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

[REPORTABLE]

Case No: A150/2019

In the matter between:

N C

Appellant

And

THE STATE Respondent

JUDGMENT DELIVERED ON 19 NOVEMBER 2019

KUSEVITSKY, J

[1] The Appellant was charged in the Magistrates Court, Cape Town with two

counts of contempt of court. It was alleged that he was guilty of contravening sections 305(1)(q) read with section 1 and section 305(6) of the Children's Act, 38 of 2005 ("the Children's Act") in that in terms of count one, he had contravened an order by Magistrate H van der Merwe in the Children's court during the period between 21 November 2014 and 15 April 2015 and in respect of count two, that he had failed to comply with a Children's Court order from 16 July 2015.

[2] On 18 May 2017, he was found guilty on both counts and sentenced to a period of one (1) year periodical imprisonment to be served from 17h00 on every Friday until 06h00 the Monday thereafter.

[3] The matter was subsequently referred to the High Court for a special review in terms of section 304(2)(a) of the Criminal Procedure Act, 51 of 1977, ("the Criminal Procedure Act"). The High Court reviewed the sentence and on 21 August 2017 altered it in terms of section 304(2)(c)(ii) of the Criminal Procedure Act. The Appellant was ordered to serve a periodical imprisonment for a cumulative period of 2000 (two thousand) hours. The Appellant filed an application for leave to appeal against both his conviction and sentence and same was dismissed by the Magistrate's Court on 2 July 2019. A petition to the High Court was similarly refused. The Appellant was however granted special leave to appeal by the Supreme Court of Appeal against the refusal by the High Court.

[4] On 02 April 2019, the Supreme Court of Appeal set aside the High Court's order dismissing the Appellant's petition for leave to appeal in respect of count 1 and granted the Appellant leave to appeal to this court against his conviction in

respect of count one and the sentence imposed in the Magistrate's Court. He was unsuccessful in respect of count two.

The Background

[5] This dispute arose because of the belligerence of the Appellant. It emanated when the complainant in the trial court and the Appellant, could not agree to which school their five-year-old daughter would attend. The parties were never married but had a Parental Plan which was made an order of court on 14 December 2012. The complainant moved to Melkbosstrand during August 2014.

[6] According to the complainant, the Parental Plan made provision for disputes between the parties to be referred to a facilitator. Martin Yodaiken, a clinical psychologist, was duly appointed to investigate which school would best suit the minor child since the mother preferred the child to attend Melkbosstrand Private School, which was closer to their home and the Appellant preferred that she attend Parklands College.

[7] After an investigation, Mr Yodaiken issued a directive, directing that the minor child should attend Melkbosstrand Private school. The factors which influenced his decision related to the distance that the complainant would have to travel, being 7km from her home, compared to the approximately 20km to Parklands College. It would also have been more convenient in respect of the minor child's attendance of extra mural activities after school and she would also be closer to her friends. The directive stated that the Appellant was required to enrol the minor child at

Melkbosstrand Private School and the complainant was of the view that the parties were bound by this directive.

[8] After the issuing of the directive, the Appellant informed the complainant that he was not going to pay the enrolment fees for the school, nor would he pay any of the school fees. At the time, the enrolment fees at Parklands College was R 16 000.00 and the monthly fees just over R 5000.00. In comparison, the Melkbosstrand school's enrolment fees were R 6000.00 at the time and the monthly school fees were approximately R 3200.00 which was made up of R 2 195.00 plus after care fees until 2.30pm in the afternoon.

[9] According to the complainant, the Appellant was prepared to pay for all of the fees at Parklands College and did not expect her to contribute a cent. However, when the facilitator's decision was in favour of the minor child attending the Melkbosstrand school, and contrary to his wishes, the Appellant informed her that he would no longer be contributing anything. The complainant then approached the Children's Court as she required the Appellant's assistance in enrolling their child and required the monthly payments for the private school in Melkbosstrand.

[10] After the hearing of the matter, the Children's Court granted an order on 21 November 2014. It was ordered that the Appellant had to enrol the minor child at Melkbosstrand private school and pay the difference of the school fees, less an amount of R 1700.00. His contribution would have been around R 1200.00 per month. The Appellant also had to pay the enrolment fee of R 6000.00 and was required to sign the necessary application forms for the minor child.

[11] The complainant explained that at the time, the minor child attended Heartlands school and she paid an amount of R 2195.00 in school and aftercare fees. She testified that the cut-off time for enrolment at the Melkbosstrand school was 24 November 2014 when the minor child had to be registered and the fees paid ready for her intake for Grade R in 2015. The Children's Court court order was dated 21 November 2014.

[12] The Magistrate in the Children's Court, a civil court, issued the following order which reads as follows:

> ' In terms of ss 48(1)(a) read with ss7, 45(1)(d) and (k) Act 38/2005 it is hereby ordered that the father of the child Mr. N. C must pay an additional amount over and above the current school fee amount of R1 700 for the enrolment; registration; development and user fees; actual school fees and after care fees (up to 18h00) to ensure the enrolment of the child at Melkbosstrand Private School immediately upon the above fees becoming payable and to continue doing so until/in lieu of any of the following eventualities :
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> - A maintenance court order;
> - An agreement in terms of s72 Act 38/2005;
> - A variation of the Parenting Plan – dated 14/12/2012 in terms of section 34(5) Act 38/2005 or review of this order on 17/4/2015.'

[13] The order also stated that the Appellant had to continue paying until another eventuality occurred, such as a maintenance court order. The complainant testified that there was no maintenance order. However, the Appellant informed her that he would appeal the Children's court order of 21 November 2014 and accordingly requested reasons from the Magistrate. The appeal was lodged on 26 November 2014.

[14] He ultimately withdrew that appeal and opted to approach the High Court to launch an application setting aside the facilitator's directive of 3 November 2014. After the filing of the appeal, the order of 21 November 2014 was automatically suspended, pending the outcome of the High Court application.

[15] It is common cause that the High Court upheld the facilitator's directive and the application was dismissed. On 16 July 2015, the order of 21 November 2014 which was further suspended on 15 April 2015 was reinstated and a further order was granted directing *inter alia* that the minor child had to be registered on or before 17 July 2015.

Application to introduce new evidence

[16] At the hearing of this appeal, the Appellant filed an application to introduce new evidence which he believed should be considered by this court in the context of the appeal against the sentence imposed on him. The new evidence was purported to be recent in nature and related to the possible adverse effect that the sentence of periodical imprisonment would have on the minor child. The information was obtained by the social worker, Ms Esna Bruwer, who was appointed by the minor's curator *ad litem* to assist both the minor child and the curator in the on-going disputes and litigation between the parents. According to Ms Bruwer, it was her view that a prison sentence for the Appellant might cause the minor child emotional harm and anxiety, as the impact of the periodical imprisonment meant that the minor child

would not be able to spend time with her father at all during his time of periodical imprisonment, which would occur over the weekends.

[17] It is trite that the power of a High court sitting as a court of appeal from a decision in the Magistrate's court to hear further evidence derives from s 309(3) of the Criminal Procedure Act and s 19 (b) of the Superior Court Act of 2013 which provides that the Supreme Court of Appeal or a court exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law, receive further evidence.

[18] Although applications to introduce new evidence historically related to evidence that existed prior to or at the time of conviction, courts have relaxed the rule relating to the introduction of new evidence to allow evidence to be adduced on appeal of facts and circumstances which arose subsequent to the sentence imposed, where there were exceptional or peculiar circumstances present. *(See Britz v State 2010 (20 SACR 524 (SCA) at para 5)*. Two further requirements must be complied with, namely whether (i) there is a *prima facie* likelihood of the truth of the evidence, and (ii) the evidence should be materially relevant to the outcome of the appeal. *(See Britz supra at para 6)*. The court further held in *Britz* that the appeal court should only allow the evidence tendered if satisfied that there is at least a probability, not merely a possibility, that the evidence, if accepted, would affect the outcome and in this instance whether the evidence warrants interference with the sentence. (At para 7)

[19] Counsel for the Appellant submitted that the circumstances in this case are

exceptional and peculiar and that granting the Appellant leave to adduce new evidence relating to the probable effect that his sentence would have on the psychological and emotional well-being of his minor daughter would not result in an opening of the floodgates to similar applications. It was argued that the offences of which the Appellant was convicted, namely contempt of court, arose in the context of a dispute between the parents of the minor child over which private school she should attend. Although the offences are serious, it was submitted that this case falls out of the norm of criminal appeals as it did not involve violent or exploitative criminal conduct or a refusal to maintain the minor child. Furthermore, the evidence that the Appellant wished this court to accept, deals with the impact that the sentence is likely to have on the minor child.

[20] According to the affidavit of Ms Bruwer, she states that the minor child is emotionally and psychologically vulnerable and that she will be adversely affected should her contact with the Appellant, who plays an active role in her life, be restricted whilst he is serving the sentence imposed on him. It was submitted that this court, as the upper guardian of the minor child, should consider this evidence and evaluate the suitability of a sentence of periodic imprisonment in the light thereof.

[21] The Respondent did not oppose the application. Given the nature of the evidence, the application to produce new evidence was granted.

[22] Turning to the grounds of the present appeal. As stated previously, the

Appellant is appealing against his conviction on count 1 and against the sentence imposed on him by the Magistrate. Several grounds were raised however I will deal with what is essentially, the main ground of appeal. The Appellant stated that the Magistrate erred and misdirected himself by;

22.1 Disregarding the fact that the court order of the Family Court dated 21 November 2014 was automatically suspended by the notice of appeal filed by Appellant on 26 November 2014; and

22.2 Disregarding the fact that said order was further suspended by an order of the Family Court on 15 April 2015 with the result that the suspension remained in effect until 16 July 2015.

[23] With regard to sentence, it was contended *inter alia* that the Magistrate:

23.1 Failed to seriously consider or apply his mind to sentencing options other than a fine or periodic imprisonment.

23.2 Imposing a sentence that was so severe as to induce a state of shock.

23.3 Overemphasised the seriousness of the offences at the expense of the Appellant's personal circumstances and disregarded the interests of the minor child and the effect of the sentence on her.

Applicable Legislation

[24] The fundamental principles relating to contempt of court proceedings specifically relating to organs of state and legal representatives, was dealt with in the matter *of Pheko and Others v Ekurhuleni City 2015 (5) SA 600 (CC)* where the court stated as follows at para 1:

> "The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

[25] Contempt of court is the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. (*See* Pheko *supra* at para 28 617 A-B). A party seeking to prove contempt of court must prove beyond a reasonable doubt that there is a court order issued by a court of competent jurisdiction which has been served on the defaulting party or which has come to his attention and that the defaulting party has wilfully and in bad faith failed to comply with said order. (*See Matjhabeng Local Municipality v Eskom Holdings Limited 2018 (1) SA 1 (CC) at para 64*).

[26] The *locus classicus* of contempt of court proceedings is the oft quoted *Facie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326* where the court stated that the test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *male fide*.' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute contempt. (*See* para 9 at 333B-C). Thus the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or

authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent. (*See* Facie *supra* at para 10 at 333D-E)

[27] It is common cause that the Appellant was present at court when the order of the Children's court was issued and that he therefore had knowledge of the said order. Counsel for the Appellant submitted that the only elements of the offence of contempt of a court order in dispute, is whether the Appellant failed to comply with this court order and, if so, whether this non-compliance was wilful, *male fide* and material.

[28] It is common cause that an appeal was lodged on or about 26 November 2014 by the Appellant against the order of the Children's court and that the suspension of this order was extended by the Magistrate on 15 April 2015.

[29] The court order of 21 November 2014 was only reinstated by the Children's court on 16 July 2015.

[30] During the trial, the Appellant testified that a notice of appeal was lodged on or about 26 November 2014, as recorded in the email sent to the school. The complainant confirmed that the appeal was lodged in November and the Magistrate in the Children's court made reference to this in his judgment.

[31] Section 51(2) of the Children's Act of 2005 states that an appeal against an order of the children's court must be noted and prosecuted as if it were an appeal against a civil judgment of a Magistrate's Court, subject to section 45(2)(c) of the Act.

Section 45(2)(c) relates to circumstances where the children's court exercises criminal jurisdiction for contempt of court and is not relevant in this instance.

[32] It is trite law that the effect of noting an appeal against a civil judgment is to suspend the operation of the court order until the appeal is finalised or withdrawn. (*See South Cape Corporation (Pty) Ltd v Engineering Management Service (Pty) Ltd 1977 (3) SA 554 (A) at 544H -545A)*

[33] The Appellant argued that the Magistrate misdirected himself on a question of law when he found that this order was not suspended by the lodging of an appeal. It was submitted that this misdirection alone is sufficient cause for this court to overturn the conviction of the Appellant on this count.

[34] It is apparent that this view was held held by the Supreme Court of Appeal in the leave to appeal judgment (*See Cooper v The State 285/2018) [2019 ZASCA 50 (1 April 2019*) which stated the following at paragraph 4:

> "[4] In order to succeed in an application for special leave to appeal against the convictions and sentence, the appellant has to show that there is a reasonable prospect of success on appeal against the convictions and sentence. In order for the appellant to be found in contempt of court of the two counts it was incumbent on the State to prove beyond reasonable doubt three requisites, namely (a) the order; (b) service or notice on the accused; and (c) non-compliance by the accused. As the Constitutional Court held in Fakie NO v CCII Systems:
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> '[O]nce the applicant has proved the order, service or notice and non-compliance, the respondent bears the 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'"

[35] The Supreme Court of Appeal went on to conclude that although the purported appeal and the review processes were ill-advised and lacked merit, it was not disputed that the Appellant had acted on the advice of his legal representative and that accordingly, it could not be concluded that the requisite malice was proved. Counsel for the State similarly in argument before us conceded that the State failed to prove that the Appellant acted *male fide* when he failed to comply with the order of 21 November 2014.

[36] This sequence of events was as follows. On 15 April 2015, the Children's court granted an Order suspending its order of 21 November 2014. On 22 June 2015, the Appellant's application to the High Court was dismissed. On the following day following the dismissal of the High Court application, the Appellant's legal representative, Ms Caroline Dichmont, wrote a letter to the complainant, *inter alia* stating the following:

> "Our client does not believe that C should start the third term at Melbosstrand Private School and believes that she should remain at Heartlands at present.
>
> Our instructions are that our client believes that Melbosstrand Private School offers no better facilities, opportunities and education than Melkos Primary School and if your client remains adamant that Parklands is not an option for C, then he suggests that she attends Melkos Primary School."

[37] This letter was referred to for the reliance of the proposition that, despite the High Court's dismissal of the application the previous day, dismissing his appeal against the magistrate's court decision confirming Mr Jodaikan's directive to have the minor child attend Melkbosstrand Private school, he still persisted in ignoring a court order via his legal representative.

[38] The letter written by the attorney was unfortunate and I am in agreement with the sentiments of the Supreme Court of Appeal that the advice given was ill-advised. Legal representatives are first and foremost officers of the court and their duty to respect the rulings of a court is paramount for the operation of the rule of the law. Whilst the Supreme Court of Appeal was of the view that the purported appeals and review processes by the legal representative were ill –advised and lacked merit, the letter that she penned was ostensible done on the instructions of her client, the Appellant and the court was of the view that on this basis, that the Appellant lacked the necessary *male fides* to make himself guilty of contempt. Legal representatives act under the instructions of their clients and it would be a worrisome consequence if clients were able to hide behind their legal representative's actions to excuse a particular behaviour.

[39] When a court order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable. The reason for extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute. (*See* Pheko para 47 at 623G-H) Naturally each case should be evaluated on its own merits. In this instance however, the matter can be resolved without me making a finding in this regard.

[40] It is true that the effect of the lodging of an appeal against the order and the subsequent suspension of the court order of 21 November 2014 would be to relieve the Appellant of the obligation to comply therewith during the period of suspension. Therefore, a party cannot be compelled to comply with an order that is in abeyance. The Children's court order was only reinstated on 16 July 2015. The period for which he was charged for the alleged non-compliance was between 21 November 2014 and 15 April 2015. He was consequently not compelled to comply with the court order and as a result, he therefore cannot be guilty of contempt of court in respect of count one. In the circumstances, I am of the view that the appeal against his conviction in respect of count one must succeed on this basis alone.

[41] Turning to sentence, it is so that in light of the finding that the appeal against count one is upheld, that we are obliged to reconsider the sentence imposed on Appellant.

[42] According to the counsel for the Appellant, the current sentence imposed is too severe.

[43] Counsel for the Appellant relied on the *dicta* in *S v Scheepers 1977 (2) SA 154 (A) at 159A-B* which held that imprisonment, whether direct or periodic, should not be lightly imposed if the objective of punishment can be met by another form of punishment. By providing for alternative sentencing options to direct imprisonment the legislature clearly distinguished between two types of offenders, namely those who ought to be removed from society by means of imprisonment, and those who,

although deserving of punishment, do not necessarily have to be removed from society. (*See* S v R 1993 (1) SA 476 (A) at 488F-G)

[44] It was submitted that although periodic imprisonment is not as onerous as direct imprisonment, that the court *a quo* had a duty to consider other less onerous sentences. It was further submitted that the only sentence other than periodic imprisonment considered by the trial court was that of a fine.

[45] It was conceded that contempt of court is a serious offence. However, it was argued that the court over-emphasised the seriousness of Appellant's offence, which did not involve violence or dishonesty, at the expense of his personal circumstances and the best interests of the minor child.

[46] It was also argued that the Magistrate was aware that one of the considerations relevant when imposing sentence is the preservation of family life and decided to impose a sentence of periodic imprisonment in part because this would allow continued contact between the minor child and Appellant during the week. However, it was submitted that in doing so, the Magistrate lost sight of the fact that the Appellant only sees the minor child every alternate weekend and on a Wednesday afternoon and evening and that by sentencing the Appellant to periodic imprisonment every weekend for 2000 hours, the court was severely limiting the contact between the Appellant and his daughter.

[47] It is common cause that the Appellant was sentenced to 2 000 hours of period imprisonment. In terms of section 285(1) of the Criminal Procedure Act, this is the maximum period of periodic imprisonment that a court can impose.

[48] Counsel for the Appellant argued that if one had regard to the sentences imposed in the cases of S v Visser 2004 (1) SACR 393 (SCA) and Deenanath v Deenanath[1], that it is clear that the sentence imposed by the Magistrate was so inconsistent so as to constitute a misdirection on his part.

[49] In *Visser* at para 12, the accused was in breach of a maintenance order for seven (7) months and owed R 38 500 in arrear maintenance. He was sentenced to 1440 hours periodic imprisonment. The Supreme Court of Appeal found that:

> *'not suspending any portion of the period of imprisonment imposed would result in an unduly harsh punishment for the Appellant'*

and substituted a sentence in terms of which one thousand one hundred and sixty (1160) hours of the sentence was suspended for five (5) years. Thus, the accused was effectively sentenced to 280 hours periodic imprisonment.

[50] In *Deenanath*, the accused was found to be in breach of two court orders issue in respect of maintenance and a contribution to the costs of litigation. He had failed to pay maintenance for 56 months and owed R322 643 at the time of the hearing. He further owed R 393 500 in respect of the costs contribution order. The court imposed a sentence of 30 days (or 720 hours) of periodic imprisonment.

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1 Unreported KZN judgment under case number 11852/2015 handed down on 14 November 2016

[51] It was argued that it was clear from the nature of the sentences imposed in these far more serious cases of contempt of court, that the sentence imposed on the Appellant, a first offender, is so excessive as to induce a sense of shock and that this court would be justified in interfering with the sentence imposed. A suspended sentence was preferred.

[52] During argument, counsel for the State did not object to a suspended sentence being imposed. Thus, having regard to the totality of the evidence in this matter, this court is of the view that, taking into account the personal circumstances of the Appellant as well as the possible impact that the sentence might have on the minor child, that the Magistrate did misdirect himself in imposing the maximum sentence and that in the circumstances, the hours of periodic imprisonment should be reduced to that of 1000 hours.

[53] This court is also of the view that a suspended sentence would be appropriate and would serve as a deterrent in forcing the Appellant to respect the law and to conduct himself in a manner that would not, in the future, jeopardise the wellbeing of his minor child.

[54] In the circumstances, the following order is made:

a) The appeal against the conviction on count one is upheld.

b) The sentence is set aside and replaced with the following order:

i) The Appellant is sentenced to 1000 (one thousand) hours of periodical imprisonment, from 6pm on Friday until 6am on Monday, such sentence to be suspended for a period of 5 years, on condition that the Appellant is not convicted of a similar offence committed during the period of suspension.

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Kusevitsky, J

I agree and it is so ordered.

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Ndita, J

Counsel for Appellant: Advocate MA Ipser
Counsel for Respondent: Advocate C Van Der Vijver

Judgment delivered in Court 7
Delivered on 19 November 2019