



**V. Chokaa & Co Advocates v Francis Thoya, County Secretary,
Mombasa County Government & 4 others (Judicial Review Application
69 of 2018) [2021] KEHC 260 (KLR) (24 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION 69 OF 2018
JM MATIVO, J
NOVEMBER 24, 2021**

BETWEEN

V. CHOKAA & CO ADVOCATES APPLICANT

AND

**FRANCIS THOYA, COUNTY SECRETARY, MOMBASA COUNTY
GOVERNMENT & 4 OTHERS RESPONDENT**

RULING

1. This ruling determines two applications, namely, the applicant's amended Notice of Motion dated 26th January 2021 filed by the applicant herein and the application dated 11th March 2021 filed by the 1st to 3rd Respondents. In order to put the two applications into a proper perspective, a history of this file, albeit briefly is essential. Vide a Notice of Motion dated 3rd January 2019, applicant in these judicial review proceedings applied for a writ of mandamus to compel the 1st and 2nd Respondents to pay Kshs. 6,612,000/= plus interests at court rates of 14% per annum from 16th December 2014 until payment in full. The applicant also prayed for costs of the application to be provided for.
2. The 1st and 2nd Respondents opposed the application through their then advocate stating inter alia that the applicant never forwarded the debt for verification hence it contravened section 35 of the *Transition to Devolved Government Act*¹ and that this court lacked jurisdiction. On 4th April 2019, Ogola J allowed the applicant's application for mandamus with costs. The judge held that the County Government having participated in the issuance of the decree, it could not seek to avoid paying the debt. On 29th May 2019, the decree was amended by consent to read Kshs. 6,612,000/= instead of Kshs. 661,000/=. On 22nd July 2019, by consent, a Notice to Show Cause dated 8th July 2019 was withdrawn and an

¹ Act No. 1 of 2012.



application dated 24th June 2014 was reinstated and a hearing date was scheduled for 23rd September 2019.

3. On 23rd September 2019, Mr. Tajbhai informed the court that they were proposing to settle the debt and he asked for 21 days. The applicant opposed the request describing it as a delaying tactic and sought to proceed with the dated 14th June 2019. Both parties relied on the affidavits/grounds filed. Vide a ruling dated 7th October 2019, Ogola J held that the 1st and 2nd Respondents could not rely on section 21 of the Government Proceedings because the matter was at execution stage. He ordered that Aisha Abdi, the Cabinet Secretary, Mombasa County Government and Mariam Mbaruk, County Executive, Finance Department, Mombasa County Government be punished by way of committal to civil jail.
4. Vide an application dated 2nd December 2019, the 1st and 2nd Respondents applied for stay of execution/ that the court varies or discharges the orders made on 11th October 2019 and review of the interests awarded to the application. They also prayed for costs of the. It's not clear whether this application was ever determined. However, on 5th December 2019 Mr. Tajbhai informed the court that they had paid Kshs. 2,000,000/=; that there were negotiations and payment was hampered by the treasury. On 17th December 2019 Mr. Tajbhai informed the court that they had made some payments. On 16th January 2020, Mr. Tajbhai informed the court that they were not able to satisfy the decree and prayed for 14 days.
5. However, on 6th March 2020, Mr Tajbhai filed yet another application dated 5th March 2020 substantially a replica of the application dated 2nd December 2019 seeking identical orders. On 14th July 2020, Ogola J dismissed the application describing it as grave abuse of court process.
6. For the sake of brevity, I will first address the 1st to 3rd Respondent's application. On 11th March 2021, Mr Tajbhai filed the application dated 11th March 2022, now the subject of this ruling, again seeking substantially identical orders as those sought in the earlier two applications. Specifically, prayer 1 is a replica of prayer 1 of the applications dated 2nd December 2019 and 5th March 2020. Prayer 2 seeks to stay the execution proceedings. Prayer 3 seeks to stay the judgment delivered on 4th April 2019 and the proceedings dated 3rd January 2019. The 1st to 3rd Respondents also prays for costs of the application to be in the cause.
7. The application is premised on the supporting affidavit of Jimmy Waliaula. The core ground in support of the application is that the Respondent is the County Government of Mombasa and is subject to the provisions of the *Government Proceedings Act*.² They state that at the time of the hearing of the application for mandamus, their advocate failed to appreciate the provisions of the Government Proceedings Act, more specifically Section 21 of the Act and Order 29 of the Civil Procedure Rules 2010. As a consequence, they state that warrants have been issued against the Respondents without hearing them or affording them a fair administrative action. They state that the misgivings of their advocate should not fall upon the Respondents. They pray to be accorded a hearing in reply to the application for mandamus.
8. Mr. Choka filed grounds of opposition dated 19th March 2021 and the Replying affidavit sworn by himself dated 19th March 2021. The nub of his objection is that the issues raised are res judicata having been raised earlier in these proceedings and a determination made on 7th October 2019 in which the court held that the matter is now at the execution stage and the defence afforded under section 21 on the Government Proceedings Act is not available. He argued that the amended Notice of Motion dated 26th January 2021 does not concern the 1st to 3rd Respondents and that they have no locus standi to

² Cap 40, Laws of Kenya.



apply to stay. Lastly, he argued that no judgment was delivered on 4th April 2019 which can be reviewed since the only judgment was rendered on 1st July 2015 in HCC No. 213 of 2014 by consent.

9. From the above arguments presented by both parties for or against Mr. Tajbhai's application, three issues distil themselves for determination. One, whether the application is *res judicata*; Two, whether this court is *functus officio*; Three whether the application is an abuse of court process.
10. On the issue of *res judicata*, it is basic law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.
11. As Somervell L.J.³ stated, *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. A litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The rationale is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.⁴
12. The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case. *Res Judicata* is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.⁵
13. Also, a judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. *Res judicata* halts the jurisdiction of the court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case in limine.⁶ The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.⁷ Also known in the US as claim preclusion, *res judicata* is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is

³ In *Greenhalgh vs Mallard (1) (1947) 2 All ER 257*.

⁴ *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others 2013 (6) SA 499 (SCA) paras 20-21*.

⁵ <http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html> -Accessed on 16 December 2017.

⁶ *Ibid*.

⁷ *Ibid*.



meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

14. Res judicata is provided for in Section 7 of the Civil Procedure Act.⁸ Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.⁹
15. As was stated in *Gurbachan Singh Kalsi v Yowani Ekori*¹⁰ by East African Court of Appeal: -

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”
16. The mere addition of parties in a subsequent suit or omission of a party or introduction of new ground(s) or prayer(s) to secure the earlier refused orders will not evade the doctrine of res judicata. If the added parties or grounds peg the claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of a party or citing a new ground would in that case be for the sole purpose of decoration and dressing and nothing else.¹¹ There is no doubt that the 1st to 3rd Respondents are citing the same grounds cited and determined in the Rulings dated 7th October 2019, 14th July 2020. The decree was obtained by consent and also there were several promises to pay and part payment.
17. The point is that civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice.

⁸ Cap 21, Laws of Kenya.

⁹ See *Lotta v Tanaki* {2003} 2 EA 556.

¹⁰ Civil Appeal No. 62 of 1958.

¹¹ *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] eKLR.



When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive. The 1st to 3rd Respondent's application offends the doctrine of res judicata. On this ground alone, the application collapses.

18. Complementary to the doctrine of Res Judicata is the conception that, when a judicial tribunal becomes functus officio in respect of a particular case, its powers and jurisdiction are exhausted in respect of that issue. I have in several decisions among them *Oksana Investment Supplies Limited v Alice Wanjiru Wamwea*¹² stated that a judicial tribunal, after giving a decision as to the merits of a case, ceases to exist as an instrumentality in its previous form or at all, or is deprived of all the judicial functions it previously possessed. It is functus officio in respect of the issues decided.⁷
19. A court which, after a trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law.¹³ This test is applicable only if there happens to have been a "final" and "determinative" decision, after a trial; and that a judicial tribunal becomes functus officio in this sense only in relation to a particular matter, not in respect of all matters. For a judicial tribunal to become functus officio, it must have delivered a valid judgment, decree or order of a final and conclusive nature and res judicata must have come into existence. What can be gleaned from the above cited ruling(s) delivered by Ogola J is that the court pronounced itself on similar applications. This court is being invited to sit on appeal on the same issue(s). I decline the invitation to travel along this forbidden route. On this ground, the 1st to 3rd Respondent's application is dismissed with costs to the ex parte applicant.
20. I will now address the question whether the 1st to 3rd Respondent's application is an abuse of court process. The fact that the court had already pronounced itself, not once but at least three times excluding consents and offers to pay and part payments, and despite all those, the 1st and 3rd Respondents had the audacity to move the court again by way of the instant application is worrying.
21. The scenario presented by this case raises the question whether the 1st to 3rd Respondents' application is an abuse of court process. The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Black's Law Dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. Abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use".¹⁴ The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.¹⁵
22. In several decisions of this court, citing jurisprudence from various jurisdictions, I have stated that the situations that may give rise to an abuse of court process are indeed in exhaustive. They involve situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. Examples include: -

¹² Civil Suit No. E121 of 2018.

¹³ (1943-4) 68 C.L.R. at p. 590.

¹⁴ Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.

¹⁵ *Public Drug Co V Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415.



- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
 - c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
 - d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
 - e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.¹⁶
 - f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
 - g. Where an appellant file an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
 - h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.¹⁷
23. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In the words of Oputa JSC, abuse of process can also mean abuse of legal procedure or improper use of the legal process.¹⁸ As Justice Niki Tobi JSC¹⁹ observed, abuse of court process creates a factual scenario where a party is pursuing the same matter by two or more court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process.²⁰
24. I have in several judicial pronouncements stated that a litigant has no right to pursue paripassu more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.
25. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse.²¹ The abuse lies in the multiplicity and manner of the

¹⁶ *Jadesimi vs. Okotie Eboh (1986) 1NWLR (Pt 16) 264.*

¹⁷ (2007) 16 NWLR (319) 335.

¹⁸ In the Nigerian case of *Amaefule & other Vs The State.*

¹⁹ *Agwusin vs Ojichie*

²⁰ *Ibid.*

²¹ *Ibid.*



exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.²² Abuse of court process is an obstacle to the efficient administration of justice. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.

26. The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in court proceedings. These are, first, that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.²³ The concept of abuse of process overlaps with the obligation of a court to provide a fair trial. How can a fair trial be guaranteed when parties drag each other to court over issues which have been litigated and determined between the same parties? By now it's evident that the instant application fits the description of an abuse of court process as delineated in the decided cases discussed above. On this ground, the instant application is fit for dismissal.
27. The 1st to 3rd Respondents application dated 11th March 2021 having failed to surmount the three hurdles discussed above, namely, *res judicata*, *functus officio* and abuse of court process inevitably the application falls for dismissal. Determining issues already decided by the court is a waste of judicial time, paper and ink. The infinite judicial resources should be deployed elsewhere in addressing deserving cases not already determined issues. Having so concluded, I see no need to address the application on merit and in any event, it has none. I dismiss the 1st to 3rd Respondent's application dated 11th March 2021 with costs to the applicant.
28. I now turn to the applicant's amended Notice of Motion dated 26th January 2021 seeking an order that the Mombasa County Regional Police Commander be cited for contempt and be arrested and committed to civil jail for a period of 6 months for failure to effect Warrants of Arrest against a one Francis Thoya, Aisha Abdi and Mariam Mbaruk for failure to pay the decretal sum awarded to the applicant in Mombasa HC Misc. No. 213 of 2014 and 214 of 2014 and Misc. No. 69 of 2018. The applicant also prays for costs of the application to be provided for.
29. The applicant states that despite being served with the said warrants, the Regional Police County Commander, Mombasa County has failed, refused and or neglected to arrest the said persons and present them to court as required, so, in order for the ends of justice to be met and to preserve integrity and respect of this courts' orders, it is imperative that the orders sought be issued.
30. The application is opposed. The 1st, 2nd & 3rd Respondents relied on the grounds cited its application dated 11th March 2021 and asked it be treated as their opposition to the instant application. On his part, the 4th Respondent filed the Replying affidavit of Jimmy Waliaula, the County Attorney, Mombasa County Government dated 28th October 2021. He deposed that the County Government of Mombasa filed the application dated 11th March 2021 in which it is contesting how the applicant was granted the orders of mandamus without a certificate of order against the Government as required by the law. He deposed that even though the County Government of Mombasa was represented by an Advocate, she failed to appreciate the law and the mistake should not fall upon the clients.

²² Ibid.

²³ *Clark vs R* {2016} VSCA 96 at [14].



31. He deposed that it is difficult to settle this matter in absence of a Certificate of Order Against the Government. He deposed that several payments have been made to the applicant but he keeps on insisting none has been made. He also deposed that no order was ever issued compelling the 4th and 5th Respondent to perform any function, hence there is no disobedience of a court order by the 4th and 5th Respondents, hence the application is unfounded.
32. Also, on record is the 5th Respondent's Replying affidavit of No 219423 Manase Mwanja Musyoka, the Regional Police Commander, Coast Region. He deposed that on 6th November, 2020 Police officers from Central Police Station proceeded to the Mombasa County Offices to enforce the warrants of arrest served upon him on 27th November, 2019. He averred that the said officers returned the warrants unexecuted and informed the then Regional Police Commander Rashid Yakub that Aisha Abdi the Cabinet Secretary Finance, was under quarantine having contracted Covid 19.
33. Mr. Musyoka averred that the officers again proceeded to the Mombasa County Offices on 4th May, 2021 to execute the warrants but Aisha Abdi the Mombasa County Finance Secretary was not in the office so the warrants were unexecuted. Also, he averred that the Office of the Attorney General was served with payment vouchers made to the firm of Chokaa & Company Advocates as proof of payment and that the Regional Police Commander has not refused to comply with the orders of this court.
34. Mr. Chokaa swore the further affidavit dated 13th October 2021. The substance of the affidavit is that this court should disregard the 1st, 2nd, and 3rd Respondents' letter dated 6th October 2021 for want of a supporting affidavit. Further, that the outstanding sum as at 21st December 2020 stood at Kshs. 10,372,580 plus interests at the rate of 14% and Kshs. 6,556,625.35 excluding interests in respect of costs taxed by consent.
35. In his submissions, Mr. Chokaa argued that no evidence has been availed to support the reasons offered for the failure to enforce the warrants and urged the court to allow the application. On his part Mr. Tajibhai counsel relied on the grounds in support of his application and the supporting affidavit and annexures. Mr Mwadeje, counsel for the 4th and 5th Respondents submitted that the key question is whether there was refusal to enforce the warrant. He submitted that in the Replying affidavit, the Regional Commander deposed how he dispatched officers to the County but the persons to be arrested were unavailable. He submitted that on 6th November 2020, officers were dispatched to effect the arrest, but they were supplied with payment vouchers showing proof of payment. He argued that the 4th and 5th Respondents executed their duties.
36. The applicant's application will stand or fall on one key issue, namely whether the applicant demonstrated that the Regional Police Commander, Coast Region willfully failed to enforce the arrest warrants. Unfortunately, this pertinent issue was not accorded the attention it deserves. Nothing was said about it at all. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fides.'²⁴ However, a deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.²⁵

²⁴ *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* [1996] ZASCA 21; 1996 (3) SA 355 (A) 367H-I; *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 602(SCA) paras 18 and 19.

²⁵ *Consolidated Fish (Pty) Ltd v Zive* 1968 (2) SA 517 (C) 524D, applied in *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T) 691C.



Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).²⁶

37. These requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.²⁷ Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa,²⁸ underlined the importance to the rule of law, of compliance with court orders in the following terms: -

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

38. The High Court of South Africa²⁹ held that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.³⁰ The authors of the book *Contempt in Modern New Zealand*³¹ have authoritatively stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

²⁶ Noel Lancaster Sands (Edms) Bpk v Theron **1974 (3) SA 688** (T) 692E-G per Botha J, rejecting the contrary view on this point expressed *Consolidated Fish v Zive* (above). This court referred to Botha J’s approach with seeming approval in *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* [**1996**] **ZASCA 21**; **1996 (3) SA 355** (A) 368C-D.

²⁷ See the formulation in *S v Beyers* **1968 (3) SA 70** (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 (‘Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it’) and CR Snyman *Strafreg* (4ed, 1999) page 329 (‘Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van ‘n regterlike amptenaar in sy regterlike hoedanigheid, of van ‘n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande ‘n aanhangige regsgeging wat die strekking het om die uitstlag van die regsgeging te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeging’).

²⁸ Burchell v. Burchell, Case No 364/2005

²⁹ In the case of Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005

³⁰ Ibid, at page 4

³¹ Available at ip36.publications.lawcom.govt.nz



- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.

39. Our 2010 Constitution expanded the Bill of Rights. The horizon of human rights is expanding. This statement finds backing Article 19 (3) (b) of the Constitution which provides that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with chapter on the Bill of Rights. It follows that a realistic approach should be made in this direction bearing in mind that the law of arrest and imprisonment permitted by the law of contempt requires balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other. It requires weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the Plaintiff, the alleged contemnor or the society, the law violator or the law abider. It requires balancing individual rights against society's rights wisely. To me the societies' will as engraved in the Constitution comes first. The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of criminal and civil law. The court must strike a delicate balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice in the name of the law-enforcement machinery. The pendulum over the years has swung to the right. However, emphasis may shift, depending on circumstances, in balancing these interests
40. Talking about balancing interests, on the face our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? We all know that a high standard of proof applies whenever committal to prison for contempt is sought because contempt of court is quasi-criminal in nature.
41. Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. The second reason is coherence: - it is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted: in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for rule of law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. It is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.'
42. In the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fides, all the requisites of the offence will not have been established. And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one': -
- 'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In



this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.³²

43. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system which that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.³³

FOOTNOTE 33

Fakie NO v CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006).

44. Turning to this case, the Regional Police Commander has stated on oath that an attempt was made to effect the arrest. The person to be arrested was said to have contracted COVID 19. This court takes judicial notice of the fact that at or about the said period, the entire country, and indeed the whole world was facing a deadly global challenge. If the applicant didn't believe this version, nothing prevented him from applying to cross-examine the deponent. Before me is an uncontroverted sworn statement and a submission from the bar. I choose to be persuaded by the sworn affidavit. The affidavit says a second attempt was made, but the person sought to be arrested was said to be out of the country. I find no reason to doubt this averment also. On the whole I am not persuaded that the person sought to be committed willfully and in bad faith (*mala fides*) failed, refused and or neglected to enforce the Warrants of Arrest. The conclusion becomes irresistible that the applicant has not demonstrated willfulness and *mala fides* on the part of the Regional Police Commander, coast region.
45. Consequently, the applicant's application dated 26th January 2021 has no merits and it falls for dismissal. Accordingly, I dismiss the said application with no orders as to costs. As stated earlier, the 1st, 2nd and 3rd Respondents application dated 11th March 2021 is hereby dismissed with costs to the applicant on grounds that it is *res judicata*, *functus officio* and abuse of court process.

Orders accordingly. Right of appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF NOVEMBER 2021.

JOHN M. MATIVO
JUDGE

³² In De Lange vs Smuts [1998] ZACC 6; 1998 (3) SA 785 (CC) para 147.

³³ (content missing)

