



Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party); Rhombus Construction Company Limited & another (Exparte); Mwangemi (Contemnor) (Judicial Review E002 of 2021) [2021] KEHC 301 (KLR) (2 December 2021) (Ruling)

Neutral citation: [2021] KEHC 301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW E002 OF 2021**

JM MATIVO, J

DECEMBER 2, 2021

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

RHOMBUS CONSTRUCTION COMPANY LIMITED INTERESTED PARTY

AND

**ACCOUNTING OFFICER, KENYA PORTS AUTHORITY EXPARTE
KENYA PORTS AUTHORITY EXPARTE**

AND

JOHN MWANGEMI CONTEMNOR

RULING

1. This ruling determines the application dated 7th October 2021 filed by Rhombus Construction Company Limited (the applicant), the Interested Party in these proceedings seeking orders that summons be issued and a date be granted for personal attendance of Amb. John Mwangemi, the Acting Manager Director and Accounting Officer of Kenya Ports Authority, (herein after referred to as the Respondent or the Procuring Entity where the context so permits) to attend this court for hearing of the instant application for contempt for disobeying orders of this court issued on 5th March 2021 and



- the orders issued by Public Procurement Administrative Review Board (the Review Board) on 23rd October 2020 and 6th January 2021 respectively in PPAEB Application Nos. 131 of 2020 and 150 of 2020, Rhombus Construction Company Limited v The Accounting Officer, Kenya Ports Authority & 2 others relating to Tender No. KPA/073/2019-20/TE for supply, testing and communication of 12No. New Reachstackers.
2. The applicant also prays that Amb. John Mwangemi be committed to jail for a period as this court may determine and or pay a punitive fine for contempt of the aforesaid orders. Additionally, the applicant prays that the costs of and occasioned by this application be personally borne by the said Amb. John Mwangemi on indemnity basis.
 3. Further, the applicant prays that the said Amb. John Mwangemi be compelled to purge the contempt by revoking the notification of purported termination of procurement process in respect of the said tender dated 21st September 2021. Lastly, the applicant prays that the said Amb. John Mwangemi be compelled and or allowed to purge the contempt by forthwith issuing notification to unsuccessful bidders in respect of said tender.
 4. In support of the application, the applicant states that the alleged contemnor is in gross contempt of the said orders, he is fully aware of the said orders and the terms of the orders because he was an active participant in the proceedings being the Accounting Officer of the Procuring Entity. It contends that the Procuring Entity ought to have complied with the said orders by issuing notification of award to the applicant and by entering into a procurement contract with the applicant who was determined to be the successful bidder.
 5. It states that Procuring Entity has failed to issue it with the Notification of Award of the subject tender and the contract despite being fully aware of the terms of the court orders. As a consequence of the said failure, the applicant states that the alleged contemnor has knowingly and wilfully breached, violated, disobeyed, disregarded and or thwarted and undermined the effect and purpose of the said orders.
 6. It states that the Procuring Entity in utter contempt of said orders terminated the subject tender under the stratagem that the tender validity period has already expired before conclusion of the proceedings yet it elected not to comply with the strict timelines imposed by this court and the Review Board. It states that the alleged contemnor bears the primary responsibility under section 44 of the *Public Procurement and Asset Disposal Act*¹ (the PPAD Act) of ensuring that the Procuring Entity complies with the said act and lawful orders issued under the said act.
 7. The applicants further state that on 23rd October 2020, the Review Board in PPARB application Number 131 of 2020 ordered the cancellation of the award of the subject tender and it directed the Procuring Entity to comply with the orders of the Review Board issued on 7th September 2020. It also directed the Procuring Entity to extend the tender validity period pursuant to section 88(1) of the Act for a period of 30 days. Lastly, it ordered the Procuring Entity to pay the applicant costs of the Review in the sum of Kshs. 305,000/=.
 8. The applicant states that the above decision was not challenged, so, it was final and binding upon the parties under section 175 (1) of the Act. Additionally, the applicant states that the Review Board heard and determined the Review Application number 150 of 2020 and rendered its decision on 6th January 2021 in which it directed the Accounting Officer of the procuring Entity to comply with the orders of the Board issued on 23rd October 2020 in PPARB No. 131 of 2020. It also directed the Procuring Entity to furnish the Board with a status report on compliance with the orders of the Board issued on 23rd October 2020 in PPARB No. 131 of 2020 within 21 days from the date of the said decision. It

¹ Act No. 33 of 2015.



also ordered that the tender validity period for the subject tender to be extended for a further period of 30 days from the 7th January 2021. Lastly, it ordered the Procuring Entity to pay the applicant costs of Kshs. 255,000/= within 14 days from the date of the decision.

9. Further, the applicant states that the Procuring Entity sought to review App No. 150 of 2020 in these proceedings and on 5th March 2021, this court ordered inter alia that the orders of 23rd October 2020 and 6th January 2021 be complied with. It states that the said order contained a penal notice. Further, the Court of Appeal dismissed the Procuring Entity's appeal on 26th April 2021 and allowed the applicant's cross-appeal. Additionally, the applicant contends that since the said orders have never been set aside, the Procuring Entity has an obligation to comply. It states that the alleged contemnor knowingly withheld the Notification of the Award of the subject tender to the successful bidder and also failed to notify the unsuccessful tenderers. Further, it failed to conclude the procurement proceedings by executing the contract with the applicant; and that vide a letter dated 21st September 2021 it purported to terminate the procurement process. Lastly, the applicant states that the aforesaid conduct amounts to contempt which is an affront to this court's judicial authority under Article 159 (1) of the *Constitution*.
10. The application is opposed. On record is the Replying affidavit of Amb. John Mwangemi, the alleged contemnor dated 21st October 2021. The substance of the affidavit is that the orders sought are drastic, that they amount to upsetting the basic tenets of the Constitution which engrains the sacrosanct nature of a person's liberty, and that the application is incompetent because the applicant seeks to cite him for contempt of orders issued by the Review Board. He averred that he assumed office as the Acting Managing Director of the procuring entity on 1st July 2021 and by the time he assumed office, the subject dispute had been litigated culminating in the Court of Appeal judgment delivered on 26th April 2021 and also, the time for complying with the orders of the Review Board had lapsed. Additionally, he deposed that contempt proceedings are criminal in nature, that liability is personal and it must be demonstrated that he acted in breach of the orders, and, if there was any breach of court orders it occurred long before his appointment.
11. He averred that in compliance with the orders of the Review Board, the Procuring Entity proceeded with the tender process within the confines of the law but the procurement department raised concerns that the financial bids submitted by the bidders were way beyond the budgetary allocation for the procurement, consequently, the tender was cancelled under section 63(1) (b) of the PPAD Act. He averred that that the orders of the Review Board did not take away the Procuring Entity's discretion to abide by the law and one of the possible ways of concluding the tendering process is termination and cancellation of the process within the confines of the law and the orders of the Review Board.
12. Additionally, he deposed that in compliance with the orders of the Review Board, the Procuring Entity proceeded with the tendering process and it invited the two qualified bidders, among them the applicant to participate in competitive negotiations in line with the directives of the Review Board and at the conclusion of the negotiations, the applicant emerged as the lowest evaluated bidder. He averred that the Procuring Entity in compliance with the directive of the Review Board engaged in competitive negotiations notwithstanding the fact that it's not a tenable option under the PPAD Act.
13. Also, he averred that prior to concluding the procurement process, the Procuring Entity received numerous complaints of criminal nature relating to the subject tender including allegations that the applicant had submitted forged documents in its bid. He averred that the said complaints constituted material governance issues as envisaged in section 63 of the PPAD Act, consequently, it exercised its right to terminate the tendering process pursuant to section 63(1)(e) of the PPAD Act and in so doing, it acted in accordance with the PPAD Act.



14. He averred that aggrieved by the Review Board's orders of 6th January 2021, the Procuring Entity instituted these judicial review proceedings but the High Court dismissed it on 5th March 2021 and ordered the Procuring Entity to comply with the orders of the Review Board. Further, aggrieved by the said ruling, the Procuring Entity appealed to the Court of Appeal vide Civil Appeal No. E011 of 2021 but vide a judgment dated 26th April 2021, the Court of Appeal dismissed the appeal. He deposed that after the Court of Appeal decision, the Procuring Entity set out to complete the procurement process and an important part of completing the process included consideration of the criminal complaints raised in relation to the tender. He averred that the DCI initiated investigations into the integrity of the Procurement Process and it wrote to the DCI enquiring whether they had concluded the investigations and DCI replied vide a letter dated 17th May 2021 received on 6th August 2021 by which time the tender validity period had lapsed
15. Mr. Mwangemi averred that the Procuring Entity had no powers under the law to extend the tender validity period and the Head of the Procurement and Supplies issued an opinion advising the subject tender to be terminated on grounds of operation of the law because its tender validity period had lapsed and premised on the foregoing reasons, he issued the letter of termination dated 21st September 2021 in accordance with the law. He averred that he had no legal mandate to extend the tender validity period and that compliance with the orders of the Review Board required the Procuring Entity to act within the confines of the law. He deposed that the applicant filed an application before the Board being No. 123 of 2021 seeking inter alia extension of the tender validity period which the Procuring Entity was supporting, and, that there was no bad faith or wilful breach of the said orders.
16. Both parties submitted extensively in support of their respective cases. On behalf of the applicant, it was submitted that the application complies with both the procedural and substantive legal requirements; that the applicant has disclosed the orders that have been breached, the nature of the contempt and the breach. The applicant submitted that the breach constitutes disobedience of court orders issued by the Review Board and that this court has powers to punish for contempt and to uphold the authority of this court and the subordinate courts. The applicant submitted that the alleged contemnor has been fully aware of the court orders and the terms of the orders. The applicant pointed out that the orders contained a Penal Notice and also the Procuring Entity was required to comply with the orders of the Review Board within 14 days. It argued that the tender validity period was extended for 30 days.
17. The applicant noted that the Court of Appeal upheld the decisions of the Review Board and the High Court. It submitted that the Procuring Entity knowingly withheld the Notification of the Award to the successful and unsuccessful bidders, and also it failed to conclude the process by executing the contract with the applicant despite knowing that the applicant herein was the successful bidder. It submitted that the Procuring Entity has refused to conclude the process within the time ordered by the Review Board and the court and its letter dated 21st September 2021 terminating the process was annulled by the review Board. Further, it argued termination must be within the law.
18. The applicant cited section 63(1) of the PPAD Act which provides for grounds for termination and argued that the said provision does not contemplate misconduct on the part of the Procuring Entity. It cited section 87 of the PPD Act and submitted that termination must be done within the tender validity period. It argued that failure to conclude within the tender validity period was in breach of orders issued by the Review Board and a decision done in breach of court orders is a breach of the Act, hence, the ensuing action is a nullity. It argued that time does not run on a nullity and that the tender validity period has not lapsed so long as the Procuring Entity remained in breach. To buttress its argument, it cited *Stephen Kibowen v Chief Magistrate's Court Nakuru & 2 others*² and *Republic v*

² {2017} e KLR.



*Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others ex parte Mwalulu & Others*³ in support of the proposition that time does not run on an illegality. Lastly, the applicant submitted that the defendant should be compelled to purge the contempt by issuing the Notification of the Award to the applicant and by notifying the unsuccessful bidders and in so doing it would uphold the dignity of this court.

19. On behalf of the alleged contemnor, it was submitted that that contempt of court is criminal in nature, so, the law must strictly be complied. Reliance was placed on *Samuel N. Mweru v National Land Commission & 2 others*⁴ which under scored 4 principles for cases of this nature. These are the terms of the orders; knowledge of the terms; failure to comply and the requirement to show wilfulness and bad faith. It was argued that the 1st to 3rd elements have been substantially dealt with, but the 4th test, namely, willingness has not been proved. It was argued that as at 1st July 2021 when the defendant was appointed as the Acting Manager, it is not possible to say that he wilfully disobeyed the order. To fortify his argument, *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui*⁵ and *Indian Airports Employees Union v Ranjan Chatterjee & Another*⁶ were cited in support of the proposition that willful disobedience must be proved. Also cited was *Maninderjit Singh Bitta v Union of India & Ors*⁷ which underscored the importance of demonstrating intentional and wilful contempt of court. It was submitted that the aspect of wilful disobedience has not been proved and that the Review Board stated that the tender was dead and incapable of being brought back. Responding to the argument that time cannot run on a nullity, it was argued that the Review Board held that time had lapsed.
20. It was also submitted that the Review Board had already rendered its decision and in the said matter the applicant had sought similar prayers as in this application. It was argued that the Procuring Entity established that the amount in question was beyond the budgetary allocation and that the law allows a Procuring Entity to terminate a procurement process. Further, that there are two ways of concluding a tender; one, by awarding or terminating it. It was contended that the Procuring Entity received criminal complaints against the applicant which were investigated but as they waited for the investigation report, the tender validity period lapsed, and, under the law, a Procuring Entity cannot extend the tender validity period more than once, so the only option was to terminate. Lastly, that the Procuring Entity intended to apply review of the Review Board's decision in Application No. 123 of 21.
21. In its submissions in reply, the applicant submitted that the tender is not dead, and that the Procuring Entity had all the tools to proceed with the procurement process. It argued that the procurement process is time bound with strict timelines and strict requirements for compliance and under section 176 of the PPAD Act failure to comply is a crime.
22. A useful starting point in determining the instant application is to recall that the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of criminal and civil law. The court must strike a delicate balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice in the name of the law-enforcement machinery. The pendulum over the years has swung to the right, that is, doing the right thing, which is, a court of law must never hurt the innocent nor should the guilty go unpunished.

³ {2004} e KLR.

⁴ {2020} e KLR.

⁵ {2021} e KLR.

⁶ AIR 1999 SC 886.

⁷ 2005 1 SCC 679.



23. Like a guided missile, a court order seeking to take away a person's liberty must be issued in the clearest circumstances, with great care, circumspection and trepidation. The order must be clear on the target. Equally, the alleged disobedience of a court order must be shown to be wilful and in bad faith. A realistic approach should be made in this direction bearing in mind that arrest and imprisonment permitted by the law of contempt requires balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other. It requires weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted, who is to be committed and where to put the weight and the emphasis. The exercise involves deciding which comes first – the Plaintiff, the alleged contemnor or the society, the law violator or the law abider. It requires balancing individual rights against society's rights wisely. The societies will which is engraved in the Constitution comes first. While balancing interests, there is a need to be alive to the question whether on the face our transformative constitution with an expanded Bill of Rights, our constitutional values permit a person to be put in prison to enforce compliance with a civil order when the pre-requisites are established only preponderantly, and not conclusively. A high standard of proof applies whenever committal to prison for contempt is sought because contempt of court is quasi-criminal in nature.
24. Turning to the instant application, the gravamen of the applicant's case is that it has in its favour orders issued by the Review Board which have been upheld by the High Court and the Court of Appeal. It argues, as I understood it that the Procuring Entity was obligated to comply with the court orders. The only way of complying was to issue the letter of Notification of Award to the successful bidder and also notify the unsuccessful bidders. On its part, the Procuring Entity as I understood it argues that complying with the court order did not preclude it from adhering to the provisions of the law and in particular the PPAD Act.
25. I am alive to the fact that both parties were in agreement that the termination of the tender was challenged before the Review Board and a decision was rendered. None of the parties availed the decision to this court. But again, both lawyers alluded to the possibility of an imminent Review being filed before the High Court challenging the same decision. As a matter of fact, as I was planning to schedule a date for delivery of this ruling, both parties appeared before for directions in a matter filed by the alleged contemnor challenging the said decision. It also emerged that the applicant herein had also filed an application in the High Court at Nairobi seeking to review the same decision. What is relevant for me is to be alive to the fact that before me is not an application for determination of the validity of the termination of the tender. That is the subject of the 2 judicial review applications mentioned above. Before is a simple question of whether the applicants have placed any material before me to establish commission of the offence of contempt as alleged to warrant committal to civil jail.
26. What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article 227. In addition, the scheme of the act is such that procurement process including cancellation of the tender process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally, the rule of law and such rights cannot be narrowly construed. Section 63 of the PPAD act provides for termination or cancellation of procurement and asset disposal proceedings in the following words:- (1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—(a) the subject procurement have been overtaken by—(i) operation of law; or (ii) substantial technological change; (b) inadequate budgetary provision.
27. By now it is trite that the PPAD act permits cancellation of a procurement process before the award is issued. The question before me is whether the court order meant that the above section was not available to the



Procuring Entity such that they could not cancel the procurement for any reason. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity, if established, must be evaluated to determine whether it amounts to a breach of the court order. This legal evaluation must, where appropriate, take into account the 5 attributes in Article 227, section 3 of the PPAD Act, and the Public Finance and Management Act in addition to upholding section 63 of the PPAD Act.

28. The law as I understand is that section 63 of the Act permits termination or cancellation of procurement and asset disposal proceedings provided the prerequisites listed there in are met. A faithful and purposive reading of the entire PPAD Act, Article 227 and the *Public Finance Management Act* leaves no doubt that any time before an award is issued, a Procuring Entity can terminate the process. However, the Procuring Entity is obligated to provide reasons. The court order directing the Procuring Entity to proceed to conclude the process cannot be reasonably construed to mean that the Procuring Entity is precluded from adhering to requirements of the Act. As to whether the termination can pass the statutory and constitutional validity, that is the subject of determination by the court hearing the proceedings challenging the termination, not this court.
29. Civil contempt is defined as willful disobedience of any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court. The court while considering the issue as to whether the alleged contemnor should be punished for not having complied with and carried out the direction of the court, has to take into consideration all facts and circumstances of a particular case. That is why civil contempt must be willful disobedience to any judgment, decree, direction, order, writ or other process of a court. Before a contemnor is punished for non-compliance of the direction of a court, the court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was willful and intentional. But while examining the grievance of the person who has invoked the jurisdiction of the court to initiate the proceeding for contempt for disobedience of its order, before any such contemnor is held guilty and punished, the court has to record a finding that such disobedience was willful and intentional.
30. If from the circumstances of a particular case, brought to the notice of the court, the court is satisfied that although there has been a disobedience but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the court may not punish the alleged contemnor. Contempt proceeding is not like an execution proceeding under the Code of Civil Procedure. Even though the parties in whose favour an order has been passed, is entitled to the benefits of such order, the court while considering the issue as to whether the alleged contemnor should be punished for not having complied with and carried out the directions of the court, has to take into consideration all facts and circumstances of a particular case.
31. Before punishing the contemnor for non-compliance of the decision of the court, the court must not only be satisfied about the disobedience of any judgment, decree, direction, writ or other process but should also be satisfied that such disobedience was willful and intentional. The contempt proceedings being quasi-criminal in nature, the standard of proof required is in the same is higher than in civil cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the criminal jurisprudence, including the benefit of doubt. There must be a clear-cut case of willful and intentional obstruction of administration of justice. The case should not rest only on surmises and conjectures. A question whether there is contempt of court or not is a serious one. It behooves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals.
32. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished. Punishment under the law of contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear



case is to make the law of contempt do duty for other measures and is not to be encouraged. The above definition of what constitutes contempt in no uncertain terms contemplates that in order to hold somebody guilty of civil contempt, there must be material available to show that he has willfully and in bad faith disobeyed the judgment, decree, direction, order or writ or other process of the courts, which is a sine qua non for a valid charge of civil contempt.

33. Turning to this case, a pertinent question arises, that is whether the disobedience in the circumstances of this is willful and in bad faith. As I have stated in several of my judicial pronouncements, the test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fides.’⁸ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.⁹ Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).¹⁰
34. The above requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.¹¹ Honest belief that non-compliance is justified or proper is incompatible with that intent. The Procuring entity states that it terminated the Procurement Process under section 63 of the Act. As at this point the tender validity period had lapsed. It says the Period lapsed as it awaited investigation reports from the DCI. I have stated elsewhere that before me is not a challenge on the validity or otherwise of the termination. That question is said to be the subject of two pending applications. I say no more. Before me is a straightforward question, which is whether the alleged contemnor is guilty of wilful and deliberate disobedience of the court orders. There is no contest that section 63 permits a procuring entity to terminate a procurement process provided any of the grounds listed therein are met. Even if the Procuring Entity misconstrued the applicability of the said provision, mere misapprehension of the law does not suggest bad faith.

⁸ *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* [1996] ZASCA 21; 1996 (3) SA 355 (A) 367H-I; Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004 (2) SA 602(SCA) paras 18 and 19.

⁹ *Consolidated Fish (Pty) Ltd v Zive* 1968 (2) SA 517 (C) 524D, applied in *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T) 691C.

¹⁰ *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T) 692E-G per Botha J, rejecting the contrary view on this point expressed *Consolidated Fish v Zive* (above). This court referred to Botha J’s approach with seeming approval in *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* [1996] ZASCA 21; 1996 (3) SA 355 (A) 368C-D.

¹¹ See the formulation in *S v Beyers* 1968 (3) SA 70 (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 (‘Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it’) and CR Snyman *Strafreg* (4ed, 1999) page 329 (‘Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van ‘n regterlike amptenaar in sy regterlike hoedanigheid, of van ‘n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande ‘n aanhangige regsgeeding wat die strekking het om die uitslag van die regsgeeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeeding’).



35. What is important is that in order to succeed in civil contempt proceedings,¹² an applicant must prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness 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.¹³ The question is whether the Procuring Entity by premising the termination on provision of the law, successfully rebutted any suggestion of willfulness and bad faith. Bad faith has been defined rarely, but an Australian court defined it as “a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker.”¹⁴ Recklessness was held not to involve bad faith.¹⁵ However, bad faith is a serious allegation which attracts a heavy burden of proof.¹⁶ It is my view that this heavy burden of prove has not been satisfied.
36. Three principals must be borne in mind when addressing applications of this nature. I have in several decisions enumerated these principles. I can only repeat what I have severally stated. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established. The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant’s motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. It is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. As I have repeatedly stated in previous rulings, the requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an ‘accused person.
37. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.
38. As O’Regan J pointed out, the power to imprison for coercive and non-punitive purposes is an extraordinary one. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system such that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.¹⁷ It is in public interest that court orders be obeyed. It is also in greater public interest that a citizen’s liberty is not taken away without proper factual and legal basis.

¹² See the High Court of South Africa In the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005

¹³ Ibid, at page 4

¹⁴ See *SCA v Minister of Immigration* [2002] F.C.A.F.C. 397 at [19].

¹⁵ *NAFK v Minister of Immigration* (2003) 130 F.C. 210, [24].

¹⁶ *Daihatsu Australia Pty Ltd v Federal Commission of Australia* (2001) 184 A.L.R. 576 (Finn J. at 587)

¹⁷ (content missing)



FOOTNOTE 17

Fakie NO v CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006).

39. Contempt proceedings are quasi-criminal in nature and the standard of proof required is higher than the ordinary civil cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the criminal jurisprudence, including the benefit of doubt. What emerges from the above discussion is that it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements discussed earlier. These elements which are a prerequisite to issuance of such orders must be established beyond reasonable doubt. I find that these prerequisites have not been established. Accordingly, the applicant's application dated 7th October 2021 fails. I dismiss it with no orders as to costs.

Right of appeal

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 2ND DAY OF DECEMBER 2021

JOHN M. MATIVO

JUDGE

