

PENILOPE POSTULKA

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GEORGE POSTULKA

[HIGH COURT—Fatiaki, J.—3 May 1988]

Civil Jurisdiction

C *Husband & Wife Maintenance Order—failure by husband to make payments—contempt procedure—omission of penal notice as to consequence of failure to pay—liberty of subject at stake—also there were other remedies—dismissal of application—but refusal to hear application for variation until contempt purged.*

K. Bulewa for the Petitioner

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T. Fa for the Respondent

Penilope Postulka (petitioner) applied to the Court for an order pursuant to Order 52 for the committal of George Postulka (respondent) for contempt of court in disobeying its order dated 19 February 1988 requiring him to pay interim maintenance of \$200 per month to the petitioner. This order was made in the absence of both petitioner and respondent; but the respondent was served (with the application) knew of the existence of the order and did nothing about it. It was sealed on 26 February 1988 and personally served on the respondent on 29 February 1988.

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The Court considered the order became effective the day it was made (i.e. 19 February) and "expired" on the 19 March 1988. On the 25 March 1988 the application for contempt (prematurely lodged on 14 March 1988) was listed before the Court which granted leave.

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The petitioner had proceeded relying on Order 45, r.1 and r.5. Order 45 r.7 made it a condition precedent to the enforcement of an order of this Court by way of committal that it should bear on it the penal notice required by the rule. This was not so endorsed in the case of the order served on the respondent nor on the original order. Its object was to call attention to the result of disobedience *Iberian Trust Ltd. v. Founders Trust and Investment Co.* (1932) 2 K.B. 87 at p. 97. The Court rejected the submission that this was an error arising "in the Court" or a "clerical mistake". He refused to entertain an application for amendment. The Court was mindful that a litigant ought not be able to say that the order (of a court) is a wrong order, therefore he will not entertain it.

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The Court proceeded to hear a motion by the respondent seeking a variation in the order for interim maintenance. He considered that the continued contempt of the respondent was a matter to be taken into account on the exercise of the discretion whether to entertain the application for variation.

Held: The proceedings were penal in nature. The liberty of the subject is at stake. Therefore the Rules might strictly to be complied with.

Application dismissed. Cross application dismissed.

Cases referred to:

Iberian Trust Ltd. v. Founders Trust & Investment Co. (1932) 2 K.B. 87
Stockton Football Co. v. Graston (1895) 1 Q.B. 453
Gordon v. Gordon (1946) P.D. 99
Danchevsky v. Danchevsky (1975) Fam. 17
Hadkinson v. Hadkinson (1952) P. 285

FATAKI, J. :

Judgment

This is an application by the petitioner pursuant to Or.52 for the committal of the Respondent for his contempt in disobeying the order of this Court granting interim maintenance to the petitioner.

The order of which the respondent is alleged to be in contempt of Court was made by the Chief Justice on the 19th of February, 1988 the terms of which are as follows:

"IT IS ORDERED THAT the respondent pay the Petitioner Interim maintenance in the sum of \$200 (Two Hundred Dollars) per month until further order of this Court.

AND IT IS FURTHER ORDERED THAT the Respondent be at liberty to apply to this Court."

It is undisputed that the order was made by the Chief Justice in the absence of both the respondent and his counsel. It is unclear how or why this occurred and in view of the nature of the application is a serious matter. but, the fact remains that the respondent was served and knew of the existence of the order and did nothing about it.

The interim maintenance order was subsequently sealed by the petitioner on the 26th of February 1988 and personally served on the respondent on the 29th of February 1988.

In my view the order became effective on the 19th of February 1988 when it was made and time began to run from that date and expired on or about the 19th of March 1988.

On the 14th of March 1988 the petitioner issued an *ex parte* motion for leave to issue committal proceedings against the respondent. This was clearly premature but as the motion was listed for hearing on the 25th of March 1988 (by which time the month had expired) I entertained the motion and granted leave.

The petitioner in seeking to enforce the order of this Court by way of committal proceedings was clearly relying on the provisions of Or. 45 rule (1) sub-rule (1) para. (e) and Order 45 rule 5(1)(a) of the Rules of the High Court.

A By the clear terms of Or. 45 Rule 7(4)(a) it is a condition precedent to the enforcement of an order of the Court by way of committal that the copy of the order served on the respondent should bear an indorsement of the penal notice required by that rule.

This penal notice, it is conceded by counsel for the petitioner was not indorsed on the copy of the order personally served on the respondent nor for that matter on the original order filed in Court.

B I note that a similar indorsement is required by virtue of Rule 237(3) of the Matrimonial Causes (Supreme Court) Rules Cap. 51 where enforcement by way of attachment is sought.

As was stated by Luxmoore J. in *Iberian Trust Ltd. v. Founders Trust and Investment Co.* (1932) 2 K.B. 87 at p. 97:

C "The object of the indorsement is plain—namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences."

Counsel for the petitioner sought, at the hearing of this application, to invoke Or. 20 rule II to amend the sealed order by adding the necessary penal notice. I have noted the contents of Or. 20 rule 7(1) and (2).

D I cannot accept that the absence of the requisite penal notice is a "clerical mistake" or that its "ommission" is an error arising in the Court's actual order neither am I satisfied that the application for such an amendment, as was sought in this case, made orally from the bar table can properly be entertained by the Court.

E The fact that these proceedings are penal in nature and that the liberty of the respondent is at stake leads me to the conclusion that the Rules ought to be strictly complied with. (see *Stockton Football Company v. Graston* (1895) 1 Q.B. 453) and that failure to comply with them should not be lightly condoned by this Court.

I am fortified in my view by the words of Lord Greene M.R. in the case of *Gordon v. Gordon* (1946) PD 99 at 103 where he said:

F "Attachment and committal are very technical matters and as orders for committal or attachment affect the liberty of the subject such rules as exist in relation to them must be strictly obeyed. However disobedient the party against whom the order is directed may be, unless the process of committal and attachment has been carried out strictly in accordance with the rules he is entitled to his freedom. I am not now speaking of contempts in the face of the court, but contempts by disobedience of an order for something to be done outside the court."

G Then at p. 104:

H "It is to be remembered that the process of enforcing orders in civil litigation made for the benefit of a party against the other party by committal or attachment is nothing more than a form of execution. It is that form of execution by which the successful litigant enforces his right against his unsuccessful opponent. If he fails to comply with the strict rules he is the sufferer because he has not succeeded in protecting or enforcing his right by this very effective means."

I am mindful that no litigant should be permitted to say that he feels strongly that the order is a wrong order and, therefore, he will not obey it.

I do however realise that this is an order made pursuant to Section 84(2) of the Matrimonial Causes Act Cap. 51 in which there are numerous alternative provisions for the enforcement of this kind of order under PART XVII of the Act and PART XVI of the Rules made thereunder. There is also the Judgment Debtor Summons procedure available under Section 4 of the Debtors Act Cap. 32.

The existence of alternative enforcement provisions and procedures led Lord Denning M. R. in *Danchevsky v. Danchevsky* (1975) Fam. 17 to say at p. 22:

"Whenever there is a reasonable alternative available instead of committal to prison, that alternative must be taken....I do not think this was an appropriate case for punishment, certainly not for imprisonment. The husband was obstinate and misguided. The right way of dealing with the matter was to take steps to enforce the order of the court, but not to imprison him. That would do no good to him or to anyone. It would put him out of work and make him unable to pay maintenance for the children or do anything."

The petitioner's application for an Order of Committal is refused. She is however free to pursue any other remedy available to her to enforce the interim maintenance order of the Court.

For the sake of completeness I now deal with the motion and affidavit filed by the respondent seeking a variation in the order for interim maintenance granted by the Chief Justice on the 19th of February 1988.

The motion and affidavit were filed on the 15th of April 1988 almost two months after the order for interim maintenance was made and during a time when the respondent was very well aware that committal proceedings were being taken against him for his contempt in disobeying this Court's order of the 19th February 1988.

I have not the slightest doubt that the respondent knew about this Court's interim maintenance order and has chosen to disregard it.

"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular (unfair) or even void." (per Romer L.J. in *Hadkinson v. Hadkinson* (1952) P 285 at p.288).

The question whether or not the respondent, who is in contempt of this Court's order, should be heard on his motion to vary or discharge the interim maintenance order of the Court, is clearly a matter of discretion for the Court to be exercised having regard to whether the continued contempt of the respondent is such as to impede the course of justice or arose due to the fault or misfortune of the respondent.

In my view the enforcement of maintenance orders made for the benefit of a wife is important to the administration of justice and in this case the respondent's contempt arose due to serious default on his part.

In the circumstances unless and until the respondent purges himself of his contempt he cannot be heard to make this application and I therefore dismiss his Summons seeking to vary this Court's interim maintenance order.

Both applications refused.