MATHEUS TAAPOPI HAMUTENYA v PAX BEAULAH HAMUTENYA

CASE NO. (P) A 195/2004

2005/03/02

Maritz, J.

PRACTICE AND PROCEDURE

Orders of Court – compliance with – in interest of administration of justice and public order – person not complying may be barred until he/she has purged contempt – rule not absolute – court retaining discretion to hear defaulter – exceptions to the rule – exceptions not present in case under consideration – no urgency attaching to application and no dire or unacceptable consequences if applicant required to purge contempt before approaching court again – application to amend custody order struck

CASE NO.: (P) A 195/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MATHEUS TAAPOPI HAMUTENYA **APPLICANT**

versus

PAX BEAULAH HAMUTENYA
RESPONDENT

CORAM: MARITZ, J.

Heard on: 2005.02.03
Delivered on: 2005.02.03 (*Extempore*)

JUDGEMENT

MARITZ, J.: The applicant is seeking an amendment of the settlement agreement incorporated in the final decree of divorce issued by this Court. In terms of that agreement custody and control of the two minor children born of the dissolved marriage between the parties are vested in the respondent, subject, however, to the applicant's rights of reasonable access to them. The effect of the amendment which the applicant is seeking will be to vest the right to custody and control of the children in him. The respondent is opposing the application on a number of grounds, one of which was raised *in limine*, i.e. that the applicant is in contempt of the existing order and that the Court should decline to hear the

application unless and until the applicant has purged his content.

It is common cause between the parties that they are the biological parents of M., currently 11 years of age, and E., currently 7 years of age; that their marriage was dissolved on the 10th of February 2003 and that in terms of the settlement agreement dated 25th November 2002 incorporated in the final decree of divorce, the respondent was awarded custody and control of the two children subject to the applicant's reasonable rights of access. After the final order of divorce had been granted, the respondent by arrangement *inter partes* allowed the minor children to continue residing with the applicant - which they had been doing for a period of 1 year preceding the dissolution of the marriage. The applicant had *de facto* custody and control of the children for the period 10 February 2003 to 2 December 2003. He restored custody and control to the respondent in terms of the Court's order for the period 3 December 2003 to 8 December 2003. As he was about to depart for a holiday with the children abroad - and was entitled to do so in terms of the Court's order - he requested that the children be allowed to accompany him. The respondent acceded to the request. She claims that she has done so on condition that the children would be returned to her upon his return on 13 January 2004. That did not happen. The applicant refused to return the children to her on 13 January 2004.

As a consequence, the respondent not only insisted that the children be returned but also laid a charge with the Women and Child Abuse Centre of the Namibian Police on account of his refusal to comply with the order of Court. After the intervention of the Namibian Police, the applicant caused a letter to be written to the respondent through the offices of his legal practitioners in which he stated his intention to launch an application for the amendment of the High Court's order. In the letter he maintained that, because such an application was envisaged and the children were in his *de facto* care, it would not be in their interest to remove them pending the outcome of the application. The respondent was also threatened that any steps to remove the children would be vigorously resisted on an urgent basis with obvious cost implications to her. Subsequently to that letter the respondent regularly collected the children for visits and thereafter returned them.

In pressing the point *in limine* on behalf of the respondent, Mr Boesak reminded the Court of the dire consequences to the administration of justice and the maintenance of order in society if orders of Court are disregarded with impunity. Recognising the considerations of public policy which underline the need to respect and comply with orders of that kind, the Court said *Sikunda v Government of the Republic of Namibia and Another,* NR 86 (HC) at 92D-E*:*

" "Judgments, orders, are but what the Courts are all about. The

> effectiveness of a Court lies in execution of its judgments and orders. You frustrate or disobey a Court order you strike at one of the foundations which established and founded the State of Namibia. The collapse of a rule of law in any country is the birth to anarchy. A Rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded."

Authority for this approach is also to be found in a case both parties drew the Court's attention to. In *Kotze v Kotze,* (2) SA 184 (C) Herbstein J said at 187F:

> "The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands."

It is for these reasons that Froneman J pointed out in *Bezuidenhout v Patensi Citrus Beherend Bpk,* (2) SA 224 (E) at 229B-D:

> "An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A - C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714).
>
> These propositions apply with equal force to orders relating to the custody and control of minor children. This much was recognised by Herbstein J in Kotze's case supra at 187 D-E;
>
> > "A similar question has recently been dealt with in England in the case of *Hadkinson v Hadkinson*, 1952 (2) A.E.R. 567. ROMER, L.J., gave the main judgment and inter alia said:

> 'It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it, unless and until that order is discharged.'

He went on to say that two consequences flow from that obligation:

> 'The first is that anyone who disobeys an order of Court is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to Court by such person will be entertained unless he has purged himself of his contempt.'

That matter also concerned a child. The learned Judge pointed out that this was the very kind of case in which the ordinary rule should be applied in all its strictness. Disregard of an order of Court is a matter of sufficient gravity, whatever the order may be. Where, however, the order relates to a child the Court is, or should be, adamant on its due observance. Such an order is made in the interests of the welfare of the child and the Court will not tolerate any interference with or disregard of its decisions on those matters."

Whilst recognising these principles, Mr Schikkerling, appearing for the applicant, advances two propositions in defence, i.e. that the applicant is not in contempt and, even if he is, the principle does not constitute an absolute bar to the applicant's right to approach the Court for relief and that this application falls within the exceptions to be so entertained. It is to those contentions that I shall turn hereunder.

It is apparent from the common cause facts that the *de jure* custody and control of the two children has been awarded to the respondent. After the divorce had been finalised, the respondent allowed the applicant to keep the children under his care until 2 December 2003

In terms of an agreement concluded *inter partes*. She stated, as I understand her affidavit, that she was constrained to agree to that arrangement because her living conditions were not such that she could provide the children with an appropriate home.

Her circumstances improved in the course of that year to such an extent that she was able to exercise her *de jure* rights from 3 December 2003. The children were both *de jure* and *de facto* her care and custody from that date until 8 December 2003. She only allowed them to accompany the applicant for the December holidays abroad. She says that she allowed that on the premise that the children would be returned to her upon his return. When that was not done notwithstanding her demand, she called on the police for help. Her efforts to solicit their cooperation in order to assert her rights came to an end after she had received the letter from the applicant's legal representatives in which he threatened legal action and advised her and the police that he intended to move an application for the variation of the existing order. It was pending the launching of such an application that the respondent regularly collected and returned the children.

It is on this basis and, in particular, the fact that she returned the children to the applicant on a number of occasions after visits to her, that Mr Schikkerling submits that she has either waived her rights to insist on due compliance with the Court's order or has acquiesced to the *de facto* of custody by the applicant pending the

application to be brought.

I find myself in disagreement with his submissions. It is to be remembered that the applicant's refusal to return the children to the respondent after the holidays on 13 January 2004 and his continued exercise of *de facto* care and custody in the face of the Court's order constitutes – to put it lightly - a strong *prima facie* case against the applicant for non-compliance with the Court's order. The applicant seeks to justify his actions by reference to waiver or acquiescence.

I find nothing in the papers to persuade me that those contentions bear any merit. It must be remembered, as was pointed out in the case of *Kauesa v Ministry of Home Affairs and Others,* NR 102 (HC) that, in the case of factual disputes in applications of this nature, such applications -

> ". . . should be adjudicated on the basis of the facts averred in the applicant's founding affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant, unless a denial by the respondent is not such as to raise a real, genuine or bona fide dispute of fact or a statement in the respondent's affidavits is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers."

See also: P*ublic Service Union and Another v Prime Minister of Namibia and Others,* NR 82 (HC) at 85. If I have regard to the

allegations made in the papers of the respondent and those made in the applicant's papers to the extent that they are either admitted or not disputed by the respondent, I must accept that the respondent demanded the return of the children from the applicant on 13 January 2004. When the applicant refused, she laid charges with the police. When, she was faced with inaction on the part of the Namibian Police after they had received the lawyer's letter, she did what she could in the form of regular visits without taking the law in her own hands. The respondent, it is clear, is of much more modest means than the applicant. She is represented in this Court because of assistance she has received from the Legal Aid Directorate. The applicant is an affluent man who can afford to give the children private tuition and has appointed a chef and a chauffeur to attend to the children's requirements.

It seems to me that the respondent raised her objection to the applicant's failure to comply with the Court order on the very occasion she could by going to the police for assistance. She immediately opposed this application and filed an answering affidavit. She has also raised the applicant's non-compliance as a point *in limine*. If one considers her actions against those required by law to constitute a waiver, her conduct proves the opposite – that she has never waived any of her custodial rights.

Much has been made of the fact that the respondent regularly collected the children from the applicant and returned them to him

after 13 January 2004. In doing so, she acquiesced to the arrangement, so the applicant contends. I am not in the least persuaded that that is indeed the case. What would the alternative have been for the respondent - to take and keep the children? Given the events at the offices of the Namibia Police where, according to the respondent she was physically assaulted by the applicant, the consequences of such an action is likely to have resulted, at worst, in violence and, at least, in a tug of war with the children in the middle. Such conduct would have been detrimental to the relationship between the children and their parents and would have been frowned upon by this Court. In the result I conclude that the respondent has neither waived her custodial rights under the Court's order, nor acquiesced to the applicant keeping *de facto* custody and control of the children.

The second point that falls to be considered is whether the applicant's contempt notwithstanding, this case should nevertheless be entertained as an exception. It is quite correct, as Mr Schikkerlingh submits, that the barring of a litigant to seek redress in a Court of law simply because he or she has failed to comply with an earlier order of Court, is not an absolute one. That much has been recognised in the case of *Di Bona v Di Bona and Another,* (2) SA 682 (C) where, at 688, it is said:

> "The rule, however, that a person in contempt of Court will not be heard is not an absolute rule. This appears clearly from the

> judgments of Romer LJ and Denning LJ in *Hadkinson's* case and in this regard those judgments have been adopted by our Courts in *Kotze's* case supra, *Clements* case supra, and in the decision in *Byliefeldt v Redpath* 1982 (1) SA 702 (A) . In *Hadkinson's* case Romer LJ mentioned a number of exceptions to which he said the consequence of the refusal to hear a person in contempt is undoubtedly subject."

I do not find that any of those exceptions apply to the circumstances of this case. There is nothing to suggest that particular urgency attaches to this application or that compliance with the Court's order until such time as the application for an amendment thereof may be heard, will or may result in dire or unacceptable consequences for the children's welfare, health or morality. On the contrary, the clinical psychologist's report on which the applicant relies - that of Claire Hearne, describes the respondent as follows:

> "Ms Hamutenya presented in a calm manner during the consultation with myself. She co-operated well throughout the consultation. She was also able to give a realistic account of herself and no overt psychopathology was noted during the interviews. Her speech, language, mood, as well as thought process and content, social relatedness and judgment and insight were all observed as appropriate to her present circumstances.
>
> Ms Hamutenya can be described as a loving and attentive parent although her present contact with the children is limited. She expressed numerous frustrations pertaining to contact with the children and expressed concerns that Mr Hamutenya deliberately places obstacles to make contact with the children difficult".

And in relation to the children she says the following (and I shall

quote only part thereof):

> "Both M. and Enio indicate a strong affection to both parents. They however formed a much stronger bond with their father over the last few years as with their mother…The mother figure is described at times with some resentment, both children struggle to understand the limited contact with her. M. expresses a certain amount of anger and distrust towards the mother figure. Enio expresses disappointment, confusion and emotional pain when confronted with issues pertaining to the mother-child relationship. Enio particularly would benefit from more contact, more frequent with his mother. Barring their insecurities within the mother-child relationship, these children can be described as two healthy well-adjusted young individuals. They function well on a scholastic and extra-mural level and are quite capable of meeting their environmental demands."

As is evident from this report presented by the applicant, there is nothing in the character or the conduct of the respondent which makes her unsuitable to care for the children pending the adjudication for any application of an amendment of the Court's earlier order.

It must, of course, be remembered that I am not requested to deal with any application for the committal of the applicant for contempt of Court. In such an application different considerations would have arisen - such as *male fides* referred to in the case of *Clement v Clement*, (3) SA 861 (T). For purposes of the point *in limine* it is sufficient that the applicant has been and still is in wilful default of

the Court's order and that there are no exceptional circumstances which allow the Court to hear the application before the contemptuous party has purged his or her default.

Furthermore - and this is apparent from this report of the clinical psychologist - the respondent is prejudiced by the applicant's conduct in her efforts to maintain and nourish a normal mother-child relationship with the two children and therefore also in the presentation of a case in opposition to the amendment of the order. The children - currently being in *de facto* care and custody of the father - quite naturally have much more contact with him and clearly enjoy the benefits of his affluence. The contact with their mother is limited to regular, but short visits which clearly do not suffice to strengthen the bond with their mother. In retaining *de facto* care and custody of the children, the applicant is positioning himself as best he can to strengthen his case in the main application.

In the premises the following order is made:

1. The application is struck from the roll.

2. The applicant is given leave to renew the application on the same papers - duly amplified - once he has purged his default to comply with the order of this Court dated 10 February 2003 insofar as it relates to the custody and control of the two

minor children, M. M. H. and E. M. H..

3. The applicant is ordered to pay the respondent's costs in the application.

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MARITZ, J.

ON BEHALF OF THE APPLICANT	**Mr Schikerling**
Instructed by:	**Olivier's Law Office**
ON BEHALF OF THE RESPONDENT	**Mr Boesak**
Instructed by:	**Sisa Namandje & Co**