

SOUTH AFRICA / JUDGMENT

R.K v I.K (17760/2019) [2024] ZAWCHC 306 (20 June 2024)

[2024] ZAWCHC 306

COURT

Western Cape High Court, Cape Town

BEFORE

Andrews

CASE / FILE NUMBER

17760/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION,

CAPE

TOWN

Case

No: 17760/2019

In

the matter between:

R[...]

K[...]

Applicant

and

I[...]

K[...]

Respondent

JUDGMENT

ANDREWS, AJ

Introduction

[1] The powerful introductory remarks by the Constitutional Court in *Pheko and Others v Ekurhuleni Metropolitan Municipality* [1] sets the tone for these proceedings:

‘The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.’

[2] This is an opposed application in terms of which the Applicant seeks an order that the Registrar of this Court is authorised to issue a Writ of Commitment for Contempt of Court, committing the Respondent to imprisonment for contempt of court for a period of 30 (thirty) days.

Factual

Background

[3] An interim maintenance order was granted, *pendente lite*, on 12 April 2017, under case number 3965/2017, which terms included *inter alia*:

- (a) The Respondent was ordered to pay the amount of R22 000 per month to the Applicant commencing on 28 April 2017;
- (b) The Respondent was to pay the Applicant the amount of R48 000 before 25 May 2017;
- (c) The Respondent would continue to pay reasonable expenses relating to the property inclusive of the bond payments, rates and taxes, water and electricity, garden services, kleen bin, security, DSTV, all reasonable maintenance to the property and garden, Applicant’s cell phone contract and to arrange for data to the value of R1400 to be loaded onto the Applicant’s dongle within 7 days from date of the order;
- (d) By allowing the Applicant to use the Toyota Fortuner motor vehicle;

- (e) By allowing the Applicant the use of the petrol account in the Respondent's name to the value of R3 000 per month;
 - (f) By paying all the reasonable maintenance, repairs, financing insurance and licensing costs on the vehicle currently in the Applicant's possession and
 - (g) That the Respondent will contribute towards the Applicant's legal costs incurred in the sum of R20 000 on or before 7 April 2017 and R20 000 on or before 12 May 2017.
- [4] It is alleged that the Respondent failed to comply with the court order in several respects. The Applicant initiated contempt proceedings which culminated in the following order being made by Cloete J ("the Cloete J" order), on 03 September 2020:
- (a) That the Respondent is declared to be in contempt of the order of this court granted on 12 April 2017 under case number 3965/2017;
 - (b) That the Respondent is sentenced to imprisonment for a period of 30 (thirty) calendar days, wholly suspended on condition that:
 - (1) The full amount owing to the Applicant in terms of the aforesaid order is paid by the Respondent by 31 October 2020; and
 - (2) The Respondent resumes payment of what is due and/or owing in terms of such order with effect from 28 November 2020; and
 - (c) That the Respondent shall pay the costs of this application on the scale as between attorney and client, including any reserved cost orders.
- [5] The Respondent thereafter lodged an application to appeal the order, which application was dismissed with costs. Thereafter, the Respondent lodged an application for leave to appeal the order at the Supreme Court of Appeal, which application was also dismissed with costs. This was followed by an application for leave to appeal the order at the Constitutional Court, which application was also dismissed with costs.
- [6] There was an attempt to enter into a settlement arrangement which proposal was not accepted by the Applicant as the Respondent had not resumed payment of the monthly maintenance amount, save for one payment of R22 000 on 7 December
2021. As at the time of instituting these proceedings the Respondent was in arrears in the amount of R980 054.20. The Applicant approached the Registrar to issue a Writ of Commitment, but was informed that she was unable to issue the writ because the Court Order does not specifically authorise her to do so. Thereafter, an attempt was made to obtain the writ by way of a Chamberbook application, however, the Applicant was directed that the order sought is to be obtained in the ordinary course, thus giving rise to this present application.

- [7] The Respondent was finally sequestered by Standard Bank on 23 January 2023. The Respondent was placed under curatorship by an order of court granted on 30 October 2023 under case number 17174/2023. Advocate Paul Tredoux N.O. was appointed as the curator ad litem on 25 April 2024 whose powers were extended to enable him to represent the Respondent in both the divorce and committal proceedings.

The Applicable Legal Principles

- [8] The law on “civil” contempt of court is well established. The seminal judgment of Pheko and Others v Ekurhuleni Metropolitan Municipality (supra)[2] the Constitutional Court in a unanimous judgment explains what is meant by civil contempt as follows:

‘The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings mero motu.’

- [9] Bannatyne v Bannatyne[3] deals with the competence of a court to enforce money judgments by way of contempt proceedings:

‘[18] Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief is competent.’

Parties Principal Submissions

On behalf of the Applicant

- [10] No Heads of Argument were prepared by Counsel for the Applicant, having been instructed a day before the hearing. In the main, it was submitted that the judgment of Cloete J, speaks for itself and that there was no need to rehash what was already argued before the court declared the Respondent to be in contempt of the court order dated 12 April 2017.

On behalf of the Respondent

- [11] The Respondent admitted that the Rule 43 Court Order was taken by agreement on 12 April 2017. The Respondent initially complied with the terms of the said Court Order, but stopped when he encountered financial difficulties. The Respondent was finally sequestered on 23 January 2023. It was submitted that by virtue of him being declared insolvent, he was divested of all his assets which now vests in the Trustee by direction of the Master as envisaged in terms of Section 20 of the Insolvency Act[4]. In other words, the Respondent no longer has control of any of his assets.

[12] It was placed on record that the Respondent has no source of income, except for receiving a SASSA grant. The Respondent essentially relies on his children to support him and did not in any event have the wherewithal to make payment. Counsel on behalf of the Respondent asserted that it would not be appropriate for the Court to give effect to the suspended sentence as it would ultimately not achieve any purpose because the Respondent is unable to pay. In addition, it was submitted that the Respondent has significant health challenges and that subjecting him to incarceration would be cruel and unusual in view of his personal circumstances namely that he is 73 years old; has no income and suffers health challenges which includes a heart condition, diabetes, hypertension, cholesterol and sleep apnoea which requires medical apparatus to enable him to sleep. The Respondent had

a triple bypass in 1996 and a further bypass in April 2021. In addition, the Respondent has, over the years, had 14 stents which

were surgically inserted. In September 2023, the Respondent attempted to take his own life. He is current on antidepressant medication.

[13] It appears that the Respondent's legal representatives have contacted the Department of Correctional Services to establish whether the prison facility is able to accommodate a person with the medical challenges presented by the Respondent, but seemingly, those attempts were unsuccessful. It was argued that the effect of incarceration is therefore likely to present a significant risk to the wellbeing of the Respondent.

Discussion

[14] It is apposite to consider the chronology of events leading up to these proceedings. The parties were married to each other on 16 May

2008. The Respondent instituted divorce proceedings in 2013. In March 2014, the parties attempted reconciliation and in 2016, the Respondent permanently vacated the former common home, whereafter the divorce proceedings were revived. In or about 2017, the Applicant launched a Rule 43 application which culminated in an order by agreement being taken on 12 April 2017 in terms of which the Respondent agreed to undertake various maintenance obligations as per the terms of the court order referenced earlier in this judgment. During 2018, the Respondent launched an application in terms of Rule 43(6) for a reduction of his maintenance obligations in terms of the order which was opposed.

[15] The Rule 43(6) application was at some stage removed from the roll and never reenrolled as the parties were attempting to settle the divorce and ancillary matters in its entirety. It is apparent that the Rule 43(6) application did not reach its conclusion. It appears that the Respondent had substantially complied with the Rule 43 order until about 28 April 2019 whereafter Respondent defaulted. The Applicant instituted contempt proceedings which were heard on 11 August 2020. Cloete J, on 3 September 2020 declared the Respondent in contempt of the order granted on 12 April 2017. This was followed by various unsuccessful leave to appeal applications as mentioned at the outset of the judgment.

- [16] It bears mentioning that these proceedings were enrolled contemporaneously with the divorce action. This court finalised the divorce action on 5 June 2024. The parties entered into a settlement agreement pertaining to the proprietary consequences, after protracted litigation.
- [17] The purpose of these proceedings is not to revisit the issues already ventilated at the contempt hearing before Cloete J, as the court has already provided a full written judgment with a sanction which was subject to certain conditions. There is no room to doubt that the finding of Cloete J was premised, in her wellreasoned and comprehensive judgment that the Respondent's conduct constituted contempt on the basis that the Respondent had an intention to defeat the course of justice.[5] It is uncontroverted that the Respondent has breached the suspended conditions of Cloete J's order, which under Section 165 (5)[6] of the Constitution, the Respondent was by operation of law bound to obey.
- [18] The Respondent was finally sequestered on 23 January 2023, seemingly after all his failed attempts to appeal the judgment of Cloete J. Whilst I do not make a finding that the sequestration was perhaps engineered as a further way of evading his court ordered obligations, the timing of it leaves one wondering. Be that as it may, the de facto position that the Respondent finds himself in is that he has, since the Cloete J order, been sequestered.
- [19] It is trite that an order sequestering a debtor's estate is one affecting his status and is accordingly a judgment in rem; that is, a judgment determining an issue of right, status or property in a way binding persons in general. It is not a judgment in personam.[7] This ultimately means that the insolvent, in this case, the Respondent cannot make a valid payment from his estate. In fact, the divesting takes place already from the time that the provisional order for sequestration is granted.
- [20] The consequence of the Respondent's insolvent estate when it is vested in the trustee, will remain so vested until 'the insolvent become reinvested therewith in consequence of the acceptance of an offer of composition by his creditors or until rehabilitation.'[8] It is trite that that sequestration does not terminate an obligation in regard to the maintenance. Furthermore, a claim for arrear maintenance due up to date of sequestration must be proved as a concurrent claim against the estate. Any claim for amounts due after the sequestration of the estate cannot be made against the estate but may be enforced against the personal estate of the insolvent.[9]
- [21] It is settled law that a litigant has no locus standi to seek an order for contempt arising out of breach where the punishment is not calculated to coerce compliance with the order as articulated in *Naidu and Others v Naidoo and Another*[10]:
- 'By the time, however, that the present matter was argued on 12 March this particular dispute had ceased to exist. The sale had not only been cancelled but possession of the business handed back to the Naidus. Counsel for the respondents submitted accordingly that the very basis on which

the committal order depended had disappeared and the order – whatever the merits of the dispute – no longer availed the applicants. His contention rested squarely on the Full Court decision of *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others* 1956 (1) SA 105 (N). As stated there, a litigant has no locus standi to seek an order for contempt arising out of a breach of an order obtained in a civil proceeding where the punishment is not calculated to coerce compliance with the order...The argument is therefore

simple, The Naidus complain that the first order has not been complied with. If the committal they seek is calculated, as indeed it must, to ensure compliance with the order (for example, the usual form of a suspended sentence subject to due performance), that has become a physical impossibility, The sale had been cancelled and the Naidus have been restored to possession of the business...'

[22] The Constitutional Court in *Pheko and Others v Ekurhuleni Metropolitan Municipality* (supra), identifies wilful disobedience of an order made in civil proceeding as a criminal offence. The noncompliance by the Respondent in casu of the Cloete J, order is therefore a criminal offence.[11] It is clear that the Respondent cannot escape the consequence of punishment. In light hereof, when punishment is considered, as in a criminal matter, the court is to have regard to various factors.

[23] The traditional factors applied when considering an appropriate sentence include the nature and seriousness of the offence, the personal circumstances of the offender as well as the interest of society.[12] In the case of *S v Zinn* the Appellate Division held that the courts should impose a sentence which in its view is appropriate.[13] The court is further mindful that the object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.[14]

[24] The Respondent fully understood what his obligations were and notwithstanding, the order of Cloete J, it did not compel performance. This court is minded that since Cloete J's sanction, the Respondent's circumstances has changed, which begs the question as to whether this court could reconsider the sanction and impose something different to that which was intended by Cloete J.

[25] In my view, this consideration is akin to the procedure applied for the putting into operation of a suspended sentence in respect of criminal proceedings. The matter of *Stow v Regional Magistrate, Port Elizabeth NO and Others* [15] serves as a useful guide where the Supreme Court of Appeal held as follows:

'...the putting into operation of a suspended sentence is an inherent element of the criminal process and where a court orders that a suspended sentence be made operational, it assumes the position of a criminal court which punishes the person who has been convicted. It has to have regard to the ordinary principles of punishment and cannot simply have a person imprisoned as would a clerk keeping a register. When the liberty of a person is at stake, grounds must exist before such liberty is taken away. In fact, the second court is nothing else but an extension of the

trial court when it considers putting a suspended sentence into operation.’

[26] Section 297(7) of the Criminal Procedure Act 51 of 1977 states that:

‘A court which has—

- (a) postponed the passing of sentence under paragraph (a) (i) of subsection (1);
- (b) suspended the operation of a sentence under subsection (1)(b) or (4); or
- (c) suspended the payment of a fine under subsection (5), whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine, as the case may be, subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.’

[27] Section 297(7) read with Section 297(9)[16] are thus the empowering provisions to assist this court in making an appropriate determination. The matter of *Moroe v Director of Public Prosecutions, Free State and Another* [17] distils the court’s approach to dealing with matters such as these. Courts are enjoined to apply its discretion judicially and in accordance with the law, taking into account relevant factors.[18] In this regard, the SCA in *Moroe* (supra) recognised that the first aim of a condition of suspension is to keep the convicted person out of prison and further held that:

‘16.2 An application for putting into operation a suspended sentence is not a mere formality but entails a fullyfledged exercise of judicial

discretion. It requires as much consideration and judicial discretion as the imposition of sentence.

16.3 In certain respects, the consideration of implementation requires even more careful consideration than the original imposition of sentence. In the first place, the original trial and the reasonableness of the relevant condition of suspension, which possibly was imposed by another judicial officer of equal status, must be assessed afresh. If the condition was ab initio unreasonable, the sentence should not be put into operation.

16.4 The circumstances of the precipitating noncompliance must be considered. If it was, for instance, a trivial or merely technical breach, a heavy suspended sentence should not be put into operation because of it.

16.5 The condition must be assessed in the light of events since its imposition. If implementation will no longer serve any substantial deterrent or reformatory purpose, it should not be ordered (*S v Hendricks* 1991 (2) SACR 341 (C) at 346d–g).

16.6 The court is at all times obliged to consider judicially the issues listed in subsections (7) and (9) respectively. In *S v Paulse* 1990

- (1) SACR 341 (W) the court emphasized that there is no justification for thinking away the time that has lapsed since the original sentence. The putting into operation of a suspended sentence does not follow automatically and remains a matter for careful judicial consideration.’[19] (my emphasis added)
- [28] It is therefore incumbent on this court, to consider the comprehensive presentence report compiled by Arina Smit, who is a practicing social worker for at least 28 years. She previously worked for The National Institute for Crime Prevention and Reintegration of Offenders (NICRO) for 21 years and is currently in private practice. The purpose of the report was to provide the court with a comprehensive understanding of the Respondent’s circumstances. In terms of the Respondent’s personal circumstances, she indicated that he is currently 74 years of age with no criminal record. The Respondent has three adult children. The Respondent has a history of cognitive decline and several chronic health issues. He was diagnosed with dementia and shows signs of cognitive impairment. His mental health raised concerns as the Respondent displayed symptoms of depression and apathy. The Respondent does not pose a significant risk to society. Ms Smit opined that the Respondent’s exposure to prison could lead to negative outcomes taking into consideration that conditions of prison are often inhumane. The Respondent’s health and age, makes him particularly vulnerable to mistreatment. She referenced the Nelson Mandela Rules which advocate for the humane treatment of prisoners, suggesting that imprisonment should be a last resort, especially for nondangerous offenders. Ms Smit finally opined that, taking into account the Respondent’s cognitive state, and low risk to society, imprisonment is not recommended.

Conclusion

- [29] Given the circumstances of this case, it is clear that Cloete J structured her order so as to keep the Respondent out of prison and afford him an opportunity to comply with conditions of suspension. The Applicant has through this application clearly attempted to coerce compliance. However, the relief being sought by the Applicant is not a mere formality and entails the exercise of judicial discretion. In fact, it requires as much consideration and judicial discretion as the imposition of the initial sanction. It is furthermore incumbent on this court to assess the matter afresh which includes the reasons for noncompliance and changed circumstances of the Respondent since the Cloete J order.
- [30] I interpose to emphasise that as guardians of the Constitution, courts jealously guard orders and ensure compliance “by all and sundry”. [20] It is said that “In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.” [21]

- [31] The circumstances of the Respondent have evidently changed; however, this court, must be astute to ensuring that a balance is maintained so as to ensure that a correct message is conveyed through this judgment that noncompliance with court orders are viewed in a very serious light. Section 165 (5) of the Constitution is said to “lie at the heart of the rule of law” and enjoins all persons to whom a court order applies obeys the terms thereof on pain of sanction.[22]
- [32] On the papers, the Respondent seeks an order for the dismissal of the Applicant’s application; however, in the address, Counsel on behalf of the Respondent conceded that the Respondent cannot escape punishment but that other forms of punishment should be explored such as community services which would still have the desired effect. This because of the Respondent’s medical condition and because, regard is to be had to the purpose for which contempt proceedings exists.
- [33] Even if the court considered to authorise the Writ of Commitment as per the relief sought, the purpose for the writ will not be achieved no matter how hard the tree is shaken or the proverbial cage is rattled. The effect of this type of relief will result in there being no winners. The parties have reached a stalemate with the gnawing question that will loom large, namely; has the Respondent succeeded in making a mockery of the rule of law upon which stands the pillars of our constitutional values. The dignity and authority of the courts must be upheld.
- [34] The Respondent’s prevailing circumstances clearly indicate that direct imprisonment will not be appropriate. I am of the view that an alternative to direct imprisonment will be an appropriate sanction which will serve to send a clear message that contemptuous behaviour towards orders of court will not be tolerated. This court, being alive to the fact that sentence of imprisonment should be a measure of last resort, is of the view that a period of imprisonment will not have the desired outcome for the Applicant, and will be detrimental to the Respondent. This does not mean that the Respondent cannot be punished for disobeying a court order. House arrest with conditions may be an appropriate alternative as a noncustodial sanction in terms of Section 276(1)(h) of Act 51 of 1977.
- [35] The Constitutional Court has described this form of sentence as “an innovative form of sentence” which is flexible to meet the specific circumstances of each offender’s case. It is trite that Section 52(1) of the Correctional Services Act 111 of 1998 entitles a court when ordering correctional supervision to impose a variety of stipulations to the sentence regime such as inter alia, house arrest, community service, an order to refrain from using or abusing alcohol which are appropriate. In order for the court to make a final determination, it will be imperative for the Respondent to be assessed regarding his suitability to be placed under correctional supervision. In addition, a Trustees’ Report is deemed necessary in order establish what is in the Respondent’s estate and whether the Applicant’s claim will be settled either in part or in whole.

[36] Therefore, in the exercise of my judicial discretion, I am of the view that the matter is to be adjourned for a period of three months to enable the Trustee appointed by the Master to provide a report to this court as to whether the Respondent's insolvent estate will be in a position to settle the Applicant's claim either in whole or in part. This report in addition to the Correctional Supervision Report will assist the court in determining an appropriate alternative sanction.

Order:

[37] After having heard Counsel for the Applicant and Counsel for the Respondent, and having considered the document filed on record, the court directs that:

1. The matter is adjourned until 19 September 2024 for:
 - (a) a Trustee's Report on whether the Respondent's Insolvent Estate will be able to settle the Applicant's claim either in whole or in part and
 - (b) Correctional Supervision Report regarding the Respondent's suitability for House Arrest in terms of section 276(1)(h) of Act 51 of 1977.
2. The matter of costs is to stand over for later determination.

ANDREWS, AJ

APPEARANCES:

Counsel for the Applicant:

Advocate BarclayBeuthin

Instructed by:

Beirowski Attorneys

Counsel for the Respondent:

Advocate P Tredoux

Instructed by:

Neville Cohen & Associates

Heard on: 04 – 05 June 2024

Delivered: 20 June 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email.

[1] Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2) [2015] ZACC 10.

[2] Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2) [2015] ZACC 10 at para 30.

[3] (CCT18/02)

[2002] ZACC 31 at para 18.

[4] Section 20 of the Insolvency Act 24 of 1936: ‘(1) The effect of the sequestration of the estate of an insolvent shall be— (a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him...’

[4] Section 20 of the Insolvency Act 24 of 1936:

‘(1) The effect of the sequestration of the estate of an insolvent shall be—

(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him...’

[5] See *Coconut Express CC v South African Revenue Service (Customs and Excise) and others* [2016] 2 All SA 749 (KZD).

[6] ‘An order or decision by a court binds all persons to whom and or organs of state to which it applies’

[7] Mars ‘The Law of Insolvency in South Africa (Juta) Ninth Edition, page 172.

[8] Mars (supra) page 182.

[9] Mars, (supra), page 373.

[10] [1993] 4 All SA 528(D) page 529 530.

[11] At para 28.

[12] *S v Zinn* 1969 (2) SA 537 (A).

[13] 1969 (2) SA 537 (A) at 540G.

[14] *Pheko and Others v Ekurhuleni Metropolitan Municipality* (supra), at para 28.

[15] 2019

(1) SACR 487 (SCA) at paragraph 45.

[16] Section 297(9) prescribes: ‘(a) If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the case may be, be arrested or detained and, where the condition in question— (i) was imposed under paragraph (a) (i) of subsection (1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or (ii) was imposed under subsection (1) (b), (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction, and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such

postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence or, in the case of subparagraph (ii), put into operation the sentence which was suspended. (b) A person who has been called upon under paragraph (a) (ii) of subsection (1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.’

[16] Section 297(9) prescribes:

‘(a) If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the case may be, be arrested or detained and, where the condition in question—

- (i) was imposed under paragraph (a) (i) of subsection (1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or
- (ii) was imposed under subsection (1) (b), (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction, and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence or, in the case of subparagraph (ii), put into operation the sentence which was suspended.
- (b) A person who has been called upon under paragraph (a) (ii) of subsection (1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.’

[17] 2022

(1) SACR 264 (FB) (10 March 2021), at para 16.

[18] Hiemstra's Criminal Procedure, *supra* at Page 28–85.

[19] At para 16.

[20] *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No

2) 2015 (5) SA 600 (CC) (Pheko II) at para 2.

[21] *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No

2) 2015 (5) SA 600 (CC) (Pheko II) at para 2.

[22] See MEC for the Department of Public Works and Another v Ikama Architects CC 2023

(2) SA 514 (SCA) para 30.

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