IN THE HIGH COURT OF NAMIBIA

CASE NO: I 2293/09

In the matter between:

VERONICA LOTTERYMAN (Previously Tromp, Born Cronje)	**APPLICANT**
and	
FREDERICK JAMES LOTERYMAN	**1ST RESPONDENT**
THE COMMISSIONER OF PRISONS OF THE REPUBLIC OF NAMIBIA	**2ND RESPONDENT**

SUMMARY

Locus standi of applicant –Application for contempt of court — Action for divorce settled - Settlement agreement made an order of court – Failure to comply with maintenance obligations in terms thereof also relating to failure to pay maintenance in respect of the parties' minor son – Objection raised in regard to applicant's *locus standi* to bring contempt proceedings due to failure to allege that application also brought on minor's behalf -

Court holding – Minor not having a 'direct and substantial interest' in contempt proceedings brought by one of the parties to the underlying court order against the other and in respect of which minor never was a party in first place – As minor therefore not a necessary party to such contempt proceedings – there was no need to cite minor in such proceedings unless minor bringing such application in own right – in which event the citation of the minor would have to indicate that he or she was duly assisted or that such application was brought on his or her behalf by a competent person

Court also approving dictum by Harms JA in the minority judgment of the South African Appellate Division in*Gross & Others v Pentz*(4) SA 617 (A) at 632 B-C - holding that - on the facts of this matter - the parties' minor son never had a sufficiency and directness of interest in the contempt proceedings instituted by his mother for him to be accepted therein as a litigating party – point in limine dismissed

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2ND RESPONDENT

CORAM: GEIER, J

Heard: 21 June 2012
Delivered: 06 July2012

JUDGMENT:

GEIER,J: [1] In this matter the applicant seeks to commit her former husband -the first respondent - to goal.

[2] She seeks such committal on the basis of the first respondent's contempt of a settlement agreement, which was made an order of Court on 18 January 2010, in terms of which, inter alia, also the marriage between the parties was dissolved.

[3] The case advanced in support of such quest in the founding papers isbrief and is essentially based on the central allegation that the first respondent has failed to abide with the Court's order since May 2010 and that he has remained in default up to the date of the bringing of this application, which was launched during March 2011.

[4] The Applicant alleges further that the first respondent was by then in arrears in respect of maintenance to the tune of N$ 121 000.00 in respect of which also, in the interim, an amount of N$ 60 000.00 was recovered by way of an attachment from the first respondent's banking account, leaving an outstanding balance at the time of the bringing of the application of N$ 80 780.85.

[5] Applicant avers further that the first respondent is in the position to comply with the maintenance order as he is employed at Oosthuizen Motors where he receives a salary. In addition she alleges that he receives a substantial income from a shop in the Ovitoto Reserve which he owns together with a partner. She also complains that the first respondent has failed to enrol her with a medical aid fund as per the relied upon Court order and that the first respondent fails to pay for the multiple expenses which are incurred in respect

of the maintenance of the parties minor son's motor vehicle.

[6] The final issue raised in the papers was the first respondent's failure to meet his obligations *vis a vis* the costs incurred by the party's minor son at a tertiary institute in Potchefstroom, South Africa.

[7] The first respondent raised a number of *in limine* issues as well as a defence on the merits.

[8] The first *in limine* issue was abandoned. The first respondent's application for striking out parts of the applicant's replying papers was disposed of on account of the court's refusal to grant condonation for the deliberate and reckless out of time filing of such papers by some 3 (three) months and due to the fact that it took the applicant a further month to file a four page application for condonation thereafter.

[9] Mr van Vuuren who appeared on behalf of the first respondent however persisted with the point *in limine* relating to the applicant's *locus standi* to bring the application on behalf of the party's minor son.

THE APPLICANT'S *LOCUS STANDI*

[10] Mr. van Vuuren formulated this point crisply in his Heads of Argument as follows:

> " *The applicant seeks the first respondent's committal for non-compliance with the order for:*
>
> a) *failure to pay maintenance for the son;*
>
> b) *failure to pay maintenance for the applicant;*
>
> c) *failure to enrol the applicant with a medical aid;*
>
> d) *for failure to pay for the maintenance of the son's motor vehicle; and*
>
> e) *for failure to pay for the son's tertiary education.*
>
> *The applicant alleges that only she is the applicant in the application. The applicant makes no allegation on the son's*

behalf nor that she launched the application in her capacity as guardian of the son.

The applicant, in the circumstances, it is submitted, is only entitled to seek relief against the first respondent in respect of the first respondent's non-compliance with the order pertaining to what the applicant is personally entitled to thereunder.

It is respectfully submitted that the applicant is not entitled to claim the relief she is seeking in her application in the circumstances."

[11] Mrs. Petherbridge, who appeared on behalf of the applicant, simply responded by stating:

"In the alternative the second point is the fact that the Applicant does not bring this application on behalf of the minor child of the parties. This is however not a valid point since the application is based on the non-compliance of an order of Court. An agreement reached between the Applicant and the First Respondent was made an order of Court. First Respondent's non-compliance is been complained of. Payment in terms of the order of Court is due to the Applicant and not the minor son of the parties.

The point in limine is to be dismissed."

[12] The logical point of departure for purposes of determining this *in limine*issue is to consider theunderlying legal principles to civil contempt proceedings.

[13] The applicable case law was recently comprehensively dealt with by Muller J in*/Ae//gams Data (Pty) Ltd and Others v St Sebata Municipal Solutions (Pty) Ltd and Others*[1], where the learned judge stated:

"In contempt proceedings the onus rests on the Applicant to set out the grounds of contempt. The Applicant has to prove the existence of the

1 2011 (1) NR 247 HC

Court order, service thereof and proof that the Respondent failed to comply with it. The Applicant has to prove wilful or reckless disregard of the Court order ..."[2]

[14] It is indeed well established that an applicant for committal on this basis must show:

a) *that an order was granted against the respondent, and*

that the respondent was either served with the order or was informed of the grounds of the order against him and could have no reasonable ground for disbelieving the information, and
that the respondent had ether disobeyed it or had neglected to comply with it.[3]

[15] It flows from these central requirements applicable to contempt relief that a party to a Court order - obliging the other – the respondent - to do something - is generally to be regarded as the applicant – ie. the party having *locus standi* to institute and bring contempt proceedings.

[16] This requirement was clearly met in the present instance.

[17] It should be mentioned in this regard that it was properly conceded by Mr. van Vuuren during argument that the applicant in this matter was not precluded in bringing the contempt proceedings in her own right and that she was - *vis a vis* any relief sought in her own right - properly before the Court. He also conceded that the point *in limine,* raised on behalf of the first respondent - even if upheld - would not strike at the root of the application and - at best - would only limit the impact thereof should the applicant succeed in obtaining the sought relief.

2 */Ae//gams Data (Pty) Ltd and Others v St Sebata Municipal Solutions (Pty) Ltd and Othersop.cit* at p 256 paragraph [33]

3 *Townsend-Turner & Another v Morrow* 2004 (2) SA 32 (C) at p 49 A – D, See also for instance - *Consolidated Fish Distributors (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C) at 522E - H; *HEG C Consulting Enterprises (Pty) Ltd and Others v Siegwart and Others* 2000 (1) SA 507 (C) at 518E.), *Clement v Clement* 1961 (3) SA 861 (T) -*Sikunda v The Government of the Republic of Namibia (2)* 2001 NR 86 HC at p 89 J – 90 A – See also generally *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at p 344 H – 345 A – paras [41] –[42]

[18] He nevertheless persisted with his point in respect of which it can at least be said that it is indeed so that – generally speaking - a minor does not have *locus standi in iudicio*[4] and, if an action is to be instituted on behalf of a minor child, such action would normally only be competently brought if such minor would be duly assisted by his or her natural guardian or a *curator ad litem*, or by the guardian himself if such guardian would bring the action on such minor's behalf.[5]That is the reason why in practice one would find for example in the citation of a minor party the phrase that the particular minor *'… is duly assisted herein by Mr. or Mrs. in his or her capacity as natural guardian … or that such action is instituted on behalf of …(the minor) … by Mr or Mrs .. in his or her capacity as natural guardian … etc'*.

[19] The question thus arises crisply whether or not the grounds – ie the failure to pay maintenance - on which the contempt application is based - affectthe applicant's *locus standi* in the present application where she is the only party that has applied to court for an order seeking the committal of the other due to the non-compliance with an order which was granted in such party's favour.

[20] In deciding the remaining issue it must firstly be of relevance that the parties - to the action - which resulted in the relied upon final order of divorce, incorporating the deed of settlement between the parties– were only the applicant and the first respondent.

[21] Secondly - and although this Court order also dealt with the issues of custody and maintenance relating to the parties' minor child and how the scholastic and medical expenses of such child would be paid for, as well as other relief not relevant to the minor child - it appears that the minor child was never a party to the divorce proceedings between the parties although his legal interests were in fact affected in such action and by the court's order.

[22] I point out that this is in accordance with the general applicable practice followed in our courts and in terms of which it is not customary to cite minor children as parties in actions for divorce.

[23] It was thus not surprising that the applicant and the first respondent were

4 See for instance : *Boberg 'Law of Persons and the Family'* 1st Ed at p 681 ff – *Spiro – Law of Parent & Child*' – 4th Ed at p 199-202 - *'Wille's Principles of South African Law'* - 9th Ed at p187 – '*Beck's Theory & Principles of Pleading in Civil Actions'* - 6th Ed - by H Daniels at p 9 - *Stassen v Stassen* 1998 (2) SA 105 (W)

5 See for instance :Amler's Precedents of Pleadings 7th Ed by LTC Harms at p272

the only parties to the resultant court order and that such order was granted 'in favour' of the applicant 'against' the first respondent only.

[24] Significantly it appears also from the papers that the minor son of the parties is neither seeking the committal of his father for contempt of court, nor that is he seeking an order for maintenance, or any other relief in his own right. The position would clearly have been different would he have sought any relief in his own right –in which event he would have been necessary party to any such application - which would have brought with it the necessity of citing the minor in the proper manner.

[25] In addition and upon an analysis of the nature of the relief applied for - were the first respondent expressly only seeks *'… the committal of first respondent to imprisonment for Contempt of Court and were she seeks an order that he remain in incarceration until he has complied with his obligations imposed upon him in terms of the Court's order of 18 January 2010 …'*, it emerges that the parties' minor son actuallyhas no 'direct and substantial interest'[6] in the outcome of contempt proceedings launched by the ex-wife against her former husband and in respect of which - at the most - the minor child's interest - if any– would be a indirect financial interest only[7] - in the sense that should the first respondent, now, comply with his obligations, in terms of the maintenance order, and make payment also of all arrear maintenance to his ex-wife, that the minor child of the parties' then - and in that event - would/should benefit from these contempt proceedings.

[26] All these factors indicate that the minor son of the parties was never a necessary party to these contempt proceedings –which were in any event also never instituted at his instance or on his behalf - in respect of which - he would then - have had to be duly assisted.

[27] Applicant was thus at no stage obliged to join and therefore cite the minor

6 See for instance – *August Maletzky&Ano v Standard Bank Namibia Pty Ltd* High Court case - A 196/2009 delivered on 14/2/2011 at para's [3]–[6] reported at http://www.saflii.org/na/cases/NAHC/2011/http://www.saflii.org/na/cases/NAHC/2011/ -ie. one that is a legal interest, which may be affected by the outcome of the order – in this instance the maintenance order granted in the minor's favour would not be affected at all and would remain unaltered – it is clear that such order stands until such time that it is varied or discharged -

7 *Stellmacher v Christians& Others2008 (2) NR 587 HC* at page 591 C para[16]

child of the parties as a necessary party to these proceedings.

[28] She was always entitled to bring these contempt proceedings in her own right despite the possibility that this might ultimately even be of benefit to the parties' minor child.[8]

[29] Finally I take into account what was said by Harms JA in the minority judgment of the South African Appellate Division in*Gross & Others v Pentz*[9] at 632 B-C that :

> *"The question of locus standi is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as litigating party (Wessels en Andere v SinodaleKerkkantoor C Kommissie van die NederduitseGereformeerdeKerk, OVS 1978 (3) SA 716 (A) at 725H; Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) at 388B-E). The sufficiency of interest is 'altydafhanklik van die besonderefeite van elkeafsonderlikegeval, en geenvaste of algemeengeldendereëlskanneergelê word vir die beantwoording van die vraagnie . . D .' (Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A) at 534D)" …*

and with reference to which it must be said that - on the facts of this matter - the parties' minor son never had a sufficiency and directness of interest in the contempt proceedings instituted by his mother for him to be accepted therein as a litigating party. This finding then also obviates any need of citing him.

[30] This point *in limine* raised on behalf of the first respondent thus fails.

THE MERITS OF THE CONTEMPT APPLICATION

8 This would also be akin to a stipulatory claim were one of the contracting parties - made for the benefit of a third - sues the other for performance in terms of their contract, there being no need to join the third party – for whose benefit the contract was concluded – as a party in such instance.

9 1996 (4) SA 617 (A)

[31] Counsel were*ad idem* that the applicant had succeeded in proving:

31.1 that there was a Court order against the first respondent;

31.2 that he had knowledge of such order,

31.3 that he had failed to comply with such order.

[32] As wilfulness is usually inferred from this the focus therefore shifted to the defence in respect of which the first respondent thus had to adduce evidence to disprove wilfulness and *mala fide*'s which would establish a reasonable doubt in this regard.[10]

[33] The first respondent then indeed, in his answering papers, endeavoured to set out the facts in circumstances against which he claimed it was apparent that his inability to pay maintenance since May 2010 - and therefore his failure to comply with the Court order - was not due to any unwillingness or due to a wilful disregard of the said order - and that such non-compliance was in any event also not*male fide* because it had been impossible for him to comply therewith.

[34] The evidence in this regard was more particularly as follows:

34.1 At the time - when the settlement agreement was concluded - and also when the final order of divorce order was granted - he was still employed by the Namibian Breweries in the position of Facilities Manager - he then earned a Nett monthly salary of around N$ 32 500.00 per month. He was thus able to pay the amount for maintenance agreed to in terms of the Settlement Agreement.

34.2 However, subsequent to the granting of the final decree of divorce - which was in January 2010 - and some 2 (two) months later - during March 2010 he found himself in the position that he had to resign. He was facing serious disciplinary charges for

10 */Ae//gams Data (Pty) Ltd and others v St Sebata Municipal Solutions (Pty) Ltd and Othersop.cit* at p 256 to 257 B

“irregular transactions” and was thusgiven the option to resign or face disciplinary charges. He opted for the former, effective from the last week of March 2010.

34.3 He informed the applicant of this during April 2010. By that time he had already provided the applicant with several post-dated cheques for maintenance for the next 5 (five) months. He now requested her not to deposit the remaining cheques to which the Applicant responded that *“… this was his problem and that he simply had to pay …”*. The first respondent then stopped payment of the cheques. The applicant however continued depositing the remaining cheques.

34.4 The first respondent then claimedthat he did not apply for a variation of the governing order as he did not have the funds to initiate legal proceedings or to obtain legal advice. He claims that he did not know what to do about the matter.

34.5 He then also attempted to obtain employment which attempts were unsuccessful. Proof of these endeavours was annexed.

34.6 Because of the financial predicament, he now found himself in, he was forced to sell his motor vehicle as he could no longer afford the monthly instalments in that regard. For the same reason he had to give up the flat which he was renting in Klein Windhoek and *‘moved in with a friend’*.

34.7 The Applicant through her legal practitioners started to demand payment of the arrear maintenanceas from June 2010.

34.8 During June - and after having discussed his financial predicament with the aforesaid friend – the aforesaid friend agreed

to assist him by offering to pay first respondent's monthly medical aid contributions and his contributions towards other insurance policies. She also agreed to pay the internet account of the parties' son.

34.9 It needs to be mentioned that - by this time- the said friend was also already paying for all the first respondent's expenses relating to food, clothing and the like.

34.10 It was pointed out that the said friend was also footing the first respondent's legal bill.

34.11 By December 2010 he had only very limited funds left in his banking account. This situation had been created by an attachment of N$ 60 000.00[11] executed at the instance of the applicant through the Deputy Sheriff. In the result the first respondent had no further funds left.

34.12 He also explained the various entries appearing from the bank statements annexed to his papers. In a more detailed response to the founding papers, first respondent then also explained that he received a monthly amount of N$ 8 000.00 from the said friend explaining that the monthly amount available/ left in his account – after deductions - was an amount of N$ 801.44 which was left for bank charges. He also disclosed that he has an overdraft facility to the extent of N$ 20.000.00 but that it is impossible for him to utilise this benefit as he has no means of repaying same.

34.13 The first respondent then set out in detail why, according to him,the total amount of arrear maintenance claimed was incorrectly computed.He admitted however to bein arrears by a

11 Which first respondent had held back in order to pay for the tertiary education of his son

total amount of N$ 27 500.00 - as opposed to the claimed arrears of N$ 80 780.85 - as at the date of the applicant's Founding Affidavit.

34.14 He clarified further that he was only involved in the operations of the shop in the Ovitoto Reserve until May 2010 and that his involvement in this business had ceased since then.

34.15 Importantly the first respondent explained that he had now been advised to seek an order for the suspension, reduction of variation of the terms of the order of 18 January 2010. He re-iteratedthat he, as a lay person, was not acquainted with the legal aspects of having a court order varied or that he knew of the implications of doing so. He allegedly was under the impression that the Court would understand and appreciate his predicament.He then alleged further that he was in the process of preparing the necessary application to be initiated in the Maintenance Court.

[35] I immediately pause to point out that the Court raised this aspect with the counsel for the first respondent who indicated that such application – for unknown reasons - had - at time of the hearing of this matter – still not been made.An indication was also given that some maintenance payments are in the meantime being made by the first respondent.On the papersthese aspects could however not be taken further.

[36] Turning now to the determination of whether or not the relief sought by applicant should be granted in the circumstances of this matter it is firstly to be taken into account that the first respondent remains bound by the terms of the existing Court order until such time that it is varied and set aside.[12]

[37] In this regard it should further be kept in mind that it has authoritatively been held that:

12 /Ae//gams Data (Pty) Ltd and others v SntSebata Municipal Solutions (Pty) Ltd and others*op.cit* at p 257 E to 259 B

"Once the Applicant has proved the order, service or notice, and non-compliance, the Respondent bears an evidential burden in relation to willfulness and male fides:

Should the Respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and mala fide, contempt would have been established beyond reasonable doubt."[13]

[38] In this regard the Court was further referred to the commentary in *Erasmus Superior Court Practice*[14] were it is stated that a respondent's conduct will not be considered as wilful if his or her non-compliance with a Court order was *bona fide* in that he or she genuinely - though mistakenly - believed that he or she was entitled to disobey the order and that such respondent - in such circumstances - would not be guilty of contempt.[15]

[39] What is left for determination in this instance is, whether or not, the first respondent has succeeded in discharging his 'evidential burden' by adducing evidence which would create a reasonable doubt and - by that same token - whether or not the applicant was ultimately able to discharge the burden – which remained with her throughout - of proving the first respondent's contempt beyond reasonable doubt.[16]

[40] These questions will, obviously, have to be determined with reference to the test applicable to disputed facts in motion proceedings.[17]

13 *Fakie NO v CII Sistems (Pty) Ltd* at p 344 J – 345 A

14 At B1-58H(service?)

15 See: *Consolidated Fish Distributors (Pty) Limited v Ziveop.cit.*at p 524 D and *Noel Lancaster Sands EiendomsBpk v Theron*, 1974 (3) SA 688 T at 691C and *Fakie NO v CCII Sistems (Pty) Ltdop.cit.* at p 344 B – E, *Townsend-Turner v Morrow* 2004 (2) SA 32 C at 51C – E
This would also appear to be the applicable law in Namibia see */Ae//gams Data (Pty) Ltd and Others v St Sebata Municipal Solutions (Pty) Ltd and Othersop.cit* at p 256 - 257 para [33]

16 */Ae//gams Data (Pty) Ltd and Others v St Sebata Municipal Solutions (Pty) Ltd and Othersop.cit*para[33]

17 See for instance:*Clear Channel Independent Advertising v Transnamib Holdings* 2006 (1) NR 121 HC at 130 par 17 to par 18 at p 131;*Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 A at 634E and 655 A;*Stellenbosch Farmers Wineries Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (c) at 235E -G

[41] In this regard it is to be kept in mind that where there is a dispute of facts, final relief can only be granted where the applicant's allegations, and the facts admitted by the respondent, would justify the granting of the sought relief. In the case of a dispute the version of the respondent must prevail.

[42] It is with these principles in mind that the first respondent's version and the applicant's entitlement to the relief sought should be considered.

[43] It appears firstly – and particularly given the scant nature of the allegations made founding papers – that the founding papers contain no allegations – admitted by first respondent - disproving the first respondent's version as to his initial genuine attempts to comply with the order – as evidenced – for instance - by the giving of post-dated cheques- and the subsequent change of his fortunes resulting in the inability to comply with the terms of the court order and that he was thus*bona fide* – as opposed to being wilful -in his disobedience of the court order.

[44] The same must reluctantly be said in regard to the alleged 'genuinely mistaken but erroneous belief that he was entitled to disobey the terms of the divorce order', 'given his dire financial circumstances', *'… which the court would understand and appreciate …',* which averments would negate wilfulness.All these allegations stand un-contradicted.

[45] The first respondent's version – which will in such circumstances have to be accepted- would thus technically also disprove anywilfulness and *mala fides*on his part.

[46] Even if I am wrong in this finding it needs to be taken into account that it was also shown on the first respondent's version that he was unable – as opposed to being unwilling - to comply with the court's order - due to his poverty which was directly brought about by theloss of his fairly senior position at the Namibian Breweries and the subsequent inability to regain employment – a situation which was exacerbated by the termination of his participation in the Ovitoto business and the attachment of N$ 60 000.00 which 'cleaned out' his last savings.

[47] As in the circumstances of this matter the first respondent's version must

prevail it must be concluded that he was also able to adduce sufficient evidence to disprove any reckless disregard of the court's order, all of which would establish a reasonable doubt in his favour. It is clear from the applicable authorities that, in such circumstances, an application for committal for contempt must fail.

[48] Although it follows from these findings that the applicant cannot succeed in her quest to have the first respondent incarcerated for contempt I wish to make it clear that the outcome of this matter could possibly have been quite different if the replying papers would not have been struck.

[49] In so far as this may be permissible I hereby wish to indicate to the First Respondent – in no uncertain terms – that he would be well advised to regularise his maintenance obligations in accordance with the parties' respective means and obligations without further delay.

[50] With these considerations in mind I deem it proper not to let the costs follow the result.

[51] In the result:

51.1 The application is dismissed.

Each party is to pay its own costs.

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GEIER, J

ON BEHALF OF THE APPLICANT: Mrs. Petherbridge

Instructed by:

Petherbridge Law Chambers

ON BEHALF OF THE 1ST RESPONDENT:AdvA van Vuuren

Instructed by:MB De Klerk & Associates