A.74/2001

A.95/2001

IN THE HIGH COURT OF NAMIBIA

In the matter between:

STANDARD BANK OF NAMIBIA LTD APPLICANT

and

G ABRAHAMS FIRST RESPONDENT

K ASSER SECOND RESPONDENT

A G BAARTMAN THIRD RESPONDENT

CORAM: Hannah, J Heard

on: 2001-05-21 Delivered on:

2001-07-02 JUDGMENT:

HANNAH, J: On 21st May I heard argument on the return day of a rule *nisi* calling upon the first and second respondents to show cause why they should not be committed for contempt of an order made on 28th March, 2001. The rule had not been served

personally on the first respondent and I was therefore concerned only with the second respondent. As a fairly fundamental question arose concerning the procedure pertaining to contempt

proceedings I reserved my judgment.

The background to the application is briefly as follows. In March, 2000 the first respondent purchased a Volkswagen Golf motor car ("the VW") from the applicant for NS165 501-60, the purchase price to be paid in installments over 5 years. Ownership of the VW remained vested in the applicant until the purchase price was paid in full. During 2000 the second respondent purchased a vehicle from Auto Toy Store the proprietor of which was one Pretorius. He paid a deposit of N$22 000. However, the vehicle was not delivered to him and when in October, 2000 he decided to cancel the transaction Pretorius lent him a vehicle. When that vehicle had to go in for repairs Pretorius gave him the use of the VW. Presumably, Pretorius had some understanding with the first respondent in this regard but whatever the position may have been as between Pretorius and the first respondent the latter was in breach of his agreement with the applicant by parting with possession of the VW. Further, payment of the installment due on 5th March, 2001 was not forthcoming. On 13th of that month a meeting was held between a representative of the applicant and the two respondents but the second respondent refused to hand the VW over to the applicant. He said that he was retaining it as security for the money owed to him by Pretorius. By this time Pretorius had fled Namibia. The second respondent was given two days within which to return the VW and when he failed to do so the applicant applied on an urgent basis for its attachment pending an action to be instituted by the applicant.

On 28"1 March, 2001 this Court made an order authorizing the Deputy Sheriff to attach the VW and interdicting the two respondents from transferring, hypothecating, encumbering or removing it from the premises where it was being kept. This order was served on both respondents during the afternoon of 28th March by the Deputy Sheriff. Although the second respondent was in possession of the VW he refused to disclose its whereabouts to the Deputy Sheriff and threw the Court Order on the ground. He said that Pretorius owed him N$22 000.

On 9lh April, 2001 the applicant applied successfully for an order directing the Deputy Sheriff to

attach the second respondent and, once he had done so, for a court to be convened for the second respondent to answer a charge of contempt of the order made on 28lh March, 2001. The second respondent was duly arrested and presented to court on 10th April when the following order was made:

> "That accused purge himself today by immediately after adjournment accompany the Deputy Sheriff and hand over the said Volkswagen Golf 1.6 to be kept in safe custody pursuant to the order of 28 March 2001, failing which he shall be detained in custody on a writ of arrest at the Windhoek Central Prison until 23 April 2001.
>
> Upon handing the said vehicle to the Deputy Sheriff he shall be released and shall either in person or represented by a legal practitioner appear before the court on 23 April 2001 at 10:00 or soon thereafter as his case may be heard to give an explanation for his contempt of court.
>
> The matter is remanded to 23 April 2001 at 10:00"

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However, the second respondent had handed the VW back to the first respondent on 29 March, the day after the initial order was made. He maintains that he thought that the first respondent would in turn return the VW to the applicant.

During the course of 10 April, 2001 the second respondent accompanied the Deputy Sheriff in a search for the first respondent and the VW. The first responded was located and he confirmed that the VW had been handed over to him by the second respondent but said that it was now in the safekeeping of his legal practitioner. An arrangement was made to go to the legal practitioner's office but the first respondent then absconded. When the legal practitioner was contacted he said he had no knowledge of the whereabouts of either the first respondent or the VW and that he had never received the latter for safekeeping. The second respondent remained at large temporarily and apparently tried to locate the first respondent or the VW but on 17Ih April, when no progress had been made, he sought legal advice and was advised to report to the Deputy Sheriff. This he did and he was incarcerated from that day until 23rd April in the Windhoek Central Prison pursuant to the order made on 10th April.

On 23ld April the matter was stood down until 25th April and on the latter date the applicant moved an urgent application seeking an order against the first respondent similar in terms to the one granted against the second respondent on 9th April. As I entertained doubts whether such an order could properly be made I made an order consolidating the two applications and issued a rule *nisi* calling upon both respondents to show cause on 21st May why the first respondent should not be committed for contempt of the order made on 28th March and why the second respondent should not be further committed for contempt of that order. I also directed that the second respondent be released from custody pending the return date.

On 21st May Mr Strydom, who appeared on behalf of the applicant, sought to persuade me that the second respondent should be further committed for contempt of the 28th March order. Counsel pointed to the fact that the second respondent had only been in custody from 17th April. Eight days imprisonment was, in the submission of Mr Strydom, far too short a period of incarceration when measured against the seriousness of the contempt which had been committed. However, I was more concerned with the question whether the Court had any power to make a further order for committal and brief argument was addressed to this point. As stated earlier, judgment was then reserved and counsel were given the opportunity to fde additional heads of argument which they have now done.

The first question to be addressed is the meaning to be given to, and the effect of, the order made on 10th April. Mr Strydom submitted that the order should not be construed as amounting to, or containing, a finding that the second respondent was guilty of contempt. Although counsel accepted that the language used was "unfortunate', he submitted that the order was more concerned with the retrieval by the applicant of the VW than with the issue of the second respondent's contempt.

With all due respect to counsel, I fail to see the distinction which he seeks to make. LAWS A (1st Reissue) Vol. 6 deals with a failure to comply with a court order in the context of contempt at

para. 202 in the following way:

> "A party to a civil case against whom a court has given an order, and who intentionally refuses to comply with it, commits contempt. Such contempt is, however, hardly ever charged as a criminal offence by the attorney-general, and it is left to the party in whose favour the order has been given to apply to court, if he so wishes, to convict the defaulting party. Such an application is merely a way of enforcing the court order, because if the application is successful, the sentence, such as imprisonment, is almost always suspended on condition that the defaulting party complies with the order in the manner prescribed by the court."

1 respectfully agree with this summary of the position and it shows that the distinction which Mr Strydom seeks to make is an illusory one.

The order commences by requiring the second respondent to "purge himself and concludes by requiring him to give at a later date "an explanation for his contempt of Court". What is clearly implicit in both these requirements is a finding that contempt had been committed even though such finding was not actually expressed. Otherwise, there could have been nothing to purge or explain.

Further, the order made provision for the second respondent to be detained in custody should he fail to hand over the VW to the Deputy Sheriff. Such provision could only have been made if there was a finding of contempt.

As for the effect of the order, it seems reasonably clear from the transcript of the hearing which took place on 10th April that there was a general assumption that the second respondent would hand over the VW to the Deputy Sheriff on that day and that he would therefore avoid being detained in custody. However, as we now know he did not because he could not. As a result he was detained in custody pursuant to the Court order albeit only for eight days. He served the sentence which had been imposed.

What it comes to, in my opinion, is that the order made on 10th April contained not only a finding that the second respondent was guilty of contempt of Court but also a conditionally suspended sentence of imprisonment which was to become operative should the second respondent fail to comply with the condition. It therefore becomes unnecessary to deal with Mr Strydom's alternative submission that the judge who made the order should be approached in order to vary the order in terms of Rule 44(1) of the Rules of the High Court. Although the order can, in certain respects, be said to have put the cart before the horse it does not, in my view, contain an ambiguity.

The second question to be addressed is whether the Court now has the power to impose an additional punishment for the same contempt? The subject of civil contempt proceedings is described in the following words in Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa* (4l ed.) at 817:

> "The object of proceedings that are concerned with the wilful refusal or failure to comply with an order of court is the imposition of a penalty in order to vindicate the court's honour consequent upon the disregard of its order and to compel performance in accordance with the order. The penalty may take the form of committal to gaol or the imposition of a fine. In less serious cases the court may caution and discharge the respondent."

There was a time when it was the practice of the Courts of England when committing for contempt to commit for an indefinite period. See, for example, *In the 'MmtsrofaSp'ecial" Reference from the Bahama Islands* 1893 AC 138; *Halsbury's* Laws of England, (2nd Ed.) at p 30. However, that practice was discontinued. In *Attorney-general v James & Others* 1962 2 QB 637 Lord Parker C.J. said at 641:

> "It is accordingly, in my judgment, settled law that in the case of criminal contempt the period of imprisonment should be for a fixed term as for punishment for a criminal offence."

If the learned Lord Chief Justice was drawing a distinction between "criminal" contempt and "civil" contempt then the matter was put beyond all doubt by section 14 of the Contempt of Court

Act, 1981 which provides:

> "14(1) In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term....."

See also *The Supreme Court Practice* Vol. 2, part 2, App. A, Form No. 85, para82 which requires that the period of imprisonment in a committal order be stated.

I have taken the trouble to refer to the position in England for two reasons. Courts applying Roman-Dutch law have been enjoined to follow the procedure of the English Courts when dealing with cases of contempt. See *Attorney-General v Crockett* 1911 TPD 893 at 917. It occurred to me during the course of argument that if the English Courts have jurisdiction to make a general committal order it may be that this Court could, in some way, construe the order made on 10th April as such an order. However, it is clear that that is not the position.

Mr Strydom accepts, correctly in my view that there exists no South African or Namibian case law which supports the view that this Court may impose a further sentence upon a person found guilty of contempt and sentenced in respect of that same contempt or that this Court can substitute a longer sentence after the sentence has been imposed. Indeed, so far as the latter is concerned there is direct English authority that a court may not take such a course: *Westcott* v *Westcott* [1985] FLR 616, CA. Accordingly, no further order will be made and the rule *nisi* will be discharged so far as the second respondent is concerned save for the question of costs.

The applicant seeks an order that the second respondent pays the costs of the application on a scale as between attorney and own client. Having regard to the circumstances in which the contempt was committed I am of the view that a special costs order is warranted but that the scale should be that of the attorney and client and not attorney and own client. However, I do not see

why the second respondent should be saddled with the applicant's costs of the hearing which took place on 21st May or with the applicant's costs of the additional heads of argument. That hearing and the additional heads were primarily concerned with the question of the Court's jurisdiction and having regard to the conclusion I have reached I consider the fairest course to adopt is to make no order as to the costs of that hearing and the additional heads. As counsel did not address me on the question of costs I will, however, give leave to both parties to apply for a variation of the costs order should either or both wish to do so.

For the foregoing reasons the rule *nisi* is discharged so far as the second respondent is concerned save that he is ordered to pay the applicant's costs on an attorney and client scale but excluding the costs of the hearing of 21st May and the costs of the additional heads of argument. Leave is granted to both parties to apply for a variation of this costs order should they so wish. In the case of the first respondent the rule is extended to 27th August and the applicant is granted leave to apply to the Registrar to expedite that return date.

HANNAH, J

For the applicant: **Advocate JAN Strydom**

Instructed by: **Messrs van der Merwe-Greeff**

For the second respondent: **Advocate A Corbett**

Instructed by: **Messrs Dammert & Hinda**