



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3956/2009

In the matter between:

STANDARD BANK NAMIBIA LIMITED

JUDGMENT CREDITOR/APPLICANT

and

AUGUST MALETZKY

JUDGMENT DEBTOR/RESPONDENT

Neutral citation: *Standard Bank Namibia Limited v Maletzky* (I 3956/2009) [2013] NAHCMD 131 (17 May 2013)

Coram: PARKER AJ

Heard: 27 March 2013

Delivered: 17 May 2013

Flynote: Contempt of court – Civil contempt of court – Civil contempt – Sentence – Purpose of sentence is to enforce a judgment or an order of court – That being the case a suspended sentence on condition that the defaulting party complies with the judgment or order is appropriate.

Summary: Contempt of court – Civil contempt – Sentence – Purpose of civil contempt is to enforce the order made by the court on 31 July 2012 – The sentence is suspended on condition that the judgment debtor (defaulting party) complies with the order in the manner prescribed by this court.

Flynote: Practice – Judgment or order of the court – Such is valid and enforceable until set aside by a competent court – Non-compliance with an order of court is offensive of Article (12)(1) of the Namibian Constitution.

Summary: Practice – Judgment or order of the court – A party is not entitled to refuse to comply with a judgment or an order of the court on the basis that in that party's opinion the judgment or order is void ab origine and therefore in law a nullity – Any contention to the contrary is offensive of Article 12(1) of the Namibian Constitution which guarantees the right of a party in whose favour an order has been made to enforce it – Such order remains valid and enforceable until or unless set aside by a competent court.

ORDER

The judgment debtor is sentenced to a fine of N\$4 000,00 or to nine months' imprisonment, wholly suspended on condition that the judgment debtor complies with the 31 July 2012 order made by the court (per Kauta AJ) in the following manner:

- (a) The judgment debtor must on or before 23 May 2013 provide to the judgment creditor the documents set out in para 2 of the 31 July 2012 order.
- (b) The rule 45(12), (h), (i) and (j) application for a full financial enquiry shall be set down after 23 May 2013 by the judgment creditor; and the judgment debtor must appear in court on the set down date, which must be duly communicated to him.
- (c) The judgment debtor must comply with the order in para 3 of the order made by the court on 31 July 2012; and in that behalf, the judgment debtor must pay the costs to the judgment creditor within 21 days from the date he is presented with an allocatur completed by the taxing master in respect of the taxed costs.

- (d) The judgment debtor is ordered to pay the judgment creditor's costs in the contempt of court proceedings.

JUDGMENT

PARKER AJ:

[1] In an earlier proceeding the judgment debtor was found guilty of contempt of court and imposition of sentence was ordered to stand over until the court had heard evidence or statements in mitigation of sentence (judgment delivered on 12 March 2013, para 12). On this day, 27 March 2013, both the judgment debtor (in person) and Mr Van Vuuren, counsel for the judgment creditor, made submissions on sentence.

[2] The judgment debtor raised a number of constitutional issues which, according to him, made the order granted by my Brother Kauta AJ on 31 July 2012 void ab origine. And further, according to the judgment debtor, since in his opinion – and I use ‘in his opinion’ advisedly – the 31 July 2012 order was made in violation of the Namibian Constitution, that order was void ab origine and therefore he thought he was entitled to disregard the order as the order was in law a nullity. In support of ‘his opinion’ the judgment debtor referred the court to the Supreme Court case of *Willem Petrus Swart v Koos Brand* Case No. SA 17/2002 (Unreported) which is his talisman in which he finds ‘solace’.

[3] At page 11 of *Willem Petrus Swart*, Chomba AJA who wrote the unanimous judgment of the court referred to a passage in the Privy Council case of *MacFoy v United Africa Co Ltd* (1961) 3 ALL ER 1169 at 1172I to make the point that s 36 of the Magistrates Courts Act runs counter to the dictum of Lord Denning in *MacFoy*. Lord Denning stated:

'If an act is void, then it is in law a nullity. It is not only bad, but is incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

[4] It is crucial to signalized this important point: In *MacFoy* Lord Denning was not referring to a judgment or order of a court when he uses the word an 'act' in the above-quoted passage. The reason is clear for any reasonable and careful reader of the passage to see. The learned Lord Denning says in the third sentence of the passage, 'There is no need for an order of court to set it (ie 'the act') aside'. The 'act' cannot, therefore, be synonymous with an 'order' or 'judgment' of a court of law. Indeed, the 'act' in *MacFoy* refers to the delivery of the statement of claim by the plaintiffs in the long vacation in terms of the Rules of the Supreme Court of Sierra Leone.

[5] Thus, a reading of the first three sentences of the above-quoted passage from *MacFoy* intertextually – as they should in order to get the true meaning and thrust of the passage – completely debunks the judgment debtor's contention. His reliance on *Willem Petrus Swart v Koos Brand* is accordingly clearly misplaced: he cannot find any 'solace' in that case to support his contention. The Supreme Court does not in that case – on any reading of the judgment – lay down a principle that in Namibia a party against whom an order has been made by a competent court in favour of another party in the proceeding can simply refuse to comply with that order because in the opinion of the first named party that order is void ab origine and therefore in law a nullity. On that score *Petrus Swart v Koos Brand* is distinguishable.

[6] Let me now be constructive and state that in Namibia any such contention or principle in the manner put forth by the judgment debtor will indubitably be offensive of Article 12(1) of the Namibian Constitution. The reason is that a party has the right guaranteed to him or her by that provision to have an order granted or judgment delivered in his or her favour enforced. (See *The Minister of Education and Another v The Interim Khomas Teachers Strategic Committee and All Persons Forming Part of the Collective Body of the First Respondent and Others* Case No. LC 166/2012

(judgment delivered on 23 January 2013 (Unreported) para 2.) This principle is in line with Mr Van Vuuren's submission that it is trite that an order of the court must be complied with; for, it is valid and enforceable until and unless it is set aside by a competent court. *In casu* the 31 July 2012 order (per Kauta AJ) must be complied with by the judgment debtor; to date he has not done so.

[7] From the submission by the judgment debtor, I should say that the only things said that come close to mitigatory factors in sentencing for his contempt of court are that he has exorbitant medical bills to pay and also that 'if at all, I blundered in good faith'. I understand the judgment debtor to say that it is his misreading of *Willem Petrus Swart v Koos Brand* which made him blunder in not complying with the 31 July 2012 court order. I see some tincture of remorse; even if Mr Van Vuuren sees 'no remorse'. Remorse may be shown in so many ways; I should say.

[8] In arriving at an appropriate sentence I have taken into account submission by Mr Van Vuuren and submission by the judgment debtor, particularly with regard to his personal circumstances which I have mentioned previously. I have also taken into account the following critical considerations. Civil contempt procedure is a means of enforcing performance of a judgment; that is to say, it is to coerce the offender to do or refrain from doing something in accordance with an order obtained against him or her, and not be merely punitive. Furthermore, in arriving at an appropriate sentence I should be guided by sentences imposed by this court in similar cases, of course, due regard being had to factual differences. In this regard, I have consulted the cases referred to me in the submissions and others (not referred to me) on sentencing for civil contempt of court. I have also taken into account the beneficial effects of suspended sentence which are that –

'In the ordinary way it (suspended sentence) has two beneficial effects. It prevents the offender from going to goal ... The second effect of a suspended sentence, to my mind, is a matter of very great importance. The man has the sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself, he will have to serve it. That there is a very deterrent effect cannot be doubted.'

(*S v Simon* 2007 (2) NR 500 at 518C-D)

[9] In all this; it is my view that what is important in the instant proceeding is that the sentence I impose ought to be suspended on condition that the judgment debtor complies with the 31 July 2012 order in the manner set out below. (See *Standard Bank of Namibia v Abrahams* 2001 NR 250 at 253B-D.) Keeping all the foregoing reasoning and conclusions in view I find that the sentence set out in the next paragraph meets the justice of the case.

[10] Mr August Maletzky; I sentence you to a fine of N\$4 000,00 or to nine months' imprisonment, wholly suspended on condition that you comply with the 31 July 2012 order made by the court (per Kauta AJ) in the following manner:

- (a) The judgment debtor must on or before 23 May 2013 provide to the judgment creditor the documents set out in para 2 of the 31 July 2012 order.
- (b) The rule 45(12), (h), (i) and (j) application for a full financial enquiry shall be set down after 23 May 2013 by the judgment creditor; and the judgment debtor must appear in court on the set down date, which must be duly communicated to him.
- (c) The judgment debtor must comply with the order in para 3 of the order made by the court on 31 July 2012; and in that behalf, the judgment debtor must pay the costs to the judgment creditor within 21 days from the date he is presented with an allocatur completed by the taxing master in respect of the taxed costs.
- (d) The judgment debtor is ordered to pay the judgment creditor's costs in the contempt of court proceedings.

7
7
7
7
7

C Parker
Acting Judge

APPEARANCES

JUDGMENT CREDITOR/APPLICANT: A Van Vuuren
Instructed by Behrens & Pfeiffer, Windhoek

JUDGMENT DEBTOR/RESPONDENT: In person