

Short notes on:

CONTEMPT OF COURT. THAT'S JUST CRIMINAL. ISN'T IT?

Introduction

Firstly, it must be noted that no, contempt of Court does not relate solely to criminal proceedings nor to criminal behaviour. Contempt of Court applies *whenever* behaviour exhibits simple disregard of a Court order.

Contempt of Court is divided into two categories namely, civil contempt and criminal contempt. In terms of the latter instance, disgrace is brought upon the Court's moral authority. In terms of civil contempt of Court, an action of disobedience is displayed. Therefore, the separation of the two forms of contempt lie in the conduct of the contemnor and the resulting 'effect' it has on the particular Court. This clarification ensures that any notion whereby it is thought that criminal contempt is a crime and civil contempt it not, is now dismissed

When can I make use of this remedy?

Not every instance of disobedience of an order of Court will justify the remedy of contempt of Court. In civil proceedings, there are a variety of alternative remedies that can be relied upon and it is strongly recommended that these remedies first be considered (e.g. a writ of execution) and possibly exercised, as an application to find someone in contempt of Court (be it civil or criminal) may be punishable as a crime. This factor then brings about the issue of violation of the contemnor's rights which is in conflict with Section 12 of the Constitution, stating that no person shall be deprived of freedom arbitrarily or without just cause as well as not being detained without a trial.

A distinction was drawn by the common law between *ad solvendam pecuniam* (payment of money) and *ad factum praestandum* (performance of a certain act alternatively, refraining from performance of a certain act). Failure to pay money in terms of a Court order is not considered an action of contempt. Another way to assess this factor is whether the performance can be quantified. Therefore, it is important to consider what the performance of the Court order is before you can rely on contempt.

How do I apply for contempt of Court? Should this be my recourse.

In order to find the contemnor in contempt, a notice of motion along with an affidavit is used in support of the application. The notice of motion must state that the Respondent is to show cause as to why an order should not be made on a final basis declaring that the said Respondent is in contempt of a particular paragraph of the Court's order alternatively, is in contempt of the Court's order in totality.

However, certain elements must be proven in order to determine whether the contemnor can in fact be found in contempt. The Court in *Mstjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT-99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) cited that the below requirements must be satisfied in order to succeed with your application:

1. The existence of the order;
2. The order must be served on, or brought to the notice of the alleged contemnor;
3. There must be non – compliance with the order; and
4. The non – compliance must be wilful and *mala fide* (there must be deliberate defiance of the Court order).

Bear in mind that due to the fact that contempt is a criminal offence, in respect of point 4 above, the standard of proof is that of beyond a reasonable doubt. This entails that the alleged contemnor bears an evidentiary burden to rebut the allegation that his non – compliance was wilful and *mala fide*.

Conclusion

Where non – compliance of an order of Court is in relation to a quantifiable thing (*ad solvendam pecuniam*), you may not rely on contempt. Alternative remedies could possibly be declaratory orders, mandamus, structural interdicts or a writ of execution. These remedies do play a role in enforcing Court orders in a civil proceeding.

Due to the fact that contempt proceedings may result in the alleged contemnor being found guilty of a criminal offence, should this recourse not be the only available option, the Courts will not be favourable to an application for contempt of Court. Therefore, the writer is of the opinion that it is of

the utmost importance to adequately assess all possible remedies before contempt can even be considered.

