375 (C) at 381

that when a Court has jurisdiction at the commencement of the proceedings a successful party is entitled to an order to the extent to which it can be made effective, even though it may not be possible to do so immediately. For an example, in ***Di Bona v Di Bona & Another*** 1993 (2) SA 682 (C) this Court refused to grant an order for committal since the First Respondent had left South Africa for England, where she had taken up residence and domicile prior to the institution of proceedings. In that matter the Court held that it did not have coercive jurisdiction beyond its territorial limits and could not entertain an action for committal of a person resident outside the Republic. Notably, ***Cats case*** *supra* was distinguished on the basis that the Respondent in that case was both resident and domiciled at the commencement of the committal proceedings, in an area in which the Court's order was effective, whereas in ***Di Bona*** case *supra* the first respondent was not so resident or domiciled, and the Court accordingly lacked jurisdiction at the time of the institution of the proceedings.

[11] The last authority I necessarily must touch on as well is the **Law of South Africa Volume 3 Part I** (by W.A. Joubert) at page 210 paragraph 354 where the learned author emphasizes that contempt proceedings are initiated by way of Notice of Motion and that the application should be brought in the Court which made the order. The author also emphasizes that this remains the position even if the Respondent is no longer in the jurisdiction of the Court. Decisions referred to thereunder are ***James v Linden*** 1918 WLD 88; ***SA Druggists Ltd v Deneys*** 1962 (3) SA 608 (E). The position is that at

the stage when the Applicant in the instant matter lodged the first application to stop the publication of Annexure "A", it could have moved that application in this Court. This Court would have had jurisdiction to deal with that matter on the very grounds now canvassed by Mr. Dörfling, namely that the Respondent's registered office is situated in Cape Town and that the First Respondent is resident in Cape Town. The Applicant who had a choice to institute the earlier proceedings made an election then. He elected to institute those proceedings in the WLD. That was done for reasons best known to the Applicant which reasons are clearly irrelevant for purposes of deciding the instant matter. The law set out above makes it very clear that these proceedings are not new proceedings. This is nothing but the continuation of an application dealt with by the WLD in respect of which the Applicant had an order granted in his favour. Why the present contempt of Court proceedings were now instituted before this Court defies the logic.

[12] There can be no merits, therefore, in Mr. Dörfling's submissions with regard to the jurisdiction of this Court. There is, in my view, no way that the court which granted the order can be side-lined and replaced by this Court. Once the matter starts before a particular jurisdiction, it must be completed in that Court which enjoys jurisdiction over that area where the proceedings were initiated. It cannot simply be abandoned only to be continued with in another jurisdictional area. As the WLD made the order forming the subject matter of the proceedings now before me, I hold that this Court does not have jurisdiction to hear and determine this matter. It follows that this

matter falls to be dismissed merely in that this Court lacks jurisdiction. It is not in fact necessary to consider the merits of this matter in view of the conclusion I have reached on the question of jurisdiction. However, for academic purposes, and in the event that I am found to have wrongly applied the law on the question of jurisdiction, I shall proceed to consider the matter on merits. It is perhaps befitting to deal with the merits as well because the parties argued the matter as a whole and did not isolate the point *in limine* from the rest of the matter.

CONTEMPT OF COURT

[13] Indeed the leading decision on contempt of Court committed by a person who disobeys a Court order is ***Fakie NO v CCII Systems (Pty) Ltd*** 2006 (4) SA 326 (SCA). The Judgment of the majority includes the following authoritative statements relating to the crime of contempt of Court and the consequences of adopting application proceedings to secure an order declaring a person to be in contempt of Court and imposition of a sanction on such a person:

'It is a crime unlawfully and intentionally to disobey a court order.'

'The test for when disobedience of a civil order constitutes contempt has come 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 the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).'

'[A] private litigant who has obtained a court order requiring an opponent to do or not do something (ad factum praestandum), [is permitted] to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction.'

'In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat.'

'The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings. In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt. But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.'

'In an application for committal for contempt, if:

(a) *a dispute arises as to one of the facta probanda such as whether an admitted or proven non-compliance was wilful and mala fide,*

(b) the applicant has not applied for the matter to be referred to oral evidence, and

(c) *the respondent's version is not '"fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the*

papers alone, that it is demonstrably and clearly unworthy of credence,'

the Court must decide the matter on the facts stated by the Respondent, together with those the Applicant avers and the Respondent does not deny." See paragraphs 6, 7, 8, 9, 42(b) to (d); 53-56 and 62-64 of the **Fakie Judgment**.

DISOBEDIENCE OF THE ORDER

[14] Mr. Dörfling's submission in this regard was as follows:

"Daar word aangevoer dat die interim interdik soos verleen deur Sutherland WnR dit ten doel het om bloot die publikasie van die artikel soos dit voor hom geplaas was ten tye van die aanhoor vir die interim regshulp, te verbied. Die feit dat die artikel nie in daardie identiese formaat verskyn het nie, so voer die Eerste Respondent aan, het tot gevolg dat die publikasie nie minagting daarstel nie."

In Mr. Dörfling's submission the aim of the Court order was as follows:

"om die publikasie van material wat lasterlik sou wees (indien daar geen regverdigingsgrond bestaan het vir die publikasie nie) te verbied en tweendens om die beweerde verbintenis met die gewraakte bewerings van Klay te verbied."

Further, submitted Mr. Dörfling that *"die ware toedrag van sake is dat die artikels nie as losstaande publikasies die lig gesien het nie, maar dat dit deel gevorm het van die inhoud van 'n tydskrif en dat die artikels dus oorweeg moet word teen die agtergrond van die beskouing van 'n leser van die tydskrif as geheel en nie bloot teen die agtergrond van die oorweging van die artikel in isolasie nie."*

I deal with these submissions later on in the Judgment. The fact of the matter (as Mr. Breitenbach (SC) correctly pointed out) the order prohibited Media 24 and Ms Venter from publishing, during the period of its operation, 'the article of which a copy was annexed as annexure "A" to the Notice of Motion.

[15] The meaning of the order is to be ascertained by using the basic principles applicable to construing Court orders, that is by considering as a whole the wording of the order and Sutherland AJ's reason for making it. Trollip JA in ***Firestone South Africa (Pty) Ltd v Genticuro AG*** 1977 (4) SA 298 (A) at 304D-F gave the following formulation of note in this regard:

"The basic principles applicable to construing documents also apply to the construction of a Court's judgment or order: the intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See Garlick v Smartt and Another, 1928 A.D. 82 at p.87; West Rand Estates Ltd v New Zealand Insurance Co. Ltd, 1926 A.D. 173 at p. 188. Thus, as in the case of a document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it."

The aforegoing authoritative formulation must, however, be read subject to a very important qualification contained in ***Administrator***

Cape and Another v Ntshwaqelo and Others 1990 (1) SA 705 (A) at 716 A-C. This qualification reads as follows:

"... [T]he order with which a judgment concludes has a special function: it is the executive part of the judgment which defines what the Court requires to be done or not to be done, so that the defendant or respondent, or in some cases the world may know it. It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

The meaning of the order under consideration does not lend itself to difficult alternatives. It means, in my view, what it exactly says. It is clear and unambiguous. It prohibited the publication of Annexure "A". In my view, from that alone it follows that its meaning cannot be restricted or extended by anything stated in the Judge's reasons for making it. See in this regard: ***Administrator Cape and Another v Ntshwaqela and Others*** *supra*. See also: ***Frankel Max Pollak Vinderine Incorporated v Menell Jack Hyman Rosenberg & Co. Inc.*** 1996 (3) SA 355 (SCA) at 362E-H.

[16] In the alternative (assuming the order is to another reader unclear or ambiguous), it prohibited the publication of an article containing the allegation by Klay, recounted in Annexure "A", that it was the Applicant who had sexually molested him while he was still a child, and the particulars of the abuse by the Applicant alleged by Klay,

recounted in Annexure "A". This is evidenced by the following passages in the judgment by Sutherland AJ's reasons:

(a) 'The controversy concerned the alleged harm that the applicant may suffer if an article describing him in admittedly defamatory terms is to be published.'

(b) 'That the applicant has a prima facie right to preserve his reputation is indisputable.'

(c) 'The prospect of irreparable harm is plain. The article accuses the applicant of being a child molester and the disclosures of his alleged victim, now an adult, form the body of the report.'

(d) 'It was correctly argued that if the article is published unlawfully the applicant may sue the respondents for huge damages. This form of remedy, it was argued by Mr Joubert [for the Applicant], offers little comfort to the incalculable damage done to his reputation. I am inclined to agree. In the prevailing social climate our social *mores* concerning the abuse of vulnerable people, most of all children, affords a platform for the most severe manifestation of opprobrium for those culpably linked to such abuse. The likelihood of mud coming unstuck is slim. Thus I am persuaded that an award of damages is no adequate alternative remedy.'

(e) 'As to the balance of convenience… the harm to the applicant, alluded to above, must take precedence on the facts.'

The publication on 21 February 2008 editions of the magazines does differ from Annexure "A" in the following respects. Firstly, Annexure "A" does not include the front cover as can be seen in Annexure CJE6 (Huisgenoot) and Annexure CJE7 (You); the

location of the Applicant's parental farm (Vrede); the names of the Applicant's wife and child; that the wife was pregnant; that the Applicant and his wife and child had moved to New Zealand; that the Applicant was a father figure towards Klay and had taken Klay under his wing; that the Applicant had "discovered" Klay and handled the production of his albums; that the Applicant had signed a contract with Klay and taken over Klay's career; that the Applicant and Klay had performed together at music concerts; and that the Applicant and Klay had a working relationship. I hold the view that the reductions in the published article have the result that it is materially different from Annexure "A". The consequence is that the publication of 21 February 2008 cannot, in my view, be said to have been prohibited by the order. In the alternative, Mr. Breitenbach (SC) submitted that even if the meaning of the order is not that it prohibited the publication of an article containing the allegations by Klay recounted in Annexure "A", it cannot be discerned from the published article that the Applicant is the person who Klay alleges had sexually molested him when he was a child. I must say that this aspect of the case is debatable indeed.

[17] The Applicant contended that he is identified when the published article is read together with the editorial in both magazines (which include the mentioning that interim interdict was granted to the Applicant) and with the front cover of Huisgenoot (which includes what the Applicant says is a photograph of him on a recent CD with the head blurred) though not You magazine (which has a different front cover). This contention by the Applicant is undoubtedly the

high watermark of the case presented before me. I hasten to add that the editorial section wherein the Applicant's name is mentioned is somewhat carelessly written.

[18] However, Mr. Breitenbach (SC) submitted in the above regard that the Applicant's contention has difficulties which he proceeded to identify as follows:

"First, the inclusion in the editorial of the statement that the interim interdict was granted to the Applicant was not prohibited by the Order. Whether the Order is interpreted alone or with reference to Sutherland AJ's reasons for making it, it did not prohibit publication of any of the following information: the fact that the interim interdict had been granted; the terms of the interim interdict and the ancillary orders (as to urgency, time periods and costs); or the identity of the person to whom the interim interdict was granted. The Applicant's name was mentioned as part of a discussion of what, according to the editorial, was a first for the magazines – the granting of a pre-publication interdict against them. Secondly, the sentence in the editorial in which the Applicant's name is mentioned does not state or imply that the Applicant is the person accused by Klay. On the contrary, after referring to the fact – well-publicised by then – that the Applicant was the person who had obtained the interim interdict it implies that the Applicant did so to protect another prominent figure in the Afrikaans music world. It reads:

'Jy sal weet dat die sanger Jurie Els 'n tydelike interdik aangevra het teen die publikasie van hierdie artikel, waarin die jong sanger

Robbie Klay vertel hoe hy as kind en oor vele jare seksueel gemolesteer is deur 'n bekende in die Afrikaanse musiekwêreld.'

Thirdly, the photograph on the cover of Huisgenoot to which the Applicant refers is a photograph of what could be a jacketed person or dummy, with the head entirely blocked out and which is partially obscured by text relating to the contents of the magazine including matter entirely unrelated to Klay and his allegations. Even if the Applicant is right that it is a photograph of him on a recent CD, it is so obscured that it could be anyone."

[19] I must mention that these difficulties are also not far-fetched, particularly in a matter wherein a Court of law is asked to pronounce a finding of guilt on the part of the Respondents. It is in instances like these that it would have been helpful to have referred the matter to trial so that the deponents of Affidavits are subjected to a truth searching cross-examination. There was no such application though in the instant matter. I am of the view that the publication of 21 February 2008 did not constitute disobedience of the order. Even if one considers the alternative construction of Annexure "A" there remains at the very least a reasonable doubt that the publication amounted to a disobedience of the order concerned.

MS IZELLE VENTER

[20] Ms Weideman contends in the Answering Affidavit that she is the one who took the decision to publish and not Ms Venter. I quote the relevant portion of Ms Weideman's Answering Affidavit:

'Die Derde Respondent [i.e. Venter] het geen uitvoerende magte nie en die besluit om die gewraakte artikel te publiseer is deur die Tweede Respondent (i.e. Media 24) geneem en nie die Derde Respondent nie. Ek is die persoon wat die besluit geneem het om die gesensorde artikel te publiseer.'

In Reply the Applicant merely says that he dealt with Ms Venter in the run-up to the application for the interim interdict on 13 February 2008 and that she played an active role in the publication process. I agree with Mr. Breitenbach (SC) that this reply does not address the thrust of Ms Weideman's evidence that after the granting of the interim interdict, she and not Ms Venter, decided to publish the 'censored article'. There is no evidence I have been able to find in the papers that Ms Venter was involved in or was responsible for the publication. She, accordingly, is not a candidate for conviction of contempt of Court.

WILFUL AND MALA FIDE

[21] In her Answering Affidavit Ms Weideman denies that she intended to act in contempt of the Order, as follows:

'Ek het geensins bedoel om die hofbevel van die Agbare Regter in die WPA saak te minag nie. My besluit was gebaseer op my streng, maar eerlike, vertolking van die bevel, en ek het probeer om nougeset daaraan gehoor te gee. My vertolking van die bevel is en was dat publikasie van "die artikel" as 'n geheel verbied is, en nie dat dit publikasie van gedeeltes daarvan belet het nie. Te meer so waar die identiteit van die Applikant nie uit die gepubliseerde gedeeltes daarvan blyk nie. Ek kan my trouens nie voorstel dat die Agbare

Regter 'n bevel sou verleen het om publikasie van die gesensorde artikel te verbied nie, of dat die Applikant hoegenaamd 'n aansoek sou gebring het vir 'n interdik ten opsigte van die gesensorde artikel nie.'

And

'Ek ontken dat ek óf die Tweede Respondent gepoog het om die Applikant se identiteit bekend te maak of enige opset in die verband gehad het. Indien die Tweede Respondent met opset die bevel wou minag sou dit baie meer geriefliker en goedkoper gewees het om bloot 'n ongesensorde uitgawe te publiseer. Die artikel en die voorblad was juis gesensor aangesien die Tweede Respondent opreg van mening was dat daar sodoende aan die bevel voldoen sou word. Ek is van mening dat my redaksionele skrywe die motivering om die artikel wel te plaas volledig uiteengesit in die konteks soos daar beskryf.'

In her Affidavit Ms Weideman also denies that she acted in bad faith, as follows:

'Dit is my respekvolle submissie dat die plasing van die gesensorde artikel wel in die openbare belang was en dat die besluit van die Tweede Respondent om wel die gesensorde artikel te plaas nie mala fide geneem is nie, maar met die opregte geloof dat dit in die openbare belang sou wees indien dit onder die aandag van die publiek gebring word dat Klay na al die jare van stilswye die moed gehad het om die storie van sy seksuele mishandeling bekend te maak. Die doel in die verband was dus omdat dit onder die aandag van die publiek te bring dat sodanige dade wel in ons samelewing gepleeg word en wat die effek daarvan is op die slagoffers en dit

verder onder slagoffers oor te dra dat hul die moed kan hê om hul stilswye te breek.'

And

'Die Applikant is korrek indien hy aanvoer dat daar behoorlike oorweging gegee is aan die vraag of die artikel gepubliseer moet word al dan nie. Dit is my respekvolle submissie dat die plasing van die gesensorde artikel geensins mala fide geskied het nie en alle betrokke partye, myself inkluis, was van mening dat die wyse waarop dit wel geplaas is, nie minagting van die hofbevel sal konstateer nie en is dit steeds die siening van myself en die Tweede Respondent.'

[22] The explanation Ms Weideman gave in her editorial at the time of publication is broadly similar:

'Hoekom is daar so baie swart strepe deur die woorde op ons voorblad en in ons artikel (vanaf bl. 12)? Die antwoord is regstegnies, maar uiters belangrik. Die regter het bevind dat DIE ARTIKEL – soos in alle regverdigheid aan die vermeende molesteerder voorgelê vir kommentaar – nie gepubliseer mag word nie. Die naam van die mens wat die interdik aangevra het, mag wel bekend gemaak word. Dit het ons dus met die volgende keuse gelaat: óf ons kon doen wat die meeste dagblaaie teen hierdie tyd reeds gedoen het en die naam van die aansoeker publiseer en nie die besonderhede van DIE ARTIKEL bekend maak nie, of ons kon DIE ARTIKEL met geringe veranderinge plaas en steeds die besonderhede behou van die eksklusiewe diepte-onderhoud wat Robbie aan ons toegestaan het. Die keuse was dus voor die hand liggend, want ons glo dis in die openbare belang dat die

besonderhede van die jare wat (sic)Robbie na bewering seksueel misbruik is, bekend gemaak word. Minstens twee ander mans het ná Robbie se dapper bekentenis na vore gekom om te sê dieselfde man het ook vir hulle seksueel gemolesteer.'

Mr. Dörfling has subjected Ms Weideman's account to what was termed "searching criticism" in ***Fakie NO v CCII Systems (Pty) Ltd*** *supra*. Mr. Dörfling's principal emphasis in the criticism of Ms Weideman's account was on:

(a) the naming of the Applicant in the editorial of both magazines as the person to whom the interim interdict was granted;

(b) the photograph on the front page of the Huisgenoot;

(c) an interpretation of the Order to the effect that it was aimed not only at prohibiting publication of '*die Applikant se beweerde verbintenis met die gewraakte bewerings van Klay'*, but also prohibiting publication of *'materiaal wat lasterlik sou wees (indien daar geen regverdigingsgrond bestaan het vir die publikasie nie)'* without any reference to the Applicant;

(d) and a comparison of Annexure "A" and the published article which shows that *'die grafiese beskrywing van die aard van die dade wat een van die hoekstene is van die potensiële laster wat die Hofbevel ten doel gehad het om te verbied'*, is net so behou'.

[23] I have already expressed an opinion on some of these points of criticism leveled against Ms Weideman and the behaviour of other

Respondents. I have also, in this Judgment, documented Mr. Breitenbach's (SC) submissions in this regard. I see no need to repeat these. It suffices to remark that the overarching difficulty with Mr. Dörfling's contentions dealt with in this paragraph and consequently with the Applicant's fundamental allegation that the Respondents acted intentionally and *mala fide*, is that Ms Weideman's assertions quoted earlier on in this Judgment ***'cannot be rejected as fictious or so implausible as to warrant dismissal without recourse to oral evidence.'*** See: ***Fakie NO v CCII Systems (Pty) Ltd*** *supra*. I agree with Mr. Breytenbach in his submission wherein he adapted the ultimate finding of the majority in the ***Fakie NO v CCII Systems (Pty) Ltd*** *supra*, paragraph 63 that:

'The accepted approach [to deciding factual disputes in motion proceedings] requires that, subject to "robust" elimination of denial and "fictitious" disputes, the Court must decide the matter on the facts stated by the respondent, together with those the applicant avers and the respondent does not deny. On that approach, since [Weideman's] version cannot legitimately be "robusted" away, [her] factual assertions, including those regarding [her] state of mind, must be accepted as established. The proven facts thus establish more than just a reasonable doubt, but a factual picture that entails acceptance of [Weideman's] version…'. See also paragraph 64 of the same Judgment.

NEGLIGENCE

[23] The Applicant alleges in the alternative that Ms Weideman and media 24 were negligent and that negligence is sufficient to sustain

their conviction of contempt of court because they are, respectively, the editor and owner of the magazines. See: ***S v Harber*** 1988 (3) SA 396 (A) 418 D-E.

The Applicant bases this contention on the decision of the Appellate Division in ***Harber's case*** *supra* that negligence is sufficient to sustain the conviction of contempt of court of the editor of a newspaper, or another form of the media who publishes material in breach of the *sub judice* rule, and a submission by Professor Snyman that the negligence requirement should be extended to the owner, publisher, printer and distributor of such a newspaper. Mr. Breitenbach (SC) contended that ***Harber's case*** is distinguishable from the present matter in that it concerned the publication of material in breach of the *sub judice* rule, which by its very nature is an offence that is most commonly committed by means of the media. It is common cause that the present case concerns an alleged violation of a Court order, which offence is universal in nature and can be committed by anyone against whom a Court order *ad factum praestandum* has been made.

[25] In my view, it is unhelpful to endeavour to compare what ***Harber's case*** decided as far as negligence is concerned and what case law presently say in that regard. The two (2) decisions are both decisions of the Supreme Court of Appeal. Perhaps one needs to remind oneself that ***Fakie NO v CCII Systems (Pty) Ltd*** *supra* was decided during the present Constitutional era. I am by no means implying that decisions of the Supreme Court of Appeal made prior to the advent of the present Constitutional order are of less value. Far from it. On the

contrary, they provide us all with the wealth of legal knowledge we can be poorer of if they did not exist. In ***Fakie NO v CCII Systems (Pty) Ltd*** *supra* the Supreme Court of Appeal placed considerable emphasis on the '(C)onstitutional characterization of contempt of Court', and concluded that 'the criminal standard of proof applies whenever committal to prison for contempt is sought.' See: paragraph 19 of the ***Fakie*** Judgment. The following explanation by the Court in ***Fakie NO v CCII Systems (Pty) Ltd*** *supra* is of significance:

'There are two principal reasons for this conclusion. The first is liberty: It is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. The second reason is coherence: It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for rule of law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt.'

In any event, how can the Applicant rely on negligence as an alternative basis for the conviction of Ms Weideman and Media 24 only now? The Applicant in his papers did not raise negligence as an alternative basis for such conviction. Raising this only now in submissions means that Ms Weideman and Media 24 have been denied the opportunity to place facts before the Court to disprove allegations that they acted negligently. It must be borne in mind that I have already made a finding earlier on in this Judgment that this

Court does not have jurisdiction to hear this matter. I have also sufficiently demonstrated above that even if this Court did in fact have jurisdiction to hear this matter, the Applicant has failed to prove beyond a reasonable doubt that any of the Respondents are guilty of the crime of contempt of Court.

ORDER

[26] In the circumstances I make the following order:

(a) The application is dismissed with costs.

_____

DLODLO, J