IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 18/5/2006
CASE NUMBER: 37415 / 05

UNREPORTABLE

In the matter between:

M Z **APPLICA NT**

And

T Z **RESPONDENT**

JUDGMENT

MAVUNDLA J

1. This is an application to have the respondent referred to jail for such period and conditions as this Court deems fit, due to the Respondent's contempt of an order granted by this Court on the 22 August 2003 under case number 7013/03.

2. As it would be expected the application is being opposed.

3. The Applicant and the Respondent were married to each other, which marriage was dissolved by this Court when a divorce order was granted on the 22 August 2003. Out of the marriage there are two children born, a girl and a boy, both are now majors. At the time of the divorce the youngest was still a minor and his custody was granted to the present applicant who was the plaintiff in that matter. The Respondent was the defendant and he was ordered to pay an amount of R1000.00 per month towards the maintenance of the youngest child and a further amount of R1000.00 per month towards the maintenance of the Applicant, the plaintiff in those proceedings.

4. It is common cause that the Respondent has to date only paid an amount of R1000.00 in compliance of the aforesaid maintenance order.

5. There has been various exchange of correspondence between the attorneys of the respective parties. I shall in due cause refer to only **that correspondence which I consider relevant for purposes of this judgment.**

6. In the matter of **Sparks v Sparks 1998 (4) SA 714 at 725F-G, Satchwell** referred to **Holtz v Douglas & Associates (OFS) CC**

en Andere 1991 (2) 797 (O) at 802C it was pointed out that to succeed on a contempt order application the "applicant must show that the respondent was guilty of a willful and *mala fide* refusal or failure to comply with therewith."

7. In *casu* the Respondent does not dispute that there is an order made against him. On his own admission he is not complying with this order. Once the above stated requisites have been proven by the applicant, willfulness or *mala fides* is inferred since the Respondent is regarded as having intended the natural consequences of his action and the Respondents bears the evidential burden of rebutting this, vide **Mbenenge AJ in Uncedo Taxi Service Association v Mtwa 1999 (2) SA 495 at 500F** as well as at **501C-G** where he say "It seems to me that, in view of the criminal nature of civil contempt proceedings, reference to "onus" being on the respondent to rebut the inference of willfulness and / or *mala fides* on a balance of probabilities can only serve to cloud the issue at hand, I have had recourse to certain judgments of the Constitutional Court wherein the constitutionality of a reverse onus is dealt with. One of such judgments is **S v Zuma and Others 1995 (2)SA 642 (CC) 1995 (1) SACR 568; 1995 (4) BCLR491)**, where the reverse onus is dealt with in the context of constitutionality of presumption, but with the problem arising from suggestion that in

contempt of court proceedings a respondent 'bears an onus on a balance of probabilities' to disprove willfulness and *mala fides* in certain circumstances, I have found the following dictum in the **Canadian case of R v Oakes (1986) 26 DLR (4th) 200 at 222**, which has been cited with approval in the **Zuma** case, to be illuminating:

'If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.'

It would be more appropriate, therefore, so to speak of an evidentiary burden as resting on a respondent against whom committal for contempt is being sought to demonstrate his bona fides and the fact that disobedience of the Court order was neither willful nor *mala fide*. In **S v Fouche 1974 (1) SA 96 (A)** (cited with approval in the Maninjwa case supra) it was held , even when it is said that there is an onus on the accused to rebut a so-called

prima facie case, that it is sufficient if he produces evidence that creates a doubt whether culpa was present or not"

8. I have been referred by counsel for the applicant to the well researched as yet unreported judgment of my brother, **Van Rooyen AJ** in the matter of **Theresa Natalie Deyzel v Gerhardus Johannes Deyzel Case no. 19869/ 2005 (TPD)** where he discusses the issue of the reverse onus on the respondent in contempt of court proceedings, as in *casu*. He cites, *inter alia*, the matter of **Laubscher v Laubscher 2004 (4) SA 350 (T)** where **De Vos, J** said that:

"**It may well be that to deprive a person of his liberty upon proof on a balance of probabilities is unconstitutional, as it may be unconstitutional to place an onus on a person faced with this possibility, but it seems to me that such limitations are reasonable and justifiable. To, my mind, it would not be unfair or unreasonable in civil contempt proceedings to expect of an applicant who is not the State to prove as in all other civil matters, what needs to be proved on a balance of probabilities. I therefore do not agree with the approach in the Uncedo Taxi matter as set out above. To my mind, the correct approach in matters of civil contempt, where the applicant is a**

private person, has been described and discussed correctly in matters decided prior to the new Constitution…"

9. As it was correctly pointed out in **S v Beyers 1968 (3) SA 70 at** at **80H-g** that contempt court proceedings are of a dual nature, namely civil or criminal, the ultimate purpose in both matters is to punish the non-complying party of the order of the Court and to induce him to comply with such order. The raging debate, as well articulated by **Van Rooyen AJ** in the **Deyzel** matter is the yard stick to be employed in deciding whether the non-complying party has a justifiable reason not to comply with the said order. This problem was raised, albeit in a different context and circumstances in the matter of **Mabaso v Felix 1981 (3) SA 865 (A) at 872B-C** when the Court observed that "A discrepancy between the civil and criminal law in the incidence of onus may appear anomalous, more especially when the same elements constitute both the crime and **delict**…That fundamental principle is that, when an accused pleads not guilty, he raises the general issue whether or not he is guilty or innocent of the offence charged; the burden of proving his guilt then rests throughout on the prosecution; and it is not for the accused to prove his innocence by, for example, proving self- defence or some other excuse or justification, although, of course, he must raise it as a defence in the course of the proceedings.

English law is to that effect as the result of the **Woolington and Mancini cases, 1935 AC 462 and 1942 AC 1. See Russell on Crime 11th ed at 760 and R v Lobell (1957) 1 QB 547** there cited. Policy then is the explanation for the difference between the criminal and the civil law. In the anxiety that no accused should be punished for a crime without proof of his guilt our common law deliberately places the burden of proving every disputed issue, save insanity, on the prosecution. But in civil law, as will presently appear, consideration of policy, practice, and fairness inter parties may require that the defendant should bear the overall onus of averring and proving an excuse or justification for his otherwise wrongful conduct…" and the second reason why the onus of proving excuse or justification is being placed on the defendant is that usually "the circumstances so excusing him or justifying his wrong doing are peculiarly within his own knowledge"

10. **Van Rooyen AJ** accepts that in matters of this nature, as in *casu*, are of criminal nature. He is of the view that that the applicant must prove beyond reasonable doubt that there is a court order that has been made against the respondent and that such order has not been complied with. It would seem that he accepts the approach articulated by **Mbenenge AJ** that once it has been established that

there is an order and it has not been complied with then there is an evidentiary onus on the respondent to rebut the prima facie case against him. He says that the respondent must show that there is a reasonable doubt that he did not abide by the order intentionally.

11. In the present case, as early as on the 12 November 2003 the attorneys acting on behalf of the Respondent per letter marked annexure E attached to the Applicant's affidavit stated that;

3.1. Easy Software Solution is not in operation and thus does not have an income;

3.2. All our client's policies have been cancelled;

3.3. Our client does not have investments in the bank.

3.4. As regards the maintenance issue, it is our client's instructions that at the present our client does not earn income and we have to proceed to vary the order relating to the amount of maintenance."

It is therefore clear that the Applicant was aware that the Respondent was stating that he is unable to comply with the Court Order because he does not earn any income.

12. The parties have been staying together prior to the divorce. The Applicant, I presume, must have been aware of the financial position of the Respondent during that period prior to the divorce. In her founding affidavit she does not place facts upon which this Court can conclude that the Respondent is in a position to comply with the Court Order.

In her replying affidavit she attempts to refute the averment of the Respondent that he is not in a position to comply with the Court order, by stating that the Respondent is a qualified programmer and that he earns a suitable income. She however does not state how much he is earning. She does not state how much the Easy Software Solution CC of which the Respondent is member, was generating at the time she was still staying with the Respondent. This must be seen in the light of the fact that the parties were married to each other on the **28 November 1979**, a period of almost 24 years. I would have expected her to place before this Court such facts, through her founding affidavit to enable the Court to conclude that the Respondent does not have any reason not to comply with the court order.

13. The Respondent denies that he is in willful default. He says that the business of which he is a member is generating no income and he

has no investments or policies which he can use to generate money to pay maintenance.

14. In evaluating the question whether the evidential burden placed on the Respondent has been discharged I must look at the totality of the evidence before me. Each and every case has got to be judged on the bases of its own peculiar facts. As I have said that the Applicant has not placed before me material facts upon which I can conclude that, objectively speaking, the Respondent has means to comply with the court order and that therefore his non-compliance therewith is done with the requisite **mens rea** to be in contempt of the Court order. Although I have not recapped every thing contained in the papers before me and merely referred to what I consider to be most relevant, I have taken into consideration every relevant fact, which is contained in the affidavits. I have taken into consideration the undisputed fact that the Respondent is staying with the daughter of both parties upon whom he says he is dependant. Having regard to the totality of the facts before me, I am unable to reject the explanation of the Respondent as not being reasonably possibly true. Where there is an order to pay maintenance, and the respondent is of no means to comply with such an order, it would be wrong, in my view, to say that simply because the applicant has proven that there is an order and such

an order is not being complied with, that therefore, without much ado from the applicant, the respondent must be deprived of his liberty. Where the applicant is in a position to demonstrate that the respondent does have means to comply with such an order, then the applicant in the main application must place such facts before the Court, in anticipation to negate any allegation to the contrary by the respondent. Such facts must not be placed before the court through the replying affidavit, this is, and in my view important having regard to the serious consequences of possible deprivation of the liberty of the respondent in such matters.

15. I am unable to reject the version of the applicant when he says that he has no means to comply with the Court order. In other words, he has acquitted himself of the evidential burden resting upon him. The reason for this is because the Applicant has failed to put before me sufficient material on the bases of which , I can find that the Respondent does have means to meet the Court order and that when he says , he does not have same, he is lying.

16. Consequently I conclude that the Applicant has failed to demonstrate that the Respondent is **mala** fides or in willful contempt of the order of this Court.

17. I am therefore of the view that the application must fail and that the cost must follow the event as it is trite.

18. In the premises the following order is made:

ORDER

Order it is ordered:

That the application is dismissed with cost.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD ON THE: 21 APRIL 2006
DATE OF JUDGMENT: 18 MAY 2006
APPICANT`S ATT: SHAPIRO & SHAPIRO
APPLICANT`S ADV:
DEFENDANT`S ATT: PRETORIA JUSTICE CENTRE
DEFENDANT`S ADV:M .K. STEENEKAMP