IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

REPORTABLE
CASE NO. 3392/2008

In the matter between:

JURIE CHRISTIAAN ELS	**APPLICANT**
And	
ESMARÉ WEIDEMAN	**FIRST RESPONDENT**
MEDIA 24 (PTY) LTD	**SECOND RESPONDENT**

Coram	:	**DLODLO, J**
Judgment by	:	**DLODLO, J**
For the Applicant	:	**ADV. D. DÖRFLING (SC)**
Instructed by	:	Du Plessis & Associates (JHB) C/o De Klerk & Van Gend 3rd Floor, Absa Building 132 Adderley Street CAPE TOWN (REF. S HILL) TEL. NO. (021) 424 9200
For the Respondents	:	**ADV. S BURGER (SC)**
Instructed	:	Cliffe Dekker Hofmeyr Inc. (JHB) C/o Cliffe Dekker Hofmeyr Inc (CPT) 11 Buitengracht Street CAPE TOWN (REF: L. NIEMAND) TEL. NO. (021) 481 6300
Date(s) of Hearing	:	**19 SEPTEMBER 2011**
Judgment delivered on	:	**07 DECEMBER 2011**

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SENTENCING JUDGMENT DELIVERED ON 7 DECEMBER 2011

DLODLO, J

[1] On 18 March 2009 this Court dismissed an application seeking conviction of the Respondents for contempt of Court in respect of an order made in the South Gauteng High Court on 13 February 2008 in which certain interdictory relief was granted to the Applicant. On appeal the Supreme Court of Appeal, however, reversed this Court's decision and returned a verdict of guilty. The matter was thereafter remitted to this Court to consider and, if necessary, hear evidence as to the sanctions appropriate to the offences committed by the First and Second Respondents and to impose the determined sanctions and to make an appropriate award of costs. Mr Dörfling (SC) and Mr Burger (SC) appeared before me on behalf of the Applicant and the two Respondents respectively. I fully agree with Mr Dörfling (SC) that this Court is duty bound to consider the appropriate sentence against the backdrop of the factual findings made by the Supreme Court of Appeal on the merits of this matter. I hasten to add though that this being sentencing it remains ordinarily governed by the

normal factors that must always be taken into account whenever any person has been convicted and must be punished for his wrongdoings.

[2] It is common cause that the Applicant, when he applied for interdictory relief sought to prevent the publication of certain material alleging him to have been the molester over many years of the Afrikaans singer, one Robbie Klay. Sutherland AJ of the South Gauteng High Court as pointed out earlier, granted the urgent interim interdictory relief effectively preventing the publication of an article containing the aforesaid material. It is not necessary to deal in detail with the findings made by the Supreme Court of Appeal for purposes of sentencing. It suffices to mention that I have thoroughly read the Supreme Court of Appeal Judgment in this regard and shall take the findings into account in my further handling of this matter.

[3] Mr Burger correctly prefixed his submissions by stating that the imposition of a sanction for contempt by a private party (the Applicant in this instance) is a "peculiar amalgam". This assertion can of cause be traced and found authoritatively set out by the Supreme Court of Appeal in ***Fakie N.O. v CCII Systems (Pty) Ltd*** 2006 (4) SA 326 (SCA) at 334 F-G as follows:

"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. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience of its orders, since disregard sullies the authority of the courts and detracts from the rule of law."

I am of course in full agreement with above authoritative formulation. Mr Burger also contended that although the punitive and remedial objects of contempt proceedings are "inextricably intertwined" the remedial object has been overtaken by the events in that not only is there no room for inducing the Respondents to fulfil the terms of the interim order (the breach of which having taken place and cannot be remedied) but the Applicant is pursuing compensation in separate proceedings based on some of the same events which form the basis of the present proceedings. Indeed what is before Court is principally the offence of violating the dignity, repute and authority of the Court. Describing the offence contempt of Court Cameron JA (as he then was) in ***Fakie N.O. v CCII Systems (Pty) Ltd*** *supra* at 332 B-C stipulated that:

"The offense has, 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."

[4] I now embark on a very difficult route on which any sentencing Court must embark. **Terblanche SS – The Guide to Sentencing in South Africa** (1999) Chapter 6 paragraph 10 deals with retribution and contends that it gives shape to every sentence and limits each sentence to the bounds of the blameworthiness of the offender to his or her 'just deserts'. In his view the moral outrage of people at the commission of the crime is an important factor determining the seriousness of the crime and the blameworthiness of the offender. The sentencing Courts, this Court included must consider all three elements of the triad of **Zinn** accurately and to its full capacity. I agree with **Terblanche** that if the Court can also impose a sentence which has the real potential to prevent future crime, such sentence will be in the interests of society. The triad of **Zinn** is

derived from the dictum in the judgment of Rumpff JA in ***S v Zinn*** 1969 (2) SA 537 (A) namely *"What has to be considered is the triad consisting of the crime, the offender and the interests of society."* This is by far the best approach to sentencing in the administration of justice. I have found it appropriate to prefix this discussion with the following crystalized sentence principles identified in ***S v Thonga*** 1993 (1) SACR 365 (V):

"In my view the punishment must firstly be reasonable, i.e. it should reflect the degree of moral blameworthiness attaching to the offender, as well as the degree of reprehensibleness or seriousness of the offence. Punishment therefore should ideally be in keeping with the particular offence and the specific offender. It is necessary, secondly, for the punishment to clearly reflect the balanced process of careful and objective consideration of all relevant facts, mitigating and aggravating. The sentence should, thirdly, reflect consistency, as far as is humanly possible, with previous sentences imposed on similar offenders committing similar offences, lest society should believe that justice was not seen to be done. Lastly, the penal discretion is to be exercised afresh in each case, taking the facts of each case and the personality of each offender into account. To all this I would add that the trial court does not impose sentence in vacuo. It, to the contrary, certainly does so within a certain frame and at a certain stage in the development of the people(s) of a district, or a country, or even a continent. The criminal court is also an instrument in the hands of society, applying its laws, reflecting its value and its moral indignation at unlawful conduct, as well as the negative or harmful effect thereof on third parties or society itself. But in a civilised society punishment reflects also the interest of the offender himself. The trial court, in a criminal matter then functions not in a technical laboratory, but as a living instrument, a vital component of the fabric of society, serving the interest of society and all of its law-abiding members.

The criminal court primarily seeks to establish and maintain peaceful co-existence among members of society within a territory to life and property by dispensing criminal justice. Furthermore, during the imposition of punishment, the trial court jealously guard the fine line between raw revenge or emotional punishment and the judicial, reasonable and objectively balanced (effective) exercise of its penal discretion."

I fully align myself with the above sentiments and this indeed reflects how careful one should walk on this route leading to correct sentencing.

[5] The personal circumstances of Ms Weideman, the First Respondent, are set out in paragraphs 13, 14 and 15 of her Affidavit filed for purposes of the present proceedings. It would be appropriate to quote these paragraphs hereunder:

"13 Ek het 26 jaar ervaring as joernalis, eers as sake- en politieke beriggewer, daarna as nuusredakteur en daarna in talle bestuurshoedanighede by verskeie publikasies. In 2001 is ek aangestel as die redakteur van You en 'n jaar daarna ook as redakteur van Huisgenoot. Ek was redakteur van hierdie twee publikasies, die tweee grootste tydskrifte in Suid-Afrika, tot September 2010 toe ek bevorder is tot hoofredakteur van onder meer Huisgenoot en You. In Mei 2011 is ek aangestel as uitvoerende hoof van Media24.

14 Tydens my redakteurskap van Huisgenoot en You het die tydskrifte talle pryse ontvang, en verskeie van die joernaliste op my personeel is vir hul gehaltewerk bekroon. Ek self is as tydskrifredakteur van die jaar bekroon by die jaarlikse PICA-toekennings. Binne Naspers en Media24 het ek ook verskeie pryse ontvang, wat Naspers se hoogste eerbewys, die Phil Weber-prys, ingesluit het.

15 *As joernalis en redakteur was feitelik korrekte beriggewing altyd my hoogste prioriteit. Ek het gereeld met joernaliste geskakel in my hoedanigheid as redakteur om heeltemal seker te maak dat hul feite en interpretasie van die bepaalde berig korrek was. Buiten die onderhawige voorval, is ek nog nooit van minagting van die hof beskuldig nie."*

Ms Weideman is also described by Mr Gerwel, the non-executive chairperson of Media24, in his Affidavit as follows:

"Me Weideman word binne Media 24 aanvaar as een van die mees bekwame en eties korrekte redakteurs in Suid-Afrika. Media24 het 'n waardering vir die diens wat sy aan die maatskappy oor die afgelope net minder as twee dekades lewer." What can legitimately be regarded as circumstances relating to the Second Respondent, Media24 is contained in paragraphs 5-8 of the Affidavit by Mr Gerwel. It is important also to set out these paragraphs *infra*:

"5. Media24 Koerante publiseer 97 koerante, wat insluit 11 koerante wat weekliks publiseer word, 7 dagblaaie en 79 gemeenskapskoerante. Die gesamentlike daaglikse sirkulasie van die koerante beloop meer as 6 miljoen eksemplare.

6. Media24 tydskrifte publiseer 62 tydskrifte wat insluit 7 tydskrifte wat weekliks gepubliseer word, 26 maandeliks en 15 jaarlikse publikasies. Daar is ook 'n aantal publikasies wat twee maal per maand gepubliseer word, en ander kwartaaliks gepubliseer word. In total het hierdie publikasies 'n lesertaal van meer as 13 miljoen. Dit verteenwoordig 77,8 % van alle tydskriflesers in Suid-Afrika.

7. *Naspers Beperk, Media24 se houermaatskappy se dagblad Die Burger verskyn reeds sedert 1915, synde die stigtingsjaar van die houermaatskappy. Die Huisgenoot het die lig gesien in 1918.*

8. *Na die beste van my wete is die bevinding deur die HHA in hierdie aangeleentheid die eerste geleentheid waarby enige van Media24 se publikasies aan minagting van die hof skuldig bevind is."*

[6] As mentioned above an appropriate sentence should reflect the severity of the crime while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender whether a private individual or a legal entity. The sentence imposed must be weighed such that it can be described as proportional to what is deserved by the offender. Having set out circumstances peculiar to both Respondents *supra* it is of importance to briefly refer to the interests of society and how the personal circumstances influence these. Whenever I deal with this aspect the judgment of Rumpff CJ in ***S v Du Toit*** 1979 (3) SA 846 (A) comes to mind and it provides guidance particularly the following formulation:

"Die belang van die gemeenskap by 'n straf wat opgelê word, is veelledig. In sommige gevalle tree die belang na vore wanneer die gemeenskap beskerm moet word teen die gedrag van 'n bepaalde individu. In ander gevalle verdien die belang oorweging wanneer die orde en vrede in die gemeenskap ter sprake kom. In ander gevalle weer tree die belang na vore wanneer lede van die gemeenskap afgeskrik moet word."

When the nature of the crime and the interest of society are considered, the accused person is somewhat in the background. No matter how serious the crime is, the offender should not be regarded with vengeance,

but with humanity. See ***S v Du Toit*** *supra*; ***Terblanche - The Guide to Sentencing in South Africa*** page 160 footnote 55.

As already shown above the First Respondent most certainly has a remarkable and unblemished record in journalism. This is the first transgression in 26 years of apparently good journalism. Had this been a criminal case in the normal sense she would be described as the first offender who obviously must be treated with leniency. The same needs to be said about the Second Respondent. This Respondent and its predecessors have indeed a long and proud tradition as publishers of newspapers and magazines in South Africa. This Court, however, shall not turn its back to the important task expected of it, namely to preserve the dignity, repute and authority of the judiciary as a whole.

[7] Mr Dörfling submitted in aggravation of sentence that the Second Respondent is on all accounts a massive media giant and therefore its publications constitute a powerful communications tool in the hand of those controlling it and that if abused or misused, it can and will lead to a devastating trail of destruction. In his submission it is imperative that the individuals and legal entities controlling such media giant act responsibly. I fully agree with this submission. The First Respondent was placed in a position of trust and had immense power; she was the driving force in the whole process. I take into account also that damage has been done and cannot be reversed anymore. In the words of Mr Dörfling indeed the horse has bolted. The forbidden article has been published. This country and of course the world at large would be poorer without the media. Media (both electronic and print) constitutes the cornerstone on which any society, any country or continent is built. It must be mentioned that the independence of the media is of absolute importance in a democratic dispensation which South Africa is. That is why its independence is

enshrined in the Constitution. This Court will always protect and uphold the media independence. However, the media must also exercise its independence responsibly. In the instant matter there was already a Court order in existence forbidding the publication of the material. Whilst I accept that legal opinion was sought and obtained prior to the publication I also believe that the matter could have been handled differently and much more carefully in view of the existence of the Court order. It must have been tempting indeed to take the risk after the acquisition of the legal opinion. Risks should be avoided at all costs because at times the consequences of taking risks can be very devastating or even catastrophic to say the least.

[8] Mr Dörfling submitted *inter alia* that neither of the Respondents should be seen to get away with a mere slap on the wrist but on the contrary the Court must impose a punishment which is severe and commensurate with the nature of the offence. In his view the gravity of the offence and the interest of society outweigh the interest of the offender in the instant matter. I have referred earlier on *supra* to the triad. It suffices to mentioned though that any possible over-emphasis of the seriousness of the offence and the interests of society at the expense of the deserving personal circumstances of the offender as a unique individual and/or entity would be wrong and would consequently amount to a misdirection on the part of the sentencing Court. Sentencing Courts are under a duty driven obligation to strive for a balanced and proportional sentence.

[9] Caution and discharge as an option is of cause out of the question. It is almost always reserved for petty offences. The transgression involved in the instant matter is of a serious nature. I have given consideration to various sentencing options. I have given consideration to imprisonment

but I have found that it is not a suitable sentence regard being had to the circumstances of this matter. In any event, the Second Respondent is a legal entity and such cannot be sentenced to a term of imprisonment. I have also considered correctional supervision. The latter sentence is described in **Hiemstra's Criminal Procedure** on pages 28-32. Essentially correctional supervision caters for the person who has to be punished but does not have to be removed from the community. The aim is to punish and rehabilitate the offender within the community context. It is a good form of sentence in that the offender's work and routine are left untouched, and the obvious negative influence of prison is avoided. See: ***S v Kelly*** 1993 (2) SACR 492 (A). Correctional supervision is of course not an appropriate sentence in the circumstances of this matter quite apart from the fact that the Second Respondent is an entity which by virtue of its nature cannot be subject to house arrest and monitoring. I have given due consideration to either or partially suspended sentence or a wholly suspended sentence subject to certain conditions. This too is problematic in that the normal conditions to be attached are to ensure that once the offender is again found guilty of the same offence, he/she /it is visited with a much harder sentence. The First Respondent has been promoted – she is no more an editor and is thus in no position to transgress again. It would be fundamentally unfair and unhelpful to burden the Second Respondent with what may at times be an onerous suspended sentence. I have thus discounted suspended sentence as an option in this matter. The only remaining option for consideration is of course the imposition of a fine. This seemingly is the only sentence option which is appropriate in the instant matter. I hasten to add though that the difficulty in assessing a balanced and appropriate sentence is aggravated by the fact that this is a rather unusual contempt of Court.

[10] In an endeavour to achieve uniformity and consistency I have sought to find some relevant precedents. I have found none and none has been pointed out to me by both Counsel. However, Mr Burger (thankfully) traced and presented to me an English case almost similar to the present and that is ***Attorney General v Punch Ltd and Another House of Lords***, UKHL 50, [2003] 1 AC 1046.

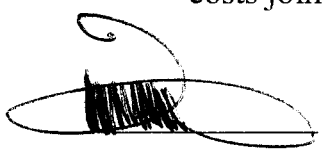
In the above cited case the trial Judge fined the editor concerned £5, 000 and the publisher £20, 000. I am of the view though that the First and Second Respondents should for all intent and purposes be treated like persons or entities who and which have been found guilty of a crime in the strict sense of the word. As such, all considerations ordinarily relevant in sentencing in criminal Courts should apply also in the instant matter. It is for this reason that these considerations have been dealt with in these sentence proceedings. I have thus come to the conclusion that the following constitutes a well-balanced, proportionate and appropriate sentence that addresses all relevant considerations:

(a) The First Respondent is sentenced to pay a fine in the amount of Fifteen thousand rand (R15 000)

(b) The Second Respondent is sentenced to pay a fine in the amount of Sixty thousand rand (R60 000)

(c) The fine shall be payable strictly within a period of fourteen (14) days from date hereof.

(d) The two Respondents are ordered to pay costs of the application which was argued before this Court on 18 March 2009, on the scale as between Attorney and client. The Respondents are liable for these costs jointly and severally, the one paying the other to be absolved.



DLODLO, J