

IN THE HIGH COURT OF LESOTHO

In the matter between:

HERMANUS GERHARDUS VAN ZYL

APPLICANT

and

WILLIAM LETOAO MOSIANE

RESPONDENT

JUDGMENT

Delivered by the Honourable Acting Justice Mrs. J.K. Guni  
On the 25th day of September, 1995

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In this application, the respondent has been brought to this Court to show cause, why he should not be committed to jail for contempt of Court Order.

The respondent is alleged to have wilfully and intentionally refused to comply with an Order of this court dated 14th May, 1995.

What were the exact terms of the Court Order allegedly disobeyed wilfully and intentionally by the respondent? There is a series of Court Orders in this file, but there is none dated the 14th day of May, 1995. The hand written index shows a number of Court Orders but the one referred to is missing. The respondent, who was the only witness to give viva voce evidence in this contempt proceedings, told the Court

that he noticed that the names on the paper handed over to him by the Deputy Sheriff, were not his names. Although he admittedly had very little command of English language, he had no enthusiasm to read the paper he received from the deputy sheriff because he regarded the paper as not addressed to him. Respondent took the paper back to his attorney even though he was informed that the same papers have been served upon his attorney and it is his attorney who provided that copy which was being served upon him by the Deputy Sheriff. The respondent was in this circumstances not completely convinced that the papers are not addressed to him as he claimed. Respondent decided that he nevertheless needed legal advise and accordingly approached his attorneys of record.

The Court Order as requested in the Notice of Motion is in the following terms:

1. Dispensing with the normal Rules regarding service of documents and hearing this matter as one of urgency.
2. Directing the Deputy Sheriff to immediately upon receipt hereof attach and take under his control the following vehicle presently in the possession of the Respondent:

1993 Mazda Magnum B2600 4 x 4 Drifter

Registration number NCX 280

Chassis number PR615279

Engine number 4G54KS0617

Colour blue and white

The following items are supposed to be attached to the abovementioned vehicle:

Turbo charge

Canopy

4 mag wheels

Extra fuel tank

Foot rails

Rubber mat for bag

Becker car radio tape combination

Tow bar

Bull bar

and hand same to Applicant or his Attorney pending the outcome of an action which is to be instructed against the Respondent by the Applicant.

3. That the Respondent be ordered to pay the costs of this Application.
4. That paragraph 2 operates as an interim interdict with immediate effect.
5. Calling upon Respondent to show cause, if any, on a date to be determined by this Honourable Court why the above Order should not be made a Final Order of Court.

6. Further and/or alternative relief.

The respondent denied that he disobeyed the Court Order on two grounds; namely

- (1) That the names on the Court Order were not his.
- (2) That even if he accepted that the names were his, the Court Order did not direct him to do anything.
  - (a) Furthermore the Deputy Sheriff who served upon the respondent the said Court Order did not explain to the respondent the contents of the Court Order.
  - (b) That Deputy Sheriff did not request or demand from the respondent the surrender of the possession of the motor vehicle in question to him.

The names of respondent as appeared on the Notice of Motion, in which the application for re-possession of the motor vehicle in question was made are WILLIAM LETOAO MOSIANE. According to the respondent's evidence before this Court, the paper handed over to him by the Deputy Sheriff bore the names, W.M. LETOAO. This the respondent refuse to accept as his names. Casual glance at these names, shows no difference. It is respondent's names, but they appear in a different order or sequence from his name in Annexure 'A'

attached to the founding affidavit of HERMANUS GERHARDUS VAN ZYL, the applicant in the application for repossession of the motor vehicle subject matter of their agreement. Respondent did not tell the Court who "WILLIAM LETOAO MOSIANE" is; perhaps he does not know him. There appeared to be no one known as WILLIAM LETOAO MOSIANE. It is the respondent's evidence that his attorney advised him to accept the papers served upon them as papers relating to him despite the error of order of appearance of his names on those papers. This was said in the light of the agreement, Annexure 'A', attached to the founding affidavit of HERMANUS GERHARDUS VAN ZYL. The respondent acknowledges his signature on this document - Annexure 'A' containing their agreement. The respondent then accepted that the papers relate to that agreement and instructed his attorney to file opposing papers for repossession of the said motor vehicle.

In this circumstances this respondent should not be heard to claim that the Court Order, does not relate to him, because he has accepted the papers in respect of the same names and has, instructed his attorneys to oppose the application for the repossession of the said motor vehicle. It is such a petty technicality, to put someone's names in reverse order, particularly where the rest of the accompanying documents bear those names in the order provided by and accepted by the owner of the said names.

Now, coming to the said Court Order itself, for

respondent to be found in contempt of the said Court Order the following must be established:

First of all the respondent must have been served with the Court Order. There are no problems as regards this requirement. The respondent has been served through his attorney and also personally by the Deputy Sheriff.

Secondly, it must be established that the Court Order was properly understood by the respondent requiring him to perform or refrain from performing certain act.

The exact terms of the Court Order were directing the Deputy Sheriff to attach and take under his direct control the motor vehicle in question as described in that Court Order. The evidence before this Court indicated that the said motor vehicle was not found in the possession of the respondent. Respondent was not asked to produce the said motor vehicle by the Deputy Sheriff. This is over and above the fact that the respondent received no explanation from the Deputy Sheriff as regards the contents of the said Court Order. The respondent claimed that on his own he could not understand the terms of the said Court because he does not understand English Language sufficiently to appreciate the legal terms used in the Court Order. Moreover, the respondent expressed his reluctance or lack of enthusiasm to read and understand the Court Order because he felt it does not relate to him due to the confused

order of appearance of his names on the said Court Order. The doubt, that the names were not those of the respondent and therefore the Court Order made out in those names did not relate to this respondent, was cleared by the respondent's attorney when respondent visited his offices after the Deputy Sheriff had given him, the respondent, the copy of the Court Order. At this stage the Court Order was then understood by the respondent. Still there was no compliance. The deputy Sheriff was not called to testify as regards what he did or said to the respondent in respect of the Court Order he served upon him.

It emerged during the cross-examination of the respondent that the said motor vehicle was not directly in his possession at the time the Court Order was served upon him. The motor vehicle was at Maluti Panel and Paint, Garage of Lioli Road, Industrial area - Maseru where it was undergoing some repairs. It was the respondent's evidence that two lawyers visited that garage to ascertain the presence of the said motor vehicle. It further appeared during cross-examination that there had been negotiations between the parties' legal practitioners to find the place of safety for the motor vehicle in question pending the finalisation of the application for its repossession by the applicant.

The Deputy Sheriff - Daniel Motaung was not called to testify before Court and stand cross-examination in the same fashion as the respondent, in order to determine his

credibility. There are conflicts between what the respondent told this Court and what the deputy Sheriff deposed to in his affidavit. Averments, made by the deputy Sheriff who was not subjected to cross-examination remain untested for their truthfulness.

For the contempt proceedings of committal to prison of this respondent to succeed, it must be proved on the balance of probabilities, that the respondent disobeyed the Court Order wilfully and intentionally. The Order must show that it required the respondent to perform something specific (Herbstein and Van Winser at page 653) and he refused or failed so to perform. Wilfully and intentionally. The terms of the Court Order do not require the respondent to perform any specific act. The deputy Sheriff who is directed to attach and take under his control the said motor vehicle, did not demand its possession from the respondent. The deputy Sheriff did not ask the respondent to indicate where that motor vehicle was for him to attach and take under his control. There seems to be a cloud of uncertainties and ambiguities as regards what exactly was required of the respondent who perhaps conveniently takes cover under that cloud. Following these proceedings the respondent is in no doubt of what is required of him. Respondent should hand over to the deputy Sheriff to attach and take into his control the said motor vehicle and deal with it as directed in the said Court Order.



The respondent is not found to have been in wilfully and intentionally contempt of the Court Order which he did not understand.

K.J. GUNI  
ACTING JUDGE

For the Applicant: Mr. L. Mare

For the Respondent: Mr. Matooane