FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 010/2006

PARTIES: Kirsten Carla Burchell (Birkholtz) and Barry Grant Burchell

REFERENCE NUMBERS -

- Registrar: 364/2005

DATE HEARD: 20/10/2005

DATE DELIVERED: 03/11/2005

JUDGE(S): Froneman J

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Applicant(s)/Appellant(s): MJ Lowe SC
- for the accused/respondent(s): EAS Ford SC

Instructing attorneys:

- Applicant(s)/Appellant(s): Neville Borman & Botha
- Respondent(s): Wheeldon Rushmere & Cole

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION **Case No. 364/2005**

Reportable

In the matter between

KRISTEN CARLA BURCHELL (born BIRKHOLTZ) **Appellant**

and

BARRY GRANT BURCHELL **Respondent**

Summary: Contempt of court for non-compliance with court orders to act or not to act in a certain way in civil cases remains a criminal offence under the Constitution – civil contempt proceedings must thus comply with the accused's right to a fair trial under s 35(3)- that includes discharge of the onus to prove all the elements beyond reasonable doubt – civil application proceedings capable of being adapted to this – development of purely civil sanctions for such contempt , such as declaratory orders and ancillary orders thereto, should also be investigated.

JUDGMENT

Froneman J.

Introduction

[1] The ultimate issue that needs to be determined in these proceedings is whether the respondent should be committed to gaol for non-compliance with his court ordered maintenance and other obligations to his ex-wife and children. The resolution of that issue in turn depends on what the true nature of the current proceedings is under the Constitution.

[2] The applicant seeks the committal of the respondent for the alleged contempt of the court order in application proceedings, brought by way of notice of motion. This form of process is known in our law as civil contempt. It is so called because it is the aggrieved party in civil litigation that seeks the committal of the recalcitrant offender and not the state. In terms of the common law the contempt is nevertheless a criminal offence and may also be prosecuted by the state in criminal contempt proceedings.[1] This difference in procedure has led to conflicting decisions in this division and elsewhere on what effect the advent of the Constitution has had on the nature of civil contempt proceedings and in particular on what standard of proof is required before an offending litigant may be committed to gaol for this form of contempt of court. No doubt for this reason the judge president directed that the present matter be argued before a full court of this division.

[3] The respondent denies that he failed to comply with his obligations issued under the court order upon the parties' divorce on 3 June 2003, or that he did so wilfully and in bad faith. As will appear more fully later in this judgment I am satisfied that the applicant has shown, on either the civil or criminal standard of proof, that the

[1] *S v Beyers* 1968 (3) SA 70 (A) at 80E-81F.

respondent has failed to comply with the earlier court order. I am also convinced that it is highly unlikely that he did not appreciate what he was doing, but I am hesitant to make such a finding of wilfulness and bad faith beyond reasonable doubt on affidavit evidence alone. Were it not for this doubt it would have been possible to skirt the divisive issue of *onus* altogether.

Civil and criminal contempt under the common law

[4] Ever since the decision in *S v Beyers*[2] it has been accepted that under the common law contempt of court, in the form of non- compliance with a court order to do or not to do something (*ad factum praestandum*), is a criminal offence which may, however, be enforced or prosecuted either by way of civil or criminal contempt proceedings. But committal for contempt under the common law was not available as a blunt instrument of first choice to enforce all court orders. Court orders sounding in money (*ad pecuniam solvendam*) could not be enforced in this manner and satisfaction had to be sought in the execution process of attaching and selling the assets of the offending litigant.[3] If this process was unsuccessful insolvency could follow, but the litigant who was unable to pay could not be imprisoned because of his poverty.[4] Committal for contempt was only available in those instances where offending litigants had been ordered by the courts to do or not to do something and had failed to comply with these orders.[5] Maintenance orders were and still are interpreted as performance orders and not merely as orders sounding in money, and are thus enforceable in contempt

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[2] *Ibid*.
[3] Harms, *Civil Procedure in the Supreme Court*, B45.2.
[4] Statutory provisions that still sought to make that possible have not survived the Constitution : *Coetzee v Government of the Republic of South Africa, Matiso and others v Commanding Officer, Port Elizabeth Prison and others* 1995(4) SA 631 (CC).
[5] Harms, *op cit*, B45.3 – 45.4.

proceedings.[6]

[5] In order to succeed in civil contempt proceedings the applicant had to prove the terms of the order, knowledge of these terms by the respondent, and a failure by the respondent to comply with the terms of the order. Upon proof of these requirements the presence of wilfulness 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.[7] Upon conviction imprisonment could be imposed but a sentence of imprisonment was usually conditionally suspended.[8]

Conflicting decisions under the Constitution

[6] In *Uncedo Taxi Service Association v Maninjwa and others* [9] (' the first *Uncedo* case) Pickering J in this division held that the common law civil committal for contempt procedure was in conflict with the Constitution insofar as an *onus* was placed on the offender and proof of guilt was required only on a balance of probabilities.[10] He nevertheless held that civil contempt proceedings for committal are competent provided that the proceedings are conducted fairly in accordance with the principles of fundamental justice measured against the yardstick of the provisions of s. 35 (3) of the Constitution.[11] This means, amongst other things, that civil contempt proceedings for committal may still be used, but that the *onus* is on the applicant to show beyond reasonable doubt that all the requirements for the offence

[6] *Bannatyne v Bannatyne* 2003 (2) SA 809 (CC) at para [18]. Inability to pay is not an issue in this application.
[7] The most recent authoritative restatement of these requirements is to be found in *Frankel Max Pollak Vinderine v Menell Jack Hyman Rosenberg* 1996 (3) SA 355 (A) at 367H-368A.
[8] Harms, *op cit* B45.4.
[9] 1998 (3) SA 417 (E).
[10] *Ibid*, at 428A-B.
[11] 429C-D and 429 F-J.

have been met.

[7] The first *Uncedo* case was followed in this division in *Uncedo Taxi Service Association v Mtwa and others* [12] and in *Victoria Park Ratepayers Association v Greyvenouw CC* [13]. Outside this province it was referred to with approval in *In re Chinamasa*.[14] In the first *Uncedo* case Pickering J expressly [15] declined to follow an earlier unreported judgment of Jones J in this division, *Kamma Park Properties (Pty) Ltd v Ngesi and others*, [16] where Jones J held that where committal is sought in civil contempt proceedings the *onus* of proof in civil cases is applicable.[17] In *Laubscher v Laubscher*[18], however, De Vos J held that the pre-constitutional common law of civil contempt was still good law and accordingly declined to follow the new approach initiated in the first *Uncedo* case.

In what follows I will set out my reasons why I consider the general approach adopted by Pickering J in the first *Uncedo* case to be correct, but I trust that it will be apparent that the research and reasoning in all these cases assisted greatly in clarifying the issues discussed below.

Is committal for civil contempt still a criminal offence under the Constitution?

[8] In my respectful view this is a fundamental question that needs to be resolved right at the start of any analysis or discussion. If committal for civil contempt remains

[12] 1999 (2) SA 499 (E).
[13] [2004] 3 All SA 623 (SE).
[14] 2001 (2) SA 902 (ZSC).
[15] Note 9 above, at 426I.
[16] Case no 12220/1997, ECD.
[17] *Ibid*, at p.3 of the typed judgment.
[18] 2004 (4) SA 350 (T).

a criminal offence under the Constitution then it inevitably follows that a respondent in such committal for contempt proceedings is an 'accused person' under s. 35 (3) of the Constitution. The constitutionality of the civil contempt procedure, as well as the nature and incidence of the *onus*, then need to be assessed in the context of the respondent's right to a fair trial under s. 35 (3). If, however, he or she is not an accused person facing a criminal charge then these questions and the nature of the relief sought in civil contempt proceedings needs to be re-assessed in the context of an individual's more general fundamental right to freedom and security under s. 12 of the Constitution. The outcome may conceivably be different, although, as will appear later, I doubt that the different route would allow easier incarceration.

[9] To hold that a respondent in civil contempt for committal proceedings is not an accused person would be a radical departure from our common law. In *S v Beyers* [19] the following was stated in this regard:[20]

"In navolging van die Engelse reg word die minagting dan beskryf as siviele minagting. Dit is egter ewe duidelik dat hierdie vorm van minagting nie deurgaans 'n strafregtelike inhoud ontsê is nie. Dit word telkens beskryf en behandel as 'n misdaad met geen aanduiding dat dit anders as die gemeenregtelike minagting van die hof beskou word nie. Of dit in ooreenstemming met die Engelse reg is, is minstens te betwyfel, maar na my oordeel weinig ter sake, omdat die omskrywing van die misdaad in ons reg nie deur die Engelse reg bepaal word nie. Die opvatting dat dit inderdaad 'n misdaad is, blyk ten duidelikste uit die feit dat 'n gewone straf opgelê word as die aansoek slaag. *Strafoplegging sonder dat 'n misdaad gepleeg is, sou in ons reg onbestaanbaar wees*. Al is afdwinging van 'n burgerlike verpligting die hoofdoel van die straf, dan word dit nogtans nie opgelê bloot omdat die verpligting nie nagekom is nie , maar uit hoofde van die misdadige minagting van die Hof wat daarmee gepaard gegaan het. Dat die straf meesal opgeskort word op voorwaarde van nakoming van

[19] Note 1 above.
[20] *Ibid*, at 80D-H.

die tersaaklike bevel, en dat die straf dan nie in werking tree nie indien die aansoeker afstand sou doen van sy regte ingevolge die bevel, doen niks hieraan af nie. Afhangende van die aard en erns van die minagting, sou die Hof gevolglik slegs 'n gedeelte van die straf kan opskort, en dan sou afstanddoening van regte deur die aansoeker die onopgeskorte gedeelte nie raak nie" [my emphasis].

[10] In *S v Mamabolo (E TV and others intervening)* [21] the Constitutional Court upheld the constitutionality of the crime of contempt of court, in the form of scandalising the court, in the face of a strong freedom of expression challenge to its existence. Committal for contempt of court orders does not raise such a strong countervailing democratic value and, provided that the individual's right to freedom and security is adequately safeguarded in the proceedings, there seems to be no compelling reason to hold that it should not continue its existence as a criminal offence in our law. 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.[22] It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts.[23] It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals.[24] 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.[25]

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[21] 2001 (3) SA 409 (CC).
[22] Section 1 (c).
[23] Section 165 (1) – (5).
[24] Section 34.
[25] See *Mamabolo's case*, note 21 above, at paras. [16] to [20], and *Victoria Park Ratepayers Association v Greyvenouw CC*, note 13 above, at paras. [19] to [23].

[11] Upholding the rule of law and effective administration of justice would thus, in general, justify the retention of committal for civil contempt as a form of the crime of contempt of court under the Constitution. In my view too, it cannot be denied that the entrenchment of the individual right to freedom and security as a fundamental right under the Bill of Rights, both in its general form under s. 12 and in its particular fair trial formulation under s.35 (3) of the Constitution, is immeasurably stronger than "through the vehicle of common law maxims and presumptions which may be altered or repealed by statute".[26] If the Constitution safeguards the freedom and security of the person more strongly than, or at the very least as strongly as, the common law there seems to be no compelling reason in logic or substance why committal for contempt should not survive as a criminal offence, but should rather be dealt with as a special civil remedy that allows the committal of a person to gaol on less stringent requirements than those required for committal following upon conviction for a criminal offence.

[12] The constitutionality of certain statutory provisions allowing for committal in non-criminal proceedings has found qualified approval in the Constitutional Court, but in my respectful view these cases do not offer support for the contention that committal for civil contempt is not a criminal offence, nor for allowing committal to gaol for civil contempt on less stringent grounds than for other criminal offences. These cases did not deal with committal for civil contempt in the form of non-compliance with court orders, but with committal orders for recalcitrant witnesses in criminal proceedings [27] and sequestration proceedings.[28] It is true that the committal

[26] Per Langa J (as he then was) in *Coetzee v Government RSA*, note 4 above, para. [35].
[27] *Nel v Le Roux NO and others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592.
[28] *De Lange v Smuts NO and others* 1998 (3) SA 785 (CC). *Bernstein and others v Bester and others*

process under these provisions have much in common with the committal for contempt upon non-compliance with court orders, but apart from the fact that committal for civil contempt of court orders has historically been treated as a criminal offence in our law, there is in my respectful view no indication in those cases that the procedural fair trial safeguards in those cases, derived from s.12 and not s.35 (3) of the Constitution, would justify committing someone to gaol if, for example, there is reasonable doubt as to whether the person had acted in contravention of the statutory provisions in question.

[13] I therefore conclude that committal for civil contempt of court orders remains a particular form of the crime of contempt of court under the new constitutional order, and that a respondent brought before court for committal in civil contempt proceedings is an 'accused person' under s. 35 (3) of the Constitution.

Are civil contempt proceedings consistent with the fair trial provisions of s. 35 (3)?

[14] Two distinct but interrelated aspects arise in this regard. The first is whether the civil application procedure lends itself to conformity with the fair criminal trial safeguards of s. 35 (3). The second is whether the nature and incidence of the *onus* in a criminal trial, namely proof beyond reasonable doubt of the guilt of the offender to be discharged by the prosecution, should and can be accommodated in such proceedings. I will deal with the latter aspect first.

[15] As far as I am aware the Constitutional Court, although acknowledging that the

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1996 (2) SA 751 (CC); 1996 (4) BCLR 449 dealt with a legislative provision in liquidation proceedings where the committal only followed upon conviction of an offence.

right to individual freedom and security is not absolute, [29] has only once sanctioned a legislative provision placing a legal *onus* on individuals where they have been deprived of their fundamental right to freedom and security, namely in the case of bail.[30] An important consideration in that decision was that the deprivation of liberty upon arrest was constitutionally allowed,[31] and that in a bail application the enquiry "is not really concerned with the question of guilt".[32] Where, however, the enquiry is concerned with the question of guilt, such as where a person is charged with a criminal offence and is thus an 'accused person' under s. 35 (3) of the Constitution, the Court has consistently invalidated 'reverse *onus*' provisions which requires a conviction despite the existence of reasonable doubt.

[16] Instructive as an example of this consistency in the present context is the Constitutional Court's decision in *S v Singo*. [33] In that case the wording of s. 72 (4) of the Criminal Procedure Act [34] was held to impose a legal burden of proof on an accused which meant that the accused had to disprove fault, which was an element of the offence he faced, made him liable to be convicted and forced him to give evidence, thus impinging upon his right to remain silent.[35] Counsel for the state sought to argue that the limitation of the fair trial rights was justified by the need for effective prosecution of conduct that hinders the administration of justice both in the immediate sense of failing to effectively prevent an accused person from appearing in

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[29] *Coetzee v Government RSA*, note 4 above, at paras [10] – [12].
[30] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1998 (4) SA 623 (CC).
[31] *Ibid*, at para. [6].
[32] *Ibid*, at para. [11]. It is also interesting and relevant to note that the form of the proceedings in bail matters, namely criminal proceedings (*S v Botha and another* 2002 (2) SA 680 (SCA)), does not determine either the incidence or the nature of the *onus* in such matters.
[33] 2002 (4) SA 858 (CC). See paras [25] and [26] and footnotes 27 – 33 for a summary of the principles involved and a list of the cases dealing with these issues.
[34] No. 51 of 1977.
[35] *Op cit*, note 33 above, at paras. [29] to [31].

court and the broader consideration of the public losing confidence in the system of criminal justice.[36] The Constitutional Court held that the importance of dealing effectively with conduct that hampers the administration of justice justified the intrusion into the right to silence, but did not justify the legal burden of proof imposed on an accused which requires a conviction despite the existence of reasonable doubt, nor the limitation of the presumption of innocence that went with it.[37] It then ordered words to be read into the section to make it clear that only an evidential burden to show a reasonable possibility of doubt rested on the accused.[38]

[17] The same constitutional considerations at issue in committal for civil contempt of court orders – upholding the rule of law, the need for effective administration of justice, the protection of an individual's right to freedom and security, and the fair trial provisions of s.35 (3) of the Constitution – were present in some form or another in *Singo's case*, and in *S v Mamabolo* [39] as well, but in neither case was it considered justifiable to touch upon the "golden thread" of the presumption of innocence that runs through criminal trials.[40] I am unable to find other compelling reasons why committal for the crime of civil contempt of court orders should be treated as a singular exception to this fundamental principle.

[18] In all cases involving the potential threat of deprivation of an individual's liberty and security the Constitutional Court has stressed that the conduct of judicial proceedings should be assessed in the context of the general and particular

[36] *Ibid*, at paras. [32] to [33].
[37] *Ibid*, at paras. [37] to [40].
[38] *Ibid*, at para. [44].
[39] *Op cit*, note 21 above.
[40] See *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC) at para [38].

constitutional safeguards protecting the 'procedural' aspect of freedom,[41] and if necessary be brought into conformity with those safeguards. Where that was possible adaptations were made (by reading words into the legislation as in *Singo's case*), or, where not, legislation or procedures were invalidated (as in *S v Mamabolo* where the summary procedure was found wanting). In no instance, however, has the Court countenanced a limitation of the right to be presumed innocent by placing a legal burden of proof on the accused in facing a criminal charge.

[19] Constitutional authority thus requires that unless any objectionable intrusions into fair trial rights in proceedings attracting criminal sanctions for offenders can be ameliorated by bringing them in line with these rights, the procedures themselves will not pass constitutional scrutiny and need to be invalidated. In the first *Uncedo* case Pickering J adopted this approach, by re-appraising the pre-constitutional common law committal for civil contempt proceedings and adapting the requirements to bring the procedure, and the incidence and nature of the *onus*, in line with what s. 35 (3) of the Constitution required. It seems to me that the only remaining enquiry is whether these attempts were successful. If not, civil contempt proceedings for committal for non-compliance with court orders risks invalidation in the same way as the summary procedure in *S v Mamabolo*.

[20] However, the reasoning and conclusion in *Laubscher* [42] appears to have gone the other way: namely that the effort to bring the procedure in line with the fair trial requirements of s. 35 (3) places too onerous a burden on a private litigant, [43] does not

[41] See, for example, *De Lange v Smuts*, note 28 above, at paras [22] and [42] to [46].
[42] Note 18 above.
[43] *Ibid*, at para [19].

give due recognition to rule of law and effective administration of justice considerations,[44] and must accordingly be upheld in its common law form where the offender bears a legal *onus* of rebutting, on a balance of probabilities, an inference of wilfulness and bad faith after the applicant had shown a transgression of the court order.[45] I am, with respect, unable to agree with this reasoning and outcome.

[21] Firstly, it appears to me to be in direct conflict with Constitutional Court authority that a reverse *onus* of this kind, leading to the possibility of finding an accused guilty of a crime even where there is reasonable doubt as to her or his guilt, is unconstitutional. Similar rule of law and effective administration of justice considerations failed to save the reverse *onus* provision in s. 72 (4) of the Criminal Procedure Act [46] in *Singo's case*.[47]

[22] Secondly, civil contempt proceedings for committal are in my view relatively easily capable of being adapted to provide effective enforcement of court orders. The *Uncedo* cases illustrate how, and I do not intend repeating the comprehensive treatment of dealing with the fair trial requirements of s. 35 (3) in the judgment of Pickering J in the first *Uncedo* case,[48] except to state that I respectfully agree with him. I only wish to add three different considerations in view of the perceived difficulties alluded to in *Laubscher*.

[23] The first relates to the perceived weakness of a private litigant to bear the full

[44] *Ibid*, at paras [17] and [25].
[45] *Ibid*, at para [27].
[46] No 51 of 1977.
[47] Note 33 above.
[48] Note 9 above.

burden of a criminal trial and the criminal standard of proof. The difficulty, with respect, is in my view overstated. Ordinary civil contempt proceedings in any event require an applicant to adduce evidence that the court order was issued and not complied with by the offending litigant. The *Uncedo* line of cases does not require *more* evidence than that, nor would a criminal prosecution by the state. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure in accordance, as far as possible, with the provisions of s.35 (3), and that the *assessment* of disputed evidence should now be done on the basis of a different standard of proof, namely beyond reasonable doubt instead of on a preponderance of probabilities. On a practical level I doubt very much whether the different standard would require anything more of an applicant than the old standard in the vast majority of cases. In those exceptional cases, rather difficult to envisage, where the resources of the state will be needed to prove the offence these resources may be utilised, as was decided in *S v Beyers*.[49]

[24] Secondly, it should be kept in mind that application or motion proceedings are primarily geared to a determination of issues on the basis of facts that are not in dispute. Normally applications are decided on the basis of facts set out by the respondent, together with other admitted facts in the applicant's papers. In such a case, or where it appears that no *bona fide* or genuine dispute of fact arises from the papers, the issues are determined on essentially undisputed facts, by their very nature already accepted as beyond doubt, not only reasonable doubt. The change in the incidence and nature of the *onus* of proof initiated in the first *Uncedo* case does not make cases of this kind any more difficult for the applicant to prove than was

[49] Note 1 above.

previously the case.

[25] Lastly, where the higher standard of proof may well play a role is (1) in the manner of drawing inferences from these undisputed facts, (2) in determining disputes of fact on the papers alone, and (3) in the approach to determining facts in dispute where there has been a referral to oral evidence. All these potential difficulties can be overcome, however.

If inferences need to be drawn from the undisputed facts it would have to be kept in mind that the ultimate inference as to the guilt of the offender must be the only reasonable inference and not merely the most plausible or probable one.

The 'robust' approach to determine disputed facts on paper might have to be reconsidered or adapted, but that kind of approach is in any event rarely and then only very circumspectly applied.

And when disputes of fact are referred to oral evidence they will have to be resolved beyond reasonable doubt, not merely on a balance of probabilities.

These are all aspects (and there may be others) that in my respectful view form part of the presiding judge's obligation in civil contempt proceedings for committal to ensure a fair trial in accordance with s. 35 (3) of the Constitution. In my view it is an obligation that can quite comfortably and practically be fulfilled without prejudice to the applicant's interests in obtaining performance of a court order expeditiously and

efficiently, or to the respondent's right to a fair trial.

[26] There is thus, in my respectful judgment, a practical and efficient manner of accommodating civil contempt proceedings for committal within the constitutional requirement of a fair trial under s. 35 (3), by requiring proof by the applicant of *all* the elements of the *crime* of contempt of court beyond reasonable doubt. Such a procedure passes constitutional muster. It is a procedure that is less intrusive of the offending litigant's right to freedom and security (as expressed in the right to a fair trial under s. 35 (3) or otherwise), than leaving civil contempt for committal proceedings untouched in its pre-constitutional common law form (even if the latter may conceivably pass constitutional scrutiny - which I do not believe it does). For that reason alone the less intrusive possibility is to be preferred.

Declarations of contempt

[27] Civil contempt proceedings have always had a dual nature[50] and the discussion thus far has focused only on its criminal aspect. In my judgment the perceived difficulties associated with its continued treatment as a criminal offence should not prevent attention being given also to its purely civil character and the possible development of the common law in that regard. In addition to its retention as a criminal offence, albeit with a stricter standard of proof, the potential effectiveness of issuing a (civil) declaratory order that an offending litigant is in contempt of a court order should not be underestimated. Such a declaration would have as its purpose to uphold the rule of law too,[51] but even if shorn of its criminal sanction or punishment

[50] "Dit is 'n proses van tweeslagtige aard wat volgens sivielregtelike procedures afgedwing word", *S v Beyers*, note 1 above, at 80C.
[51] Compare *M v Home Office and another* [1993] 3 All ER 537 (HL) at 567e-g.

there is, in my view, no reason why other civil sanctions may not attach to such an order. One of them may be that the offending litigant could be prohibited from using the civil courts in other litigation until he has purged his contempt, or, in the case of an appeal against such an order, that the usual suspension of the order pending the determination of the appeal should not come into operation. The important point is, however, that upholding the rule of law and ensuring the effective administration of justice is not wholly dependent on the effectiveness of civil contempt proceedings in its guise as the prosecution of a criminal offence that allows committal to gaol of the offender. Other possibilities, purely civil in nature, need to be explored and developed as well. The form of the order in this judgment will reflect an attempt to develop ancillary civil sanctions in this manner.

Application to the facts

[28] The applicant alleges that the respondent is in contempt of the court order granted upon the divorce between the parties in June 2003 by failing to pay maintenance for the applicant and the minor children since October 2004, by failing to pay property rates in terms of the order, and by failing to pay R9000,00 per month in respect of applicant's motor vehicle since December 2004, also in terms of the order.. The respondent contends that he and the applicant verbally agreed that he would pay an amount of R84613,42 to liquidate the applicant's overdraft with Absa Bank as a loan and that if the loan was not repaid this sum would be set off against the maintenance he owed in terms of the court order. This amount is, he says, in excess of what he owes the applicant under the disputed court orders.

[29] In reply the applicant attached correspondence between the parties which gave the lie (for reasons I will more fully explain in the next paragraph) to the respondent's version of the supposed verbal agreement between him and the applicant. A striking out application was then filed on respondent's behalf, on the basis that this correspondence was privileged, as forming part of without prejudice negotiations between the parties. That application fails for the same reason as the respondents defence to the application must fail, namely that the correspondence clearly establishes an agreement between the parties which contradicts the assertions now made by the respondent on affidavit.

[30] The respondent, in his affidavit, relies upon the payment of R84613,42 on 8 April 2004 as proof of the alleged oral agreement between him and the applicant. The correspondence between their attorneys show that this amount was paid into the Absa account at the suggestion of the *respondent* on 2 April 2004 in return for his release from another liability that he owed the applicant in respect of what is referred to in the papers as 'the Hardman debt'.[52] At that time there was no dispute about arrear maintenance. The respondent's proposal was accepted by the applicant on 5 April 2004 [53] and payment was made into the account three days later. On 10 June 2004 respondent's attorneys confirmed that the payment was in return for release from the Hardman debt [54] and that the only outstanding issue related to costs. This issue was also duly resolved later.

[31] The same kind of refutation of the respondent's contentions about the vehicle

[52] Papers at 159 -160, paras 1 and 4.
[53] Papers, at 162, para 2.
[54] Papers at 170, paras 1 and 5.

payments appears from the papers. The correspondence clearly shows that the respondent undertook to pay monthly instalments of R9056,00 in respect of a new substituted vehicle which he duly paid for eight months.[55] He then stopped these payments and managed to obtain repayment from the bank on the pretext that he was only liable as a surety, at a time when the original suretyship agreement could not immediately be traced. When this agreement was found, his attorneys again agreed to continue payment in the sum of R9000,00 per month.[56]

[32] The correspondence and the respondent's own conduct until the present application was launched shows that an agreement was reached between the parties in respect of the issues referred to above (and others not relevant now). Maintenance was not one of the issues covered by the agreement. The payment of R84613,34 was never raised as a defence in respect of the non-payment of maintenance (which arose only in October 2004). The first time that the respondent's present 'defence' was raised, was in his opposing affidavit filed on 7 April 2005. When the correspondence putting paid to this spurious defence was filed the respondent sought to have it struck out without disputing the correctness of its contents. The legal basis for its exclusion – without prejudice negotiations – failed because those negotiations resulted in the conclusion of an agreement.[57] The result is a factually undisputed agreement, evidenced by the correspondence and confirmed by the subsequent conduct of the parties up until the present application was launched.

[33] These undisputed facts establish that the respondent is in breach of a court order

[55] Papers, at 160, para 3, and 66.
[56] Papers, at 172.
[57] See Zeffertt, Paizes & Skeen, *The South African Law of Evidence*, at 619 and note 669 thereto

of which he was aware. I consider those elements to have been established beyond reasonable doubt. They are undisputed on the papers. But in order to find the respondent guilty of the criminal offence of contempt of court he must also be found to have breached the court order wilfully and in bad faith. I have little doubt that it is probable that he did so but whether that is the only reasonable inference to be drawn is an issue that I think should only be determined after the respondent has had the opportunity, if he so wishes, to explain his apparently contemptuous conduct in the witness-box, and be subjected to cross-examination on the question. Should the applicant wish to pursue the matter that far, the order set out below will allow her to do so.

[34] I do however consider that by the ordinary civil standard, on a preponderance of probabilities, it has been established that the respondent is in contempt of the earlier court order. The parties agreed that in the event of such a finding it would be competent to issue a declaratory order to that effect. I mentioned earlier that such an order could be made more effective by attaching further possible sanctions thereto if the contempt is not purged. The order will make provision for some of these possibilities.

Order

[35] The following order is made:

1. It is declared that the respondent is in contempt of the court order dated 3 June 2003 in respect of the maintenance payments, motor vehicle payments and rates

payments as set out in the applicant's founding affidavit;

2. The respondent is granted a further ten days from the date of this judgment to purge the contempt set out in paragraph 1 above, failing which the applicant may set the matter down upon notice as a matter of urgency, with or without further amplification of the papers, calling upon the respondent to show cause why:-

(a) a further order should not issue in terms of which the respondent would be prohibited from proceeding in any other litigation in any other matter that he may be involved with in the High Court until he has purged the said contempt;

(b) he should not pay the costs of any further proceedings on an attorney and client scale;

(c) further sanctions to ensure purging of the contempt should not be imposed against him.

3. The respondent is ordered to pay the costs of the application.

4. The applicant may, in any event, within 10 days of the date of this judgment, set the matter down as aforesaid for argument on whether the matter should be referred to oral evidence on the issue of whether the respondent wilfully disobeyed the court order of 3 June 2004, for the purposes of determining whether the respondent should be committed to gaol for the crime of contempt of court.

J.C.Froneman

Judge of the High Court.

I agree.

B.Sandi

Judge of the High Court.

I agree

N.Dambuza

Judge of the High Court.