

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU:

CIV/APN/520/09

In the matter between:

BEVERLY ANN CERFONTEYN

APPLICANT

And

**TEBOHO TŠOEU
MAGISTRATE MAFETENG
COMMISSIONER OF POLICE
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONENT
3RD RESPONDENT
4TH RESPONDENT**

SUMMARY

Contempt of court – Committal for – Applicant successfully making out a case for wilful disobedience of an order of court – Application succeeds.

RULING

Delivered by the Honourable Madam Justice L. Chaka-Makhooane J on this 25th day of February, 2011.

[1] This is an application for contempt of court and the Applicant's prayers as they appear in the Notice of Motion are couched in the following terms:

1. *That a Rule Nisi be issued, returnable on a date to be determined by the above honourable court calling upon the 1st Respondent to show cause if any why:*
 - (a) *He shall not be committed to prison for contempt of the Court Order herein.*
 - (b) *He shall forthwith deliver possession of the vehicle subject to these proceedings to the Deputy Sheriff or Commander Mabote Police Station.*
2. *That the 1st Respondent be ordered to pay the costs of this application as well as all costs occasioned by his refusal to hand over the vehicle in question.*
3. *That the Court grant Applicant further and/or alternative relief.*

- [2]** It is common cause that one Paballo Tšoeu, now the deceased, was charged in the Mafeteng Magistrate's Court, with the unlawful and intentional possession of a Toyota combi Hi Ace, registration number A1994. The said vehicle allegedly belongs to the Applicant herein. When the accused was reported dead the charges against him were withdrawn.
- [3]** On the 16th September, 2009, the 1st Respondent *in casu*, moved an application in CC/111/09 before the Mafeteng Magistrate's Court for an order directing the Respondents to release the said vehicle to the him. The 1st Respondent claims that he had been appointed the Executor of the Estate of the late Paballo Tšoeu. The application was granted on the 8th October, 2009.
- [4]** On the 4th December, 2009, the Applicant approached this court on an *ex parte* urgent basis seeking an order directing the seizure of the said vehicle from the 1st Respondent's

possession, for safe-keeping in the custody of the Court, pending the finalization of the application hereof. The Applicant further prayed for an order setting aside the order that was granted by default in the Magistrate's Court, releasing the vehicle to the 1st Respondent. That application was granted.

[5] The Applicant alleged that the 1st Respondent willfully defaulted in complying with the Court Order that the vehicle be released to the court through the Deputy Sheriff, for safe-keeping. The present contempt application arises out of the Respondent's alleged failure to comply with that order.

[6] The Respondent has raised three (3) points *in limine*, namely that the Deputy Sheriff lacks *locus standi in Judicio*, the Applicant's non-observance of **Rule 8 (8)** of the **High Court Rules** ("Rules") and the mis-joinder of the 2nd, the 3rd and the 4th Respondents in these proceedings.

[7] I shall first deal with the point of *locus standi*. **Mr. Molapo** for the 1st Respondent contended that Lereng Lipholo, the Deputy Sheriff, deposed to the founding affidavit in the matter before this court did not have a *locus standi* to institute the contempt proceedings. **Mr. Molapo** further argued that the Applicant, Beverly Cerfonteyn should have been the one to depose to the founding affidavit since she is a party to the action and not the Deputy Sheriff, Lereng Lipholo. The Deputy Sheriff's founding affidavit in this application is improper.

[8] **Ms. Ramphalile** for the Applicant in response, argued that the Applicant remained Beverly Cerfonteyn and not the Deputy Sheriff. She contended that the Deputy Sheriff's founding affidavit was filed in order to support the contempt of court application and his deposition to the Affidavit does not make him a party to the proceedings.

[9] In considering the point that the Deputy Sheriff Lereng Lipholo has no *locus standi in judicio* in these proceedings and as such should not have deposed to a founding affidavit, it is my opinion that if these are contempt proceedings and the Deputy Sheriff is the one who has first hand knowledge of the contempt alleged, he is perfectly entitled to depose to such an affidavit. This does not as a result make him a party to the proceedings. The Applicant shows that the Deputy Sheriff was an “Informer” for the court and in such proceedings he was the one who brought the contempt to the attention of the court. See **Cape Times Ltd v Union Trade Directories (Pty) Ltd and Others 1956 (1) SA 105 (N) at 124 E.** It is therefore, my finding that this point *in limine* cannot succeed.

[10] On the point *in limine* of non-compliance with the Rules of Court, the Respondents argue that the application was brought in contravention of **Rule 8 (8)** that the Respondent moved the court in an application for the release of the vehicle *ex parte* and on an urgent basis and got an order without

giving the Respondent notice. The Respondent argues that in that regard he cannot be said to be in contempt. The court was referred to **Libuseng Lesala v Lebalang Khutlisi and another C of A (CIV) 18/2004** (unreported).

[11] The Applicant has indicated that the application has been brought under the civil law contempt of court and not in terms of **Rule 8 (8)**. They argue that the application for contempt is *sui generis*. I note that the Applicant does not exactly deny that he may have flouted the rules of court. I also observe that civil contempt proceedings are usually and properly initiated by way of Notice of Motion. See **Blackburn and others v Union Government 1926 CPD 305**.

[12] On this score I agree with the Respondent that court rules are to be strictly complied with and non-observance should be frowned upon. The Applicant's non-observance of the rules is condoned, only to the extent that the Respondent eventually

had a chance to oppose the application hence the current proceedings. However, an appropriate costs order is to be considered by the court at the end of this judgment.

[13] On the issue of mis-joinder I accept the Applicant's explanation that they simply proceeded with the parties who had already been cited since the first application came before the High Court. It would seem it was logical, according to the Applicant to continue on that route since even the case number has not changed. It stands to reason that no one will be prejudiced by the continued inclusion of the 2nd to 4th Respondents in these contempt proceedings. This point *in limine* stands to be dismissed.

[14] Having disposed of the points *in limine* I am convinced that the order of court that was issued by Monapathi J on the 4th December, 2009 has not been complied with. What remains to be determined, however, is whether the Respondent has not

only wilfully disobeyed the order of court but that he was also *mala fide*. **Haddow V Haddow 1974 (2) SA 181 (R) at 182 (H)**

[15] The Applicant's contention is that the Respondent has disobeyed an order of court that required him to deliver the vehicle which was the subject matter of the proceedings in another matter (CC 111/09), release to him by the Mafeteng Magistrate's Court. He was personally served with the application and the court order which required him to release the subject matter to the Deputy Sheriff. The Respondent did not respond for three (3) months thereafter and did so only when he was served with the contempt of court application.

[16] It is the Applicant's further contention that the Respondent's opposition of the contempt application, that he is no longer in possession of the vehicle because he sold it in his capacity as executor of his late brother's estate, and that the vehicle that

the Deputy Sheriff saw bearing the same registration number and of the same model as the subject matter, was another vehicle he bought after selling the subject matter, is unsupportable and most probably not true.

[17] The Respondent vehemently denies being in contempt because he has not wilfully neglected to obey an order of court issued against him. He argues that the order had not only been superceded by events, it was also impossible to perform because the vehicle which was the subject matter had already been sold and was no longer in his possession. The Respondent submitted that by the time the order was obtained and he had already disposed of the vehicle. He contends that he subsequently bought another vehicle and he registered it with the same registration number A1994 as the subject matter he had disposed of. The Respondent submits that he cannot therefore, be said that he has wilfully refused to comply with an order of court if he is unable to comply with it.

[18] In the case of **Holtz v Douglas and Associates (OFS) CC En Andere 1991 (2) SA 797** it was held that:

“Contempt of a court order (arising out of civil proceedings) as an offence can be defined as the intentional refusal or failure to comply with the order of a competent court, provided that it is borne in mind that the terms of the court order will determine the identity of the person whose refusal or failure to comply with the order is punishable.”

[19] It is common cause that the Respondent was served with an order of court that he never complied with. He does not deny it. He however, he insists that it was rather difficult to comply with an order that had been overtaken by events. He was ordered to deliver to the Deputy Sheriff the vehicle that was the subject matter of an application that resulted in the order issued by my brother Monapathi J. What is of particular interest is that the Respondent has an explanation as already shown above, but he failed to give it following the court order until he was faced with the contempt of court application.

[20] Had there not been any contempt proceedings against the Respondent, would he have bothered to show why he had not complied with the order of court? The answer to this question is surely in the negative. I am inclined to agree with the Applicant where he says if he had indeed sold the vehicle then it should have been easy to produce proof of such sale. Also if he was Executor he would have produced some evidence of this and that the sale of that vehicle was as a result of his appointment as Executor of his late brother's estate.

[21] In an application for contempt, it has been shown that an applicant needs to show:

- (a) that an order was granted against Respondent; and
- (b) that respondent was either served with the order or was informed of the order; and
- (c) that Respondent has either disobeyed it or has neglected to comply with it.

See **Consolidated Fish (Pty) Ltd v Zive and Others 1968 (2) SA 517 at 522 E-G**

[22] *In casu* it is undisputed that the order was granted against the respondent, it is also not in issue that Respondent was served with the order. The bone of contention between the parties is only on the final requirement which is that Respondent has either disobeyed or neglected to comply with it.

[23] Respondent argues that by the time the order of court was obtained he was no longer in possession of the said vehicle. It might very well be so, however, the Deputy Sheriff has shown that he repeatedly insisted that the Respondent provides proof of this sale or he should identify the person he sold it to. Failure to do so leaves the court with no option but to agree with the Applicant that the Respondent's explanation is false and is unsupported. The Applicant has thus made out a case for contempt by showing that the Respondent had wilfully

disobeyed a court order. *Mala fide* does not necessarily qualify in this case. Only in the case of “constructive” contempt would Applicant also have to prove *mala fides*. See **Consolidated Fish Distributors (PTY) LTD v Zive and Others** (supra) at **524 H**.

[24] Based on the foregoing reasons the application succeeds in terms of the prayers as they appear in the Notice of Motion. The following order is accordingly made:

- (a) The application is granted with costs.
- (b) 1st Respondent to pay only two thirds ($\frac{2}{3}$) costs in relation to prayer 2. This is to show the court’s displeasure for non-compliance with the rules of court.

L. CHAKA-MAKHOOANE
JUDGE

For Applicant : **Ms. Ramphalile**
For 1st Respondent : **Mr. Molapo**

