

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO: HC-MD-CIV-MOT-GEN-2017/00079

In the matter between:

**RALPH A HÖFELEIN**

**APPLICANT**

and

**D J BRUNI NO**

**FIRST RESPONDENT**

**NEETA SHARMA**

**SECOND RESPONDENT**

**Neutral Citation:** *Höfelein v Bruni NO* (HC-MD-CIV-MOT-GEN-2017/00079) [2018] NAHCMD 328 (18 October 2018)

**CORAM:** **MASUKU J**

Heard : 17 July 2018

Delivered: 18 October 2018

**Flynote:** Civil Procedure - Contempt of court - the standard of proof to be employed for finding a person guilty of contempt of court is the same as in criminal proceedings - whether the court is satisfied beyond reasonable doubt

that the 1<sup>st</sup> respondent was wilful and *mala fide* in her disobedience - any doubt, however small, should enure in her favour.

Jurisdiction – *Peregrinus* – where *peregrinus* has acted through his or her lawyers – liability is through them.

**Summary:** Applicant and 1<sup>st</sup> respondent married in community of property and during the subsistence of which, a child was adopted by the parties.

2<sup>nd</sup> respondent filed for divorce and a final order of divorce was granted on 8 April 2011. The court ordered that custody and control of the child be awarded to 2<sup>nd</sup> respondent with reasonable access by the applicant. By consent of the parties and on endorsement by an order of this court, 2<sup>nd</sup> respondent was allowed to leave this jurisdiction with the child but on certain terms.

The court further ordered that a liquidator be appointed in relation to the distribution of the parties' joint estate by virtue of which, 1<sup>st</sup> respondent was appointed - Subsequent to this appointment, 1<sup>st</sup> respondent compiled a report as to the division of the parties' joint estate.

The applicant alleged that the 2<sup>nd</sup> respondent denies him access to the child and that as a consequence, the latter is in contempt of a court order and should be ordered to comply failing which she should be denied access to her share of the estate as long as the non-compliance persists.

The applicant further alleged that the report by the 1<sup>st</sup> respondent was biased and should, as a result, be set aside by the court.

Held: That the 1<sup>st</sup> respondent had, in the answering affidavit, indicated his unwillingness to proceed with the liquidation of the joint estate. For that reason, the court found it fit to set aside the 1<sup>st</sup> respondent's report, without making any adverse findings on his conduct of the liquidation, however.

Held further that: The fact that both respondents were represented by a same firm of attorneys did not sit well and that the 1<sup>st</sup> respondent, sitting as he does,

in apposition of being an arbiter of sorts, should maintain an impartial and independent disposition. The complaints by the applicant about the 1<sup>st</sup> respondent's alleged partiality, could not, in the circumstances, be easily dismissed.

Held: it is always healthy for a child to be afforded reasonable access to both parents.

Held further that: Although the applicant had approached a German court in an effort to exercise his access rights to the child, that court did not find that he was not entitled not to have access to the child.

Held: That although the 1<sup>st</sup> respondent is not physically within the court's jurisdiction, this court has a right to hear and determine the matter and to issue appropriate orders against her as she has submitted herself to the court's jurisdiction by participating in this matter.

Held: that in view of the 2<sup>nd</sup> respondent's allegation that she relied on expert reports to deny the applicant access, a reasonable doubt exists as to whether the said respondent acted contumaciously of the court order.

Held further that: The 1<sup>st</sup> respondent should be afforded an opportunity to comply with the court order once again before drastic steps are taken against her.

In the result, the report filed by the 1<sup>st</sup> respondent was set aside and the 2<sup>nd</sup> respondent was given an opportunity to comply with the court order allowing the applicant access to the minor child, failing which the applicant was granted leave to approach the court on modified papers for appropriate relief.

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**ORDER**

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1. The report compiled by the First Respondent, Mr. David Bruni, as liquidator, be and is hereby set aside.
2. The Second Respondent is ordered to comply with the relevant parts of the order of court dated 8 April 2011, particularly regarding the applicant's access to the minor child.
3. In the event the Second Respondent fails or neglects to comply with the order stipulated in paragraph 3 above, the Applicant is granted leave to institute an appropriate application on the present papers as may be duly amplified.
4. The Second Respondent is ordered to pay the costs of this application.
5. The matter is postponed to 25 October 2018 at 09:30 in chambers for the determination of the conduct of the matter and modalities regarding paragraphs 1 and 2 above.

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**RULING**

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MASUKU J:

Introduction

[1] Ms. Joyce Maynard is quoted as having said the following:

'When people ask what I write about, that's when I tell them: 'The drama of human relationships". I'm not even close to running out of material.'

[2] This case is yet another chapter in the drama of human relationships that went moribund. The applicant, Mr. Ralph A. Hofelein and the 1<sup>st</sup> respondent, Ms. Neeta Sharma, were tied in the bonds of matrimony in Calcutta on 8 December 1997. As time went on, serious gulfs developed in the marital relationship, which led to an acrimonious divorce, granted by Botes AJ on 8 April 2011.

[3] At the centre of this case are two pillars. The first relates to a child who shall be referred to as N. She was adopted by the couple during their marriage and an order was given by this court regarding the issue of her custody during the divorce. The applicant is extremely unhappy with the fact that he does not have access to the child, who by consent of the parties and subsequently endorsed as an order of this court, was allowed to leave this jurisdiction with the 2<sup>nd</sup> respondent and on terms I will refer to as the judgment unfolds further.

[4] The second pillar, relates to the distribution of the parties' joint estate. In terms of the order granting divorce, the court further made an order regarding the appointment of a person who would be responsible for the division of the parties' estate. The Vice President of the Law Society on Namibia, had, in terms of the order of Botes AJ, appointed Advocate Jesse Schickerling as a liquidator. For reasons that are not relevant, he eventually vacated the office of liquidator and the President of the Law Society of Namibia, on 16 September 2014, appointed the 1<sup>st</sup> respondent as liquidator.<sup>1</sup> It is in that connection that the 1<sup>st</sup> respondent features in this case.

#### Relief sought

[5] The applicant approached this court seeking the following orders:

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<sup>1</sup> See p. 119 of the record – letter from the President of the Law Society of Namibia to Angula Coleman.

- '1. Setting aside the report and determination made by the first respondent on the joint estate of the applicant and the second respondent;
- 2, Declaring that the second respondent is in contempt of the court order dated 8 April 2011.
3. That once a determination has been made by the first respondent, the applicant is authorised to withhold the transfer of any money to the second respondent and/or the first respondent until the second respondent has purged her contempt of the order of this Court dated 8 April 2011 relating to the applicant's access to his minor daughter.
4. Costs in the event that the application is opposed.'

[6] The application was opposed by both respondents and I propose to deal with the issues that arise in this matter below.

#### Issues for determination

[7] From a close reading of the papers, it would appear that two issues present themselves for determination of the entire matter. First, is whether there is sufficient basis to set aside the determination made by the 1<sup>st</sup> respondent in respect of the parties' joint estate. A corollary, to that question, would obviously be what should happen in the event the court grants this prayer.

[8] The second question relates to the declaration that the 2<sup>nd</sup> respondent is in contempt of court. It would seem that prayer 3, relating to an order granting the applicant a right to withhold money otherwise due to the 2<sup>nd</sup> respondent from the estate is a sequel to a finding that the 2<sup>nd</sup> respondent is in contempt and the withholding is to be an incentive, so to speak, for the 2<sup>nd</sup> respondent to comply with the said order. I proceed to deal with the matters arising below.

*Setting aside of the second respondent's determination*

[9] From a reading of the applicant's papers, it appears that the motivation behind the prayer for the setting aside of the determination is a foreboding feeling harboured by the applicant that the 1<sup>st</sup> respondent was not even-handed in dealing with the matter of the estate and appeared to be favourably disposed to the 2<sup>nd</sup> respondent and to some extent, hostile to the applicant. In this regard, it is alleged by the applicant that the 1<sup>st</sup> respondent exhibited an unwillingness to investigate the presence of some property that allegedly fell for distribution but which was in India.

[10] During the hearing of the matter, I raised the issue with Mr. Marcus as to whether it was necessary to even deal with the issues of the propriety of the 1<sup>st</sup> respondent's dealings with the property of the parties in view of his clear and unequivocal unwillingness to continue doing any work connected to the estate of the parties herein.

[11] At para 10 of his answering affidavit, the 2<sup>nd</sup> respondent deals with a number issues, including that the applicant did not comply with the court's order requiring him and the 2<sup>nd</sup> respondent to allow the 1<sup>st</sup> respondent to take charge of the assets of the parties, including cash in their respective possession. It would seem that the 2<sup>nd</sup> respondent takes issue in this regard and calls upon the court to order the applicant to purge his contempt in that regard. It would appear, from a further reading of the 1<sup>st</sup> respondent's affidavit that the 2<sup>nd</sup> respondent is *in pari delicto* (equal guilt), in that regard. There is no call on the 2<sup>nd</sup> respondent to purge her contempt, I note.

[12] More tellingly, the 2<sup>nd</sup> respondent states the following at para [24] of his answering affidavit:

'I have in any event made known my attitude as "substituted" liquidator that I have no desire to play the role of a judge determining the truthfulness or otherwise of any of the parties' allegation (*sic*) relating to their joint estate and have indicated that I wish

to withdraw from the matter. I am advised by my attorney of record that Applicant has indicated that he intends to amend his Notice of Motion.<sup>2</sup>

[13] At para 26, in his valedictory part of his answering affidavit, the applicant states as follows:

'At the risk of being unfair to the Second Respondent and the Court, I wish to withdraw from the matter and request that this Court appoints a liquidator in my stead if this Court finds that my report is not correct and should be set aside; I submit that this Court cannot make a finding on the "lack of papers" or facts before it.'

[14] I will not be drawn to comment on the 1<sup>st</sup> respondent's bold assertion in his last statement above. The court, it must be mentioned, does have the wherewithal to make appropriate orders, including methods of fact gathering that may prove useful and necessary from case to case. What is, however plain, although the 1<sup>st</sup> respondent appears to make it conditional on the court deciding to set his report aside in the immediately quoted paragraph above, a reading of both paragraphs, shows indubitably, that he was unhappy with having to continue in the role to which he was appointed. His desire to 'withdraw' from the case is manifest and is repeated in both paragraphs above.

[15] What cannot be gainsaid, having had regard to the whole matter, is that the relationship between the applicant and the 1<sup>st</sup> respondent is not good. It is clear that the applicant does not appear to have confidence in the 1<sup>st</sup> respondent and feels, subjectively that he was not being properly treated or respected by the 1<sup>st</sup> respondent. In that regard, it would appear to me that in view of the feelings of the applicant, considered *in tandem* with the 1<sup>st</sup> respondent's desire to withdraw, it would serve no useful purpose to keep Mr. Bruni in harness in this matter.

[16] I also picked up an issue of grave concern during argument and it is this – both the respondents are represented by the same law firm, yet they

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<sup>2</sup> See p. 107 of the record.



are in different positions. The 1<sup>st</sup> respondent must occupy and more importantly, must also be seen to occupy a position of independence and manifest detachment from both parties, which are the only attributes that may serve to imbue his work, findings and decisions with the necessary even-handedness and fairness to both sides. The complaints by the applicant in this matter, given this relationship, do not, in my view serve to dispel any feelings of partiality by the applicant. It is unhealthy and unseemly for the legal practitioners of the 1<sup>st</sup> respondent to also represent the 2<sup>nd</sup> respondent in a case such as this.

[17] In the premises, I am of the considered view that it would be in the interests of the parties in this matter to release Mr. Bruni, the 1<sup>st</sup> respondent from harness. He expressed his desire to be so allowed to step down. This decision is not made any easier by the applicant's unhappiness with the 1<sup>st</sup> respondent's actions, considered in the context of what appears to be a close association with the 2<sup>nd</sup> respondent, leading to him at some stage complaining that correspondence which was to be between the two of them was being copied by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent.

[18] From a holistic view of the matter, the applicant does not have any faith in the independence of the 1<sup>st</sup> respondent, particularly what he perceives to be a close relationship between both respondents, which leaves him feeling like an outsider in the whole enterprise. In an ideal situation, there should be no commonality of the kind witnessed between the respondents in this matter. I say so because the first respondent is an 'arbiter' and the second respondent is a 'litigant', to make submissions before the latter, so to speak.

[19] In allowing Mr. Bruni to have his wish to withdraw realised, I must not be understood or misunderstood to have made any findings on the veracity of the content of the complaints raised by the applicant regarding the 1<sup>st</sup> applicant's report. It would, in my view, serve no useful purpose, having due regard to the mutually exchanged poisoned feelings between the applicant and the 1<sup>st</sup> respondent to prolong this relationship any longer. I interpose to mention that the 2<sup>nd</sup> respondent, in this entire imbroglio, appears to have

made common cause with the 1<sup>st</sup> respondent, apportioning the blame for the stagnation of the matter squarely on the applicant's shoulders.

[20] In view of the foregoing, I am of the considered view that it would be proper to relieve Mr Bruni of further involvement in this matter in view of his wish to withdraw. It would appear sensible to me, in the circumstances, to set aside the report, not for the reasons stated by the applicant but to enable the person next appointed, to receive a clean slate and canvass on which to apply his paint, so to speak. This is not to say that he may not obtain the file and use the information already collated and collected by the 1<sup>st</sup> respondent and his predecessor towards drawing this long-suffering matter to a conclusion. It would then be necessary, to have another independent person appointed in the 1<sup>st</sup> respondent's stead, to hopefully, with the co-operation of both parties, put this long suffering matter to bed once and for all.

[21] I should mention, however, that the respondents have correctly attacked the notice of motion filed by the applicant as contradictory in its terms and requirements. On the one hand, in prayer 1, the applicant requires of this court to set aside the 1<sup>st</sup> respondent's report but incongruously prays in prayer 3 that once the 1<sup>st</sup> respondent has filed a report, that the portion due to the 2<sup>nd</sup> respondent be withheld in order to compel her to comply with the court order relating to the issue of the applicant's access to the minor child as granted to him by the order of Botes AJ.

[22] I am in full agreement with the position adopted by the respondents for the reason that there appears to be a quantum leap between the court setting aside the 2<sup>nd</sup> respondent's report and the court then implementing the findings of the report and ordering the withholding of the 2<sup>nd</sup> respondent's portion until she complies with the access requirements of the order.

[23] In the light of the position I have adopted in this matter, which appears practicable and sensible, as one cannot compel a person in Mr. Bruni's position, to again mount the apparently restive horse of dividing the joint estate in view of his avowed intention no longer to proceed as discussed

above. The applicant's sleight of hand in changing course in the heads of argument and asking the court to uphold the report and seek an update cannot, without a plausible explanation, be acted upon. Parties should be aware that the court is not an electric switch that you can switch on or off at will without any explanation. I will deal with the appropriate order at the end of the matter.

*The second respondent's alleged contempt of court*

[24] In his forceful submissions, Mr. Marcus argued that the 2<sup>nd</sup> respondent is in contempt of a court order issued, as previously stated on the date of the granting of the divorce. The 2<sup>nd</sup> respondent was the plaintiff and the applicant was the defendant in those proceedings. At paras 4 to 6.10, the court order reads as follows:

- '4. Custody and control of the minor child N, born on the 10<sup>th</sup> of March 2006, is granted to the plaintiff.
5. The plaintiff is allowed to remove the minor child from Namibia and to relocate with the child to India.
6. The defendant shall have the rights of access to the minor child N as follows:-
  - 6.1 Summer school holidays
  - 6.2 Summer school holidays of India for a period of six weeks. The first summer school holiday for 2011 is limited to a period of three weeks. Winter school holidays of India for a period of sixteen days.
  - 6.3 The defendant's right of access is to be exercised and is to be exercised and is to be afforded to him in Namibia. If the defendant is to travel with the minor child during his access periods outside the borders of Namibia, he shall first obtain the plaintiff's written permission which shall not be unreasonably withheld, failing which the permission of this court.

- 6.4 The plaintiff shall be responsible for the payment of the travelling return airfares of the minor child for the summer school holiday to the place of the defendant's residence and shall be responsible for the traveling costs of the person who travels with and accompany the minor child from and to India.
- 6.5 The travelling fees for access during the winter school holiday of the minor child shall be equally shared between the plaintiff and the defendant. In the event of any of the parents accompanying the minor child during any of the flights, personal contact between the parties should as far as possible be avoided.
- 6.6 For the period between the holidays and when defendant has no physical access, the plaintiff shall create a "skype" account for the minor child for purpose of video communication between the minor child and the defendant for a period of not less than three quarters of a hour each week.
- 6.7 The plaintiff shall allow defendant all telephonic access to the minor child, convenient to the parties as a result of the time zone difference between the respective places of residence of the parties.
- 6.8 The plaintiff shall make all necessary arrangements for the minor child to telephone (video or otherwise) the defendant on the following calendar days –
- 6.8.1 Father's day;
  - 6.8.2 Defendant's birthday;
  - 6.8.3 The minor child's birthday; and if possible
  - 6.8.4 Esther's and Ms Kalo's birthdays.
- 6.8 The defendant shall be allowed access at any time to the minor child should he be visiting India.
- 6.9 The plaintiff shall provide the defendant with the minor child's medical, school and extra mural reports.

6.10 The aforesaid arrangement in respect of the defendant's rights of access is to be maintained up and until the end of the winter holiday during 2012. During the winter holiday an evaluation by Mr Annandale, alternatively a clinical psychologist, appointed by the Registrar of this Honourable Court should be conducted in Namibia during the winter school holiday as to whether these access arrangements should continue in future or whether different arrangement(s) for access should be made. If necessary and if so requested by the expert both parties are ordered and directed to make themselves available for the evaluation at their own costs. The costs of the evaluation is to be borne by the parties in equal shares. Any amendment to the access rights shall only become enforceable once an order of this Court is obtained.

7. Each party is to pay his/her own costs of suit.'

[25] The applicant contends that the 2<sup>nd</sup> respondent acted in violation of the above court order in that she deliberately did not comply with the access paragraphs granted to the applicant above. In this regard, the applicant claims that the 2<sup>nd</sup> respondent took the child away and went to different countries including India (which was known to the court when it granted the order), Germany and Singapore. In this regard, the applicant claims that he has been totally shut out of the child's life in violation of the clear terms of the court's order.

[26] In desperation, he further states, he approached a German court, namely the District Court in Ahrensburg in 2014 and applied for access to his minor child. The court granted his wish whilst noting that the access should be tentative at the beginning. This, it is contended by the 2<sup>nd</sup> respondent, varied or superseded the order of this court regarding custody. There is a further claim made that German courts apply laws that advance the interests of the minor child more and that that order should be allowed to remain.

[27] The 2<sup>nd</sup> respondent further contends that she did not comply with the order of this court contumaciously. In a statement dripping with traces of judicial piety, she claims that she has no history of violation of court orders. That may well be correct but I should hasten to mention, without dealing head-on with this issue that there is always a first time. She alleges that she was impecunious and that she acted in the best interests of the minor child in accordance with a recommendation by a Ms. Schirm and a local child psychologist in India. In addition, she further made reference to certain portions of the judgment of this court, per Botes AJ, which are critical of some of the respondent's behaviour.

[28] I wish to deal with the last issue first. Whatever foreboding and critical comments this court made in the judgment, I am of the view that that constitutes water under the bridge when considering that this very court granted the applicant the access that is recorded in para 6 of the order captured in para [23] above. The criticisms that the 2<sup>nd</sup> respondent seeks to rely on in warding off the contempt accusations in this regard, are nothing but a smoke screen and should not be allowed to take sway as the court granted the applicant custody very well aware of the defects, if there be, that the applicant may have had.

[29] Regarding the reports by the said Ms. Schirm and the child psychologist in India, I am quite satisfied that the applicant did not act properly. She was aware of her obligations to this court and if there were any difficulties and/or developments that rendered her compliance difficult, she should have made her position known to the court and should have secured a variation of the order. It was certainly not proper for her, even if relying on and complying with expert reports, to run roughshod over a court order that is compulsive and binding on her, regardless of where she had moved to.

[30] Mr. Marcus, in argument, also punched holes and seriously perforated the applicant's allegation that she was impecunious and that is why she could not come to Namibia as ordered by this court. It was his contention that the applicant files no documents evidencing the alleged impecuniosity, particularly

considering that she was earning a very healthy salary when she left Namibia. That may well be so. What a law-abiding citizen should do, when faced with the real difficulty that the 2<sup>nd</sup> respondent claims she faced, is not to bury her or his head in the sand and hope and pray incessantly, that the issue is not raised at all. The proper way to go is to approach the court, even by writing a letter, explaining the invidious position one is faced with. The 2<sup>nd</sup> respondent's protestations of infallibility in this regard, simply do not wash with me.

[31] I should mention that Mr. Ravenscroft-Jones submitted that this court's order was subsequently superseded by the order of the German District Court. I am not called upon to make a decision on that matter but what sticks out like a sore thumb is that the very German court also did not deny the applicant access to the child. It recommended, as earlier stated, a slow and cautious approach to restoring the relationship between the applicant and his daughter.

[32] I say with no apology that barring clearly reprehensible and detrimental conduct on the part of a parent, it is always healthy for a child to be afforded access to both parents and if necessary, that allowed by the peculiar circumstances of the case. It is proper for the well-being of both the applicant and particularly his daughter, to maintain even a modicum of contact with her father.

[33] To deny the applicant access and any contact altogether with N in the absence of compelling reasons endorsed by a court of law and without affording the applicant any hearing in that regard, as it appears to be the case, is in my view atrocious and plainly unjust. In short, not even the German courts denied the applicant access to the child altogether. On this point, it seems to me that Mr. Ravenscroft-Jones is skating on very thin ice.

[34] I now turn to consider case law on the subject of contempt of court. Both parties, as fate would have it, placed reliance on the same case, namely, *Fakie NO v CII Systems (Pty) Ltd.*<sup>3</sup> In that judgment, Cameron J dealt with the

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<sup>3</sup> 2006 (4) 326 (SCA).

issue of contempt of court in a most compelling exposition of the relevant law on the subject.

[35] In his heads of argument, Mr. Marcus cited the following excerpt from the *Fakie* judgment regarding contempt of court:

'It is a crime to unlawfully and intentionally disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional "stamp of approval," since the rule of law – a founding value of the Constitution – "requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.'"

[36] *Fakie* has received resounding endorsement in our courts. In *Ndemuweda v The Government of the Republic of Namibia*,<sup>4</sup> Ueitele J endorsed the remarks and findings of the *Fakie* judgment. In yet another judgment of this court, *Fakie* got a further endorsement.<sup>5</sup> In this regard, the court in the latter judgment cited with approval the standard to be met for a court to find that a person was in contempt of a court order.

[37] At para 9, in *Fakie*, the court stated the following:

'A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly believe him or herself to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could be evidence of lack of good faith.'

[38] In dealing with the very subject above, the learned authors Herbstein & Van Winsen<sup>6</sup> make the following compelling exposition on the subject:

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<sup>4</sup> (HC-MD-CIV=MOT-GEN-2017/00336) [2018] NAHCMD 67 (23 March 2018).

<sup>5</sup> *Endunde v The Chairperson of the Okavango East Communal Land Board and Others* (2016/00384) [2018] NAHCMD 113 (27 April 2018).

<sup>6</sup> *The Civil Practice of the High Courts of South Africa*, Volume 2, Juta, 5<sup>th</sup> ed, at p. 1103.



'In general, all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. Accordingly, once it is shown that an order was granted and that the respondent disobeyed it or neglected to comply with it, wilfulness will normally be inferred and the respondent will bear the evidential burden to advance a reasonable doubt as to whether non-compliance was wilful and *mala fide*. The court will commit a person for contempt only when the disobedience is due to wilfulness. In *Clement v Clement*<sup>7</sup> it was held that a person's disobedience must not only be wilful but also *mala fide*. A respondent can defend himself by advancing evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*. Honest belief that non-compliance is justified or proper is incompatible with the intention to violate the court's dignity, repute and authority.'

[39] The question that I have to answer, in view of the portions quoted above is whether it can be said beyond reasonable doubt that the 1<sup>st</sup> respondent violated this court's order wilfully and *mala fide*. I have had regard to the allegations made by the 1<sup>st</sup> respondent to the effect that she was complying with professional advice from child specialists in not complying with the court order. I must mention that I am not impressed by the explanation tendered by the 1<sup>st</sup> respondent in this regard and there are many glaring lacunae in her explanation.

[40] It must be recalled that the standard of proof to be employed for finding a person guilty of contempt of court is the same as in criminal proceedings, namely, whether the court is satisfied beyond reasonable doubt that the 1<sup>st</sup> respondent was *mala fide* in her disobedience. Any doubt, however small, should enure in her favour.

[41] I am of the considered view that on the entire conspectus of the case, although I have expressed misgivings about the explanation of the 1<sup>st</sup> respondent, I cannot say without diffidence, that her explanations, although improbable in some respects, are beyond doubt false. It may well be that she relied on professional advice that is clearly wrong, which may serve to negative her intention to wilfully and *mala fide* denigrate the authority and repute of this court.

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<sup>7</sup> 1961 (3) SA 861 (T) at 866.

[42] In this regard, I am of the considered opinion that the court should lean in favour of the 2<sup>nd</sup> respondent in this regard and find, not without any compunction, it must be added, that a reasonable doubt exists as to whether the said respondent acted contumaciously of the court order. I am, in the circumstances, of the opinion that the 2<sup>nd</sup> respondent should, regard had to the issues adverted to above, be afforded yet another opportunity to comply. This must be on the express understanding that her failure to comply with the court order this time around may not stay the hand of the angel of punishment from landing a blow with force on her temple.

[43] In this regard, there is an issue that I raised with Mr. Marcus regarding whether this court may issue an order calling upon the respondent to comply with the court order again. His answer was resoundingly negative. He submitted that the 2<sup>nd</sup> respondent is a *peregrinus* of this court and hence the court has no jurisdiction over her so that whatever order the court may issue may be nothing but *brutum fulmen*.

[44] I do not agree with Mr. Marcus in this view. I say so for the reason that it overlooks the fact that the 2<sup>nd</sup> respondent, although not within the jurisdiction of this court physically, she has, however, submitted to the court's jurisdiction. In this regard, she is before court through her lawyers and has filed papers opposing the relief sought by the applicant before this court. It is accordingly incorrect to say that this court has no jurisdiction over her. In the circumstances, she is liable to comply with any order the court issues and may not hide behind the façade that she is not presently in Namibia in the flesh.

[45] I should also mention, in this connection, that a reading of the 2<sup>nd</sup> respondent's papers, does not reflect her arguing that this court has no jurisdiction over her in this matter. With these issues in mind, I am of the firm opinion that Mr. Marcus is therefor not correct and in fairness to him, this is an issue that was sprung upon him by the court in argument and he may not have had the time and opportunity for reflection of the true legal position.

[46] In any event, I should add, there is no question that some of her property is within this court's jurisdiction and is subject, as earlier shown, to this court's determination, thus making it possible for this court to enforce its order against her. All that may be necessary in this regard, and only in the event that it appears that this court does not have jurisdiction over the 2<sup>nd</sup> respondent, would be to file an application with this court to found or confirm jurisdiction.

[47] I say all this in appreciation of the fact that Mr. Ravenscroft-Jones did not say that his client, the 2<sup>nd</sup> respondent, is beyond the reaches of this court orders and I say this in fairness to him. He and his instructing legal practitioners must ensure that they advise her accordingly in this regard as there may be no reprieve in case there is non-compliance this time around.

#### Conclusion

[48] In view of the discussion of the issues that arose and were determined above, I am of the considered view that the application should succeed to some limited extent, in respect of both issues raised for determination, namely the setting aside of the liquidator's report and finding that the 2<sup>nd</sup> respondent is in contempt of this court's order.

#### Order

[49] In the premises I grant the following order:

1. The report compiled by the First Respondent, Mr. David Bruni, as liquidator, be and is hereby set aside.
2. The Second Respondent is ordered to comply with the relevant parts of the order of court dated to Namibia 8 April 2011, particularly regarding the applicant's access to the minor child.

3. In the event the Second Respondent fails or neglects to comply with the order stipulated in paragraph 3 above, the Applicant is granted leave to institute an appropriate application on the present papers as may be duly amplified.
4. The Second Respondent is ordered to pay the costs of this application.
5. The matter is postponed to 25 October 2018 at 09:30 in chambers for the determination of the conduct of the matter and modalities regarding paragraphs 1 and 2 above.

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TS Masuku  
Judge

#### APPEARANCES

APPLICANT: N Marcus  
of Nixon Marcus Public law Office, Windhoek

RESPONDENTS: JP Ravenscroft – Jones  
instructed by Erasmus & Associates, Windhoek