

SOUTH AFRICA / JUDGMENT

Msiza v Msiza and Another (M271/15) [2016] ZANWHC 23; 2017 (1) SACR 42 (NWM) (26 May 2016) [2016] ZANWHC 23

COURT

North West High Court, Mafikeng

BEFORE

Landman

CASE / FILE NUMBER

M271/15

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

WEST DIVISION, MAHIKENG)

CASE

NO.: M271/15

DATE:

26 MAY 2016

In

the matter between: HAROLD
MSIZA.....APPLICANT
(Identity
Number: 76.....)
And
DIKELEDI
MSIZA.....1ST
RESPONDENT
ABRAHAM
PAULUS BISSHOFF
N.O.....2ND
RESPONDENT

IN RE: (Identity Number:
76.....)
T L RAMPE
N.O.....2ND
RESPONDENT
THE SHERIFF OF
THE HIGH COURT RUSTENBURG.....3RD
RESPONDENT

JUDGMENT

Landman J:

- [1] This is an application launched by Harold Msiza, the applicant, against the Minister of Police and the Station Commander of the South African Police Service, Rustenburg for an order for their committal for allegedly being in contempt of an order of this court dated 21 July 2015.

Background

- [2] On the evening of 21 July 2015 the applicant and his legal team appeared before me in Chambers seeking relief on an urgent application. I granted an order which, inter alia, provided that the status quo of the minor child would be restored to the primary residence and vest in the applicant, pending the return date of a Rule Nisi. The first respondent (the applicant's former spouse) was also prohibited from removing the minor child from the Republic of South Africa pending that date and the South African police were interdicted from seizing the child's passport. My order also provided that:

'2. The Sheriff may enlist the assistance of the South African Police Service in order to give effect to this order.'

- [3] After securing the order, the applicant and his legal team left Mahikeng and went to the Police Station at Rustenburg. They arrived there at 23:30 on the same evening and delivered the court order to the South African Police stationed there. The applicant says that despite being handed the court order all the police officials were extremely unhelpful and refused to

assist them. The police officials said that the first respondent also has a court order and that the applicant should approach the court for it decide the matter. A huge debate followed between the police officers. The police officials regarded the first respondent's court order (an order of the Magistrate's Court) of more value than the High Court order that was presented to them. Secondly, the police were angry and upset for some reason that was not made clear to the applicant and his legal team. But the applicant goes on to say that, at one stage, a police official indicated to them that they did not receive any money in reply to the question why was everyone upset.

- [4] The applicant says that some of the police officials present had executed the Magistrate's order on the previous day and had removed the child from the custody of the applicant. A female police official who had been present the previous evening refused to divulge any information pertaining to the location of the first respondent's residence.
- [5] At about 01:20 the applicant's wife phoned the Station Commander and explained the situation to him. The Station Commander

called the station and police officers were instructed to render assistance. The applicant says the police officers were still very unhelpful and made it clear that they were not in the mood to assist the applicant. The police officials left together with the applicant and the legal team to search for the first respondent's residence. The police remained in their vehicles. It was left to the applicant and his wife to try and ascertain from employees of the complex where the first respondent was residing. After a while the police officials said it was clear that the respondent whereabouts could not be determined and left.

- [6] A security guard at the complex provided the applicant with some information and he and his wife immediately went back to the police station with an address. They waited for an hour to be assisted. They were then assisted by two police officials; one a Captain. They returned to the complex. They found the first respondent's cousin. The first respondent's cousin said she did not know where the first respondent was but eventually thought that she may be in Phokeng. The applicant and his wife returned to the police station to lay a charge of child abduction against the first respondent, but the police officials refused to assist them.
- [7] The eventual upshot is that the first respondent and the child left the Republic the next day and entered Botswana. The applicant has not seen his child since their departure.
- [8] The fourth and fifth respondent (hereafter the Police) say that none of the officers who had assisted in the execution of the Magistrate's order on 20 July were on duty on the evening of 21 July 2015. Lieutenant Molosioa was on duty. She was presented with the High Court order. The applicant demanded that it be served on the first respondent. She asked applicant to provide an address for service. The applicant was not certain where the first respondent was to be found, but indicated that the respondent had said she was living at Kaya Bella in Waterfall, Rustenburg. The applicant demanded that the police officials accompany him to verify the address. At this moment the Lieutenant Molosioa received a call from the Station Commander who had been contacted by the applicant's wife.

[9] The applicant was then told that the police officials were willing to assist him. However, it was not their primary responsibility to verify the address for service. Nevertheless, three vehicles were dispatched to accompany the applicant to the complex. On their

arrival at K..... B..... the applicant could not identify where the court order should be served.

Later a Captain

proceeded to the scene and received a report on the situation. He said to the applicant that it was unreasonable to expect the police to make inquiries at all the dwellings in the K.... B..... complex at 01:00 and that the police had to attend to other reported cases. The police left the applicant to establish the whereabouts of the first respondent. The Captain provided the applicant with his contact numbers in case the applicant should establish the address.

[10] At about 03:00 the applicant returned to the police station saying that he had discovered the address and the Captain accompanied by a Sergeant returned to K.... B..... The address was incorrect but information was received as to where the first respondent's

cousin lived in the complex. The police and the applicant found the respondent's cousin, who told them that the first respondent

was already in Botswana. Certain arrangements were made and the police departed.

[11] Prior to the commencement of argument, I pointed out to the parties that my order provided that the sheriff could enlist the assistance of the police in executing the order if this was necessary. I also pointed out that there was no affidavit from the sheriff to say that the police had refused to assist him or her in executing the order.

[12] Ms Van der Westhuizen, who appeared on behalf the applicant, submitted that as the police fell under the executive arm of government, they were required to execute the court order. She said that it would not have been possible to have obtained the services of the sheriff outside of office hours and that the Police were obliged in terms of the order to assist them and to execute the order.

[13] The primary responsibility for the execution of court orders is that of the Sheriff of the High Court concerned. Section 43(1) of the Superior Courts Act 10 of 2013 provides that the sheriff must, subject to the applicable rules, execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff.

[14] The applicant was obliged to enlist the services of the sheriff. My order directing the police to assist the sheriff should he request assistance was specifically made because it is not the responsibility of the South African Police Service to execute civil orders of the High Court.

[15] In any event, it is perfectly clear that as soon as the Station Commander, the fifth respondent, was phoned by the applicant's

wife, he immediately directed his staff to render assistance and that this assistance was indeed rendered. On no account can the Station Commander be said to have been in contempt of court. It is simply outrageous to seek the conviction of the Station Commander for contempt of court.

[16] Although this is not stated specifically by the deponents to the affidavits filed on behalf of the police, one can understand that when the order was presented at the charge office that the police officials may not have known exactly what should be done. Had the sheriff been there to direct the nature of the assistance that he or she required, it is highly likely that he would have received the immediate assistance and co-operation of the police assuring that the whereabouts of the first respondents were known. Nevertheless, once the situation was explained to the Station Commander, the police rendered assistance to the applicant.

[17] In any event, I am satisfied that the only part of the order, as far as the police is concerned, was to render assistance to the sheriff if this was requested. No such request was made and consequently there is no merit in the applicant's application to find the respondents guilty of contempt of court. The application must be dismissed.

Costs

[18] Costs should follow the result. The costs of 29 October 2015 were reserved. The matter could not proceed on that date because the fourth and fifth respondent's papers were not in order. These respondents are liable for those costs.

Order

[19] In the result I make the following order:

1. The application as regards the fourth and fifth respondents is dismissed with costs.
2. The fourth and fifth respondents are to pay the wasted costs incurred on 29 October 2015.

AA Landman

Judge of the High Court

APPEARANCES:

Date of hearing: 19 May 2016

Date of Judgment: 26 May 2016

Counsel for the Applicant: Adv Van der Westhuizen instructed by Labuschagne Attorneys

Counsel for the 4th and 5th Respondent: Adv Moagi instructed by State Attorneys Mahikeng

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