THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 512/09

In the matter between:

CHRISTIAAN JURIE ELS **Appellant**

and

ESMARÉ WEIDEMAN **1ST Respondent**

MEDIA 24 LIMITED **2ND Respondent**

IZELLE VENTER **3RD Respondent**

Neutral citation: *Els v Weideman* (512/09) [2010] ZASCA 155 (30 November 2010)

Coram: NUGENT, HEHER AND MAYA JJA

Heard: 18 November 2010

Delivered: 30 November 2010

Updated:

Summary: Court – contempt of – scope of order prohibiting publication of 'article' – breach was publication of cover, editorial and truncated article published together – mala fides inferred from content of editorial and cover.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Dlodlo J sitting as court of first instance):

1. The appeal succeeds in respect of the first and second respondents.
2. The appeal is dismissed in respect of the third respondent.
3. The order of the court a quo is set aside and replaced with the following:

'(1) The first and second respondents are convicted of contempt of court.

(2) The application against the third respondent is dismissed.'

4. The application is remitted to the court a quo to consider and, if necessary, hear evidence as to the sanctions appropriate to the offences committed by the first and second respondents, to impose the said sanctions, and to make an appropriate award of costs.
5. The first and second respondents are to pay the costs of the appeal jointly and severally.

JUDGMENT

HEHER JA (MAYA JA concurring):

[1] This case is about what a newspaper may lawfully publish but it is not about freedom of the press or freedom of expression. It concerns obedience to an extant court order.

[2] The appellant appeals against the whole of the judgment of Dlodlo J in the Western Cape High Court in which the learned judge dismissed with costs his application for an order that the respondents were guilty of contempt of court and imposing sanctions on them. Dlodlo J granted leave to appeal to the Full Bench of his division. On application to this Court by the appellant that order was replaced by one directing that the appeal be heard by this Court.

[3] The appellant is a singer and well-known personality in the South African

entertainment world. He emigrated to New Zealand and was living there in February and March 2008 when the events giving rise to this appeal took place.

[4] *Huisgenoot* and *You* are magazines edited by the first respondent, Ms Weideman, and owned and published by the second respondent, Media 24 Limited. They are Afrikaans and English versions of the same magazine. The third respondent, Ms Venter, was the editorial head of the Johannesburg office of the magazines.

[5] In setting out the chronology that follows, I make extensive use of the version deposed to by the respondents in the contempt proceedings almost all of which is common cause.

[6] On Monday 11 February 2008 the *Beeld* newspaper published an article stating that one Robbie Klay, whom it described as a 21 year old singer and actor, had been, over a period of seven years, the 'sex toy' ('seksspeelding') of one of the best known men in the South African entertainment world. The article did not identify the man, saying Klay did not want the name to become known because that would ruin the man's life. According to the article Klay had disclosed the name to *Beeld*, but in the article the man was referred to simply as 'die oom' (ie a respected older man).

[7] The article contained detailed allegations by Klay relating to the abuse he had suffered at the hands of this man and explained that Klay had kept silent about the abuse because he had feared that his own career would suffer as the man possessed power in the entertainment industry. The article concluded by saying that all attempts by *Beeld* to contact 'die oom' the previous day had been unsuccessful: his cell phone was switched off and several people suspected he was overseas.

[8] At 11h16 (22h16 New Zealand time) on 11 February 2008, Ms Marie Opperman, a journalist who wrote for Media 24's magazines and had previously written articles about Els's marriage and the birth of his daughter, sent an e-mail to him, attaching an English version of the *Beeld* article. Opperman said that it was alleged that Klay had said, off the record, that Els was the man he was referring to. She said *Huisgenoot* was sending

someone to interview Klay. She asked Els to comment, saying the deadline for the article was the next evening.

[9] Over the following two days Opperman sent four further e-mails bearing a similar import. Most distastefully, she also pressured the appellant to persuade his wife, a person well-known in South Africa in her own name, to comment on the allegations. Opperman also contacted the appellant's sister who informed her that she had earlier been told by the appellant that he was busy with an answer to her e-mails.

[10] Els replied to Opperman's last e-mail at 22h58 on 12 February 2008 (09h58 on Wednesday 13 February New Zealand time):

'Stuur asb vir my die storie. Ek en my prokureur is tans aan die gesels daaroor en ek sal antwoord sodra ek die storie gekry het.

Terloops: Ek kruip nie weg nie maar ek het niks om weg te steek nie en daarom wil ek nie kommentaar lewer nie. Ek sal beslis 'n naamskending saak maak sodra my onskuld bewys is, daarvan kan Robbie en Huisgenoot seker wees.'

[11] At about 10h00 on 13 February Els's South African attorney contacted the office of the publisher of family magazines at Media 24. In the result an undertaking was given to send a copy of the article to the attorney.

[12] At 12h01 (23h01 New Zealand time) on 13 February the draft article was sent to Els and attorney du Plessis by the third respondent who also notified du Plessis that she had done so. As indicated in the Opperman e-mails, the article was based on and quoted detailed allegations by Klay that Els had sexually molested him from the age of 10 years.

[13] At 12h38 (23h38 New Zealand time) on the same day Els sent an e-mail to the third respondent:

'My prokureur Koos du Plessis . . . sal jou kontak aangesien ek hom en 'n advokaat aangestel het om hierdie saak namens my te hanteer. Maak seker jy maak kontak met hom voor julle publiseer asb want hierdie ding is groter as wat 'n mens dalk besef en die gevolge kan ernstig wees.

[14] Shortly before 17h00 on 13 February 2008 Els's attorney informed Media 24's attorney that Els intended bringing an urgent application at about 18h00 at the home of Sutherland AJ in Johannesburg. (Although Els alleges that earlier in the day his attorney sought an undertaking that the article would not be published until he had been given a fair opportunity to respond to it, that allegation was denied by the second respondent's attorney.)

[15] The application comprised a notice of motion without a supporting affidavit. The respondents were Media 24 and Venter. Sutherland AJ heard argument from Els's counsel (who was present in person) and the respondents' counsel (over the telephone from Cape Town). He granted the relief sought and furnished brief oral reasons. Later that evening the learned judge e-mailed to the parties' legal representatives a document which in essence contained the terms of the order, and the following day he gave more detailed written reasons.

[16] Sutherland AJ's order included interim relief phrased as follows:

'An interim interdict shall issue immediately against the First and Second Respondents from publishing the article of which a copy was annexed as "A" to the Notice of Motion, pending the institution of an application for final relief by the Applicant within 10 days hereof.'

Annexure 'A' was the draft article which, earlier that day, Venter had sent to Els for his comments.

[17] The order did not expressly prohibit publication about the proceedings before Sutherland AJ. The fact that Els had applied for and obtained the interim interdict was, according to the respondents, widely publicized in the media.

[18] On 14 February 2008 the Cape newspaper *Die Burger*, (also a Media 24 publication) published an article which included the following:

'Huisgenoot en You se redakteur, Esmaré Weideman, het gisteraand gesê ná deeglike oorweging is besluit om voort te gaan met die publikasie van die artikel maar om nie die sanger se identiteit te openbaar nie.

"Ons is verbaas deur die interdik, aangesien die appèlhof onlangs bepaal het die media se mond

kan nie deur middel van 'n interdik gesnoer word nie, omdat die opsie bestaan om ná publikasie 'n lastereis in te dien. Nog meer verbasend is dat die interdik toegestaan is in die Witwatersrandse provinsiale afdeling van die hooggeregshof, aangesien Media 24 se hoofkantoor in die Kaapse provinsiale afdeling van die hooggeregshof is.

In die lig daarvan dat minstens twee ander persone ná publikasie van mediaberigte na vore gekom het om dieselfde sanger van seksuele molestering te beskuldig, ag Huisgenoot dit in openbare belang dat ons voortgaan met die publikasie van die artikel."'

[19] The contents of the article published in *Die Burger* on 14 February prompted one of Els's attorneys to telephone Venter about the impending publication in *Huisgenoot* and *You* and to confirm the contents of their conversation in an e-mail to Venter later that day. The e-mail included the following:

'Ons verstaan uit die artikel soos vanoggend in Die Burger gepubliseer, asook uit die gesprek hierbo na verwys, dat Huisgenoot/You ten spyte van die hofbevel van voornemens is om voort te gaan met die publikasie van 'n "gewysigde" weergawe van die artikel.

Ons plaas op rekord dat indien ons kliënt se identiteit op enige wyse afgelei kan word uit bogenoemde, u asook Media 24 hulself skuldig sal maak aan minagting van die hof en sal ons by regte wees om 'n lasbrief vir u arrestasie uit te reik.'

[20] On 21 February 2008 editions of *Huisgenoot* and *You* were published, each containing matter which, Els alleges, constituted the article referred to in the order of Sutherland AJ.

[21] On 25 February 2008 Els instituted contempt proceedings in the Western Cape High Court against Weideman, Media 24 and Venter. Although Weideman was not a party to the proceedings in Johannesburg she had knowledge of the order and obliged to comply with its prohibition.

[22] Els identified the offending matter in each of the publications as:

(a) the front cover;

(b) the contents page;

(c) the editorial;

(d) an article entitled 'MY JARE in GESENSOR! se KLOUE' (*Huisgenoot*) and 'CENSORED! molested me SEXUALLY' (*You*);

(e) a further article in the 'advice' section entitled 'INSTINK WAT JOU KIND KAN RED' (*Huisgenoot*) and 'HOW THE ABUSE BEGINS' (*You*).

[23] Els alleged that the respondents had published the article intentionally and in bad faith. (In argument before the court a quo, as the judgment of Dlodlo J makes clear, counsel on his behalf contended in the alternative that Weideman and Media 24 had been negligent and that negligence was sufficient to sustain their conviction of contempt of court because they were, respectively, the editor and the owner of the magazines.[1] That contention was repeated before us, but it is unnecessary to answer the questions that it raises.)

[24] Els asked for orders convicting the three respondents of contempt of court, sentencing Weideman to imprisonment, Media 24 to a fine, and Venter to a suspended period of imprisonment, and directing them to pay the costs, jointly and severally.

[25] The respondents opposed the relief on grounds which included the following:

(a) the Western Cape High Court did not have jurisdiction to hear the contempt application because the order allegedly breached had been made by the South Gauteng High Court;

(b) the matter published in the 21 February editions of the magazines did not constitute the article and its publication was not prohibited by the order on any other basis;

(c) that Weideman, not Venter, took the decision to publish; and

(d) Weideman did not intend to act in contempt of the order, nor did she act in bad faith.

[26] On 18 March 2009 Dlodlo J delivered judgment dismissing Els's application on the grounds that the Western Cape High Court did not have jurisdiction to entertain an

[1] Relying on *S v Harber* 1988 (3) SA 396 (A).

application in relation to alleged contempt of an order made by the South Gauteng High Court. For 'academic purposes and in the event that I am found to have wrongly applied the law on the question of jurisdiction' the learned judge proceeded to consider the merits of the application and concluded that 1) the offending publications differed from the article and were consequently not prohibited by the order, 2) Venter had not been involved in or responsible for the decision to publish and could not, therefore, be convicted of contempt of court, 3) Weideman's assertions that she did not act intentionally or mala fide could not be rejected as so implausible as to warrant dismissal without recourse to oral evidence, which Els had not sought, and, 4) negligence had not been raised as an alternative basis for conviction in Els's papers. The application was, for all these reasons, the learned judge considered, without merit.

[27] Before us on appeal both counsel approached the matter on the basis that, if we should find that the court a quo had indeed possessed jurisdiction to decide the application, we should proceed to decide the merits and not refer the matter back. Subject to what may have to be said on the question of sanction (should the arguments for the appellant otherwise be sustained) that appears to be an appropriate course as the matter has been fully argued in both courts.

Jurisdiction

[28] The issue in the appeal really involves two aspects. The first is the relationship between the High Courts of this country in regard to the enforcement of an order of one of them. The second is whether proceedings for contempt of court arising from a breach of an order of one High Court can be tried before another and, if so, whether the last-mentioned court can or should decline to exercise jurisdiction in such an application.

[29] The argument before this Court was largely directed to the second aspect. Perhaps that was because the law in relation to the first is clear and has been stated on previous occasions by this Court. In summary-

(a) a judgment and order of the Gauteng South High Court would run throughout the Republic and would have legal effect (including enforceability) in the jurisdiction of other

High Courts of our country: s 26(1) of the Supreme Court Act 59 of 1959;

(b) the first respondent resided in Cape Town and the second respondent had its head office and principal place of business in that city: the Western Cape High Court accordingly had jurisdiction over the persons of the first and second respondents: s 19(1) of the Act. The third respondent, who resides in Johannesburg, was subject to the jurisdiction of that Court by reason of the provisions of s 19(1)(b) of the Act;

(c) the alleged breach of the order took place in Cape Town when the offending article was published there. The cause therefore arose within the jurisdiction of the Western Cape High Court as contemplated by s 19(1)(a).

In the normal course this legislative foundation would be decisive and considerations of convenience and commonsense (both of which favoured the jurisdiction of the court a quo) would not need to be brought into the equation. See *Estate Agents Board v Lek 19*79 (3) SA 1048 (A) at 1067E-G and the cases there cited. As Steyn CJ said in *Roberts Construction Co Ltd v Willcox Bros* 1962 (4) SA 326 (A) at 336A:

'Ook ons Howe kan, wat hul prosedures en die ten-uitvoer-legging van hul vonnisse betref, reken op doeltreffendheid buite hul gebied. Die dagvaardings en bevele van die een Hof kan in die gebied van 'n ander bestel en afgedwing word.'

Why should that salutary principle not also apply to the application to the Western Cape High Court in this case?

[30] The respondents' argument (which found favour with the learned judge) was that the particular nature of the proceedings excluded the aegis of any court but the one that granted the order; the applicant could in the first instance have applied in the Cape instead of electing the jurisdiction of South Gauteng but, having made the election he was bound by law to submit such contempt as he perceived to that court. Dlodlo J was persuaded by the following considerations:

1. The South Gauteng and Western Cape High Courts are separate high courts each with its own area of jurisdiction (with particular reliance on s 166(c) of the constitution and schedule 16(4)(a) to it; and s 3(1) of the Rationalisation of Jurisdiction of High Courts Act 41 of 2001).

2. An application for committal for contempt of court has to be made to the court which made the order which a respondent is said to have disobeyed. Contempt proceedings are

not new proceedings but merely a continuation of proceedings previously instituted: *James v Lunden* 1918 WLD 88.

[31] I respectfully disagree with the reasoning of the learned judge.

[32] The separate jurisdiction of courts must be understood in the light of the practical adaptations brought about by the provisions of the Supreme Court Act and its predecessors. As pointed out in *Estate Agents Board v Lek* at 1062A-C, since 1912 the judgment or order of one division of the Supreme Court has been executable in the jurisdiction of all the others. Effectiveness is not sufficient of itself to confer jurisdiction but may be a factor to be taken into account, in conjunction with other factors, in considering whether some common law *ratio jurisdictionis* does exist to confer jurisdiction on a High Court in respect of the particular proceedings. For the reasons already mentioned such other factors are present in this case.

[33] With regard to the authorities relied on by the learned judge I agree with counsel for the appellant that they fall generally into two categories:

(a) those that hold that the High Court cannot or will not exercise jurisdiction to try a question of contempt of the order of a lower court or one exercising an unrelated jurisdiction: *R v Chadwick* (1901) 22 NLR 139 (the magistrate's court); *Clerk of the Peace v Davis* (1908) 29 NLR 20 (the magistrate's court); *Komsane v Komsane* 1962 (3) SA 103 (C) (the so-called 'Native Divorce Court'); *Wright v St Mary's Hospital Melmoth* 1993 (2) SA 226 (D) (the Industrial Court). None of these cases was concerned with the legal relationship between the divisions of the High Court as they presently exist;

(b) the continuation of proceedings in a high court in which it was initiated and in which an order was granted, at a time when the disobedient party has left the area of jurisdiction of that court (*James v Lunden*; *Cats v Cats* 1959 (4) SA 375 (C); *Di Bona v Di Bona* 1993 (2) SA 682 (C)). Such a case gives rise to considerations very different from those affecting the present appeal.

In the relationship between the High Courts the mutual duty to enforce orders has the consequence that each court recognises and protects the dignity of another wherever that dignity is infringed in South Africa (provided only there is established a recognised *ratio*

jurisdictionis).

[34] I do not agree that because contempt proceedings are a continuation of an already instituted proceeding or 'no more than a step in the execution of the judgment' (*James v Lunden*) the judgment must be enforced in the court which granted the original order. When a party leaves a High Court with an order in his favour (not obtained *ex parte*) those proceedings have been effectually completed (subject to appeal or in the case of an interim order, its confirmation). A subsequent breach of the order or wilful disobedience to its terms outside the jurisdiction of the court gives rise to a right in the holder to take steps to enforce the order wherever in South Africa he may find the defendant. To hold otherwise would negate the statutorily-created country-wide enforcement of judgments. Should the court approached by the complainant decide that, because of reasons peculiar to the case before it, the issue of contempt would more appropriately or conveniently be decided by the court which made the order, it might decide to exercise its powers to transfer the case to that court.[2]

[35] Nor do I agree unreservedly with the proposition that 'contempt of court is not an issue inter partes; it is an issue between the court and the party who has not complied with a mandatory order of court': *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) at 673D-E. When an order made in civil proceedings is disobeyed, the party in whose favour the order is made will bring the breach to the notice of the court if he has an interest in doing so (eg in seeking to enforce his judgment). The onus is upon that party to establish the contempt and persuade the court that sanction is merited; only on the rarest of occasions will the court initiate such proceedings itself.

[36] Counsel for the respondents boldly claimed support for his argument in the common law, which, so he submitted, restricted the power to try contempt proceedings to the court whose order was said to have been disobeyed. In addition to the authorities cited above he referred us to *In re Dormer* (1891) 4 SAR 64 and *Luyt v Luyt* 1926 WLD

[2] Section 3(1)(b) of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001.

179. But neither case addresses proceedings for contempt in a high court in respect of an order made by another high court in a dispensation remotely similar to that which now exists. Nor does either lay down a principle which is opposed to such enforcement. Indeed counsel was unable to formulate any principle that could justify such a limitation.

[37] Some reliance was placed by the respondents on a dictum of Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para [7]:

'[A] private litigant who has obtained a court order requiring an opponent to do or not do something (*ad factum praestandum*), [is permitted] *to approach the court again*, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction.' (Counsel's emphasis.)

A court that grants an order undoubtedly retains jurisdiction to ensure that the order is complied with, as pointed out in that passage, but the passage does not suggest that its jurisdiction to do is exclusive.

[38] To sum up, the statutory authority vested jurisdiction in the Western Cape High Court. That jurisdiction was buttressed by considerations of common-sense and convenience. Given the common constitutional foundation and mutual duty of enforcement among the High Courts of South Africa it makes no sense to insist that the court which issued the order is the only one to feel the insult to its dignity and, therefore the only proper court to try such an issue. None of the countervailing arguments carries persuasion.

[39] For the reasons set out above I find that the learned judge erred in finding that the Western Cape High Court lacked jurisdiction to try the issue of contempt of court.

The meaning of the order made by Sutherland AJ

[40] Media 24 published an edited and mildly truncated version of the article. Counsel for the respondents initially submitted that the interdict unequivocally prohibited publication of 'the article', meaning thereby the full article as reflected in annexure 'A' without deletions or modifications. However he conceded in argument that the intention of the learned judge, as appeared from his reasons for judgment, was to provide protection

pendente lite against damage to the appellant's reputation and the order would only have that effect if it covered the substance of the article.

[41] The order is unequivocal. It forbids publication of the article. Quite plainly the learned judge was concerned by the impact of the whole article. The order does not say or imply that the respondents may escape its breadth by making judicious cuts according to their own judgment. Sutherland AJ did not consider it appropriate to identify what he regarded as areas more damaging than others and confine his order to those areas. Nor was he asked by the respondents' counsel to frame the order so as to permit publication of any part of the article. To interpret the order as one permitting the respondents to perform that exercise would be to redefine its scope, and, potentially, destroy its effect. The only sensible and practical construction to place on it is that the respondents were prevented from publishing any form of the article that reflected its substance. Whether the substance is so reproduced is not a matter of quantity: its thrust may be repeated in a few well-chosen sentences.

[42] The alleged breach of the court order is said to have occurred on the cover, in the editorial and two articles published in *Huisgenoot* and *You* on 21 February 2008. Annexure 'A' to the court order is reproduced on page 12 of each magazine under the sensational headings referred to in para 23 above. An attempt was made to eliminate (by blackening words out) all direct or indirect references to the alleged abuser so as to eliminate any possibility of him being identified by a reader; so also in relation to his wife, who is also a national figure in her own right. What remains as an indicator of the identity of the abuser are the following passages in *Huisgenoot*:

'Een van die land se mees geliefde sangers is 'n kindermolesteerder.'

and

'Die man wie se gruwelike geheim hy nou oopvlek, het hom as tienjarige sanger [deleted] hom gehelp om 'n sukses van sy loopbaan te maak en het selfs drie liedjies [deleted]'. (Both in the 'MY JARE' article.)

and

'Jare lank het Robbie Klay . . . saamgeleef met die vretende geheim van die dinge wat die "oom" in die vermaaklikheidsbedryf aan hom gedoen het . . . En hy was bang dat sy mentor, met sy mag in

die musiekbedryf, sy ontluikende musiekloopbaan sou verongeluk.' (In the 'INSTINK' article.)

[43] The editorial and the articles were preceded by a cover on which a photograph taken from a recent CD or DVD made by Els and sold to the public had been used – although the face was distorted so as to be unidentifiable of itself, the jacket and trousers worn by Els are readily identifiable when compared with the CD cover or DVD box.

[44] Of further direct relevance is 'VAN MY KANT', the editorial written by Weideman which appeared on p 6 of the respective publications. In *Huisgenoot* it reads as follows:

'Teen dié tyd weet jy dalk al van die drama wat hom die afgelope paar dae afspeel rondom die publikasie van Huisgenoot se hoofstorie vandeesweek.

Jy sal weet dat die sanger Jurie Els 'n tydelike interdik aangevra het teen die publikasie van hierdie artikel, waarin die jong sanger Robbie Klay vertel hoe hy as kind en oor vele jare seksueel gemolesteer is deur 'n bekende in die Afrikaanse musiekwêreld.

Die hof het die interdik toegestaan. Dit is die eerste keer in Huisgenoot se geskiedenis dat 'n interdik teen ons toegestaan is.

Hoekom is daar so baie swart strepe deur die woorde op ons voorblad en in ons artikel (vanaf bl 12)? Die antwoord is regstegnies, maar uiters belangrik. Die regter het bevind dat DIE ARTIKEL – soos in alle regverdigheid aan die vermeende molesteerder voorgelê vir kommentaar – nie gepubliseer mag word nie.

Die naam van die mens wat die interdik aangevra het, mag wel bekend gemaak word.

Dit het ons dus met die volgende keuse gelaat: óf ons kon doen wat die meeste dagblaaie teen hierdie tyd reeds gedoen het en die naam van die aansoeker publiseer en nie besonderhede van DIE ARTIKEL bekend maak nie, of ons kon DIE ARTIKEL met geringe veranderinge plaas en steeds die besonderhede behou van die eksklusiewe diepte-onderhoud wat Robbie aan ons toegestaan het.

Die keuse was dus voor die hand liggend, want ons glo dis in die openbare belang dat die besonderhede van die jare wat Robbie na bewering seksueel misbruik is, bekend gemaak word. Minstens twee ander mans het ná Robbie se dapper bekentenis reeds na vore gekom om te sê dieselfde man het hulle ook seksueel gemolesteer.

Die hofbevel was vir ons verbasend, veral omdat die Appèlhof onlangs bevind het dat die media net in uitsonderlike gevalle deur 'n interdik gesnoer behoort te word omdat die keuse bestaan om ná publikasie 'n lastereis in te dien.'

[45] I do not propose to repeat the article in *You*. It is substantially an English

translation or edition of *Huisgenoot*. It may be noted however that

i) in the editorial the reference to 'geringe veranderinge' becomes 'certain changes'.

ii) in the first paragraph of the article 'Een van die land se mees geliefde sangers' becomes 'one of the most popular Afrikaans singers in South Africa'.

[46] Of course, what may not lawfully be published at all may also not be published piece-meal where the separate publications are presented as or comprise an integral disclosure of facts or allegations. In this instance the purchaser of the magazine and the reader of the editorial had his or her attention directed to the article with the intention that he or she should read the two in association and draw the logical conclusions.

[47] The respondents' answer is two fold: first that they were not interdicted from publishing the identity of the applicant for the interdict; second that the editorial does not say that Els brought the urgent application in his own interest and a reader would understand that he acted on behalf of someone else. There is no merit in either submission.

[48] The respondents were perfectly entitled to disclose the identity of the applicant for the interdict and to say that he had obtain relief in particular terms. They were interdicted from publishing the allegations of abuse contained in the article in such close proximity to the disclosure of identity of the applicant or in such a manner as to create the impression that the applicant and the abuser were one and the same person. That is exactly the impression created by the editorial and the article read together. That that was the intention of the editor is also apparent from the choice which she exercised as appears from the editorial.

[49] The suggestion that any reader of normal intelligence would regard Els as acting in the interest of another is disingenuous. It would be very unusual. The editorial creates no such impression and if the possibility were to occur to anyone it would be dispelled by the failure of the editorial to draw that very material fact to the attention of its readers. There is this further consideration: in the editorial the statement is made that the article was shown to the 'alleged abuser' whose name could not be made public for comment; this is

followed immediately by the statement that the name of the applicant for the interdict may be disclosed – the public was simply challenged to put two and two together.

[50] For these reasons I am left in no doubt that what appeared in the two magazines on 21 February 2008 comprised the substance of the interdicted article and such publication was therefore a breach of the court order.

Intention and mala fides

[51] Dlodlo J found, obiter, that neither intention nor mala fides had been established. These findings were challenged in this Court on three grounds:

1. Counsel submitted that the learned judge erred in not finding that the respondents had failed to advance evidence that established a reasonable doubt as to whether their non-compliance with the court order was wilful and mala fide.

2. Counsel also contended that analysis of the affidavits established that the respondents must have foreseen and did foresee that the publication carried the risk of Els being identified and that the necessary mens rea was accordingly present.

3. As a matter of law it was argued, culpa was a sufficient form of mens rea for purposes of contempt of court where the offending party acted in the capacity of the editor of a publication.

[52] Disobedience of a court order will constitute contempt when the breach is committed deliberately and in bad faith: *Fakie*, para 9:

'A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)'.

[53] Thus, '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': *Fakie*, para 10. Where there is an honest belief that non-compliance is justified

or proper, that is incompatible with the required state of mind (ibid).

[54] This Court, in *Fakie*, recognised that a respondent's version must be carefully scrutinised, but added that 'however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is "fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence' (at para 56). As Els did not ask for the matter to be referred to oral evidence or for Weideman to be cross-examined he must, as counsel for the respondents submitted, live with the consequences of the affidavits read for their own sake.

[55] The respondents adduced evidence calculated to show that they published the censored article with no intention to breach the terms of the order. In summary, if their protestations can be believed,

i) they understood that publication of a truncated version of the article which did not enable the reader to identify the alleged abuser fell outside the terms of the order; and

ii) they believed that it was in the public interest to publish details of Klay's unfortunate history of abuse.

[56] Nevertheless the respondents knew that if they disclosed the identity of the abuser in the article they would breach the order. As Weideman put it in her answering affidavit: 'Ek stem wel saam met die punt wat in die tweede laaste paragraaf van die brief gemaak word, naamlik dat minagting van die Hof slegs sou geskied "*indien ons kliënt (synde die Applikant) se identiteit op enige wyse afgelei kan word uit bogenoemde*", te wete die gewysigde weergawe van die artikel. Ek en die Tweede Respondent was versigtig om toe te sien dat die Applikant se identiteit nie uit die (gesensorde) artikel sou blyk nie.'

[57] The first respondent's state of mind before and at the time of publishing the article can best be understood by reference to her answering affidavit, the contents of the editorial and the design of the cover of *Huisgenoot*.

[58] As appears from the passage quoted in para 56 above, Weideman sought to

convey her understanding that the order would have been breached only if the identity of the abuser could have been inferred from the amended article. The editorial conveys a like impression. That however was a misrepresentation of her state of mind. That her true appreciation of the scope of the order was, correctly, much wider, appears from para 20 of her affidavit:

'Die artikel en die voorblad was juis gesensor aangesien die Tweede Respondent opreg van mening was dat daar sodoende aan die bevel voldoen sou word.'

Weideman knew, therefore, that disclosure of Els's identity (as the alleged abuser) either in the article or on the cover would breach the order. Consistent with that knowledge she must also have appreciated that disclosure in the editorial would have the same consequence.

[59] In both the editorial and her affidavit Weideman made much of her intention to publish the article because of the public interest (in the broad sense) in hearing about the abuse which Klay, and others like him, had suffered. However the following passage in her affidavit casts serious doubt on that motive:

'9.1 Ek ontken dat *"die artikel"*, soos dit voor die Agbare Regter van die WPA gedien het, in wese, of hoegenaamd in *Huisgenoot* en *You* gepubliseer is.

9.2 In hierdie verband wys ek daarop dat die beweringe dat mnr Klay as kind deur 'n ouer man gemolesteer is, asook besonderhede van die beweerde molestering, reeds teen 11 Februarie 2008 wyd gepubliseer is. Daardie beweringe was dus toe reeds wêreldkundig. Die hele punt van *"die artikel"* was Klay se bewering dat die Applikant die persoon was wat hom sou gemolesteer het. Dit was die identifisering van die Applikant as daardie persoon wat die wese was van die artikel. Daarsonder sou dit niks bygedra het tot die reeds-bestaande publikasies oor Klay se beweringe nie. *"Die artikel"* het dus om die identiteit van die beweerde molesteerder gedraai.'

That the role of public interest was, in her mind, subservient to exciting the narrower interest of the public in the identity of the abuser is also apparent from the cover of *Huisgenoot*. The attention of the reader is drawn to-

(a) the reproduction of the figure of the abuser (with the face obscured);

(b) the words 'as kind gereeld gemolesteer deur GESENSOR! se man'; and

(c) ‘My jare as GESENSOR! se seksspeelding’.

The ‘censored’ parts of the cover design were specifically created for the purpose and are not extracts from the article.

[60] The Court asked respondents’ counsel what publication of the article could offer the reader in the absence of disclosure of the identity of the abuser. He could only suggest the report of the ‘in-depth’ interview with Klay. But it is clear that nothing was added to the article after the making of the order. As the editorial makes clear the particulars of the article were retained (‘behou’), the details of the abuse were already in the public domain and, as the affidavit confirms, the spice of the article lay in revealing the name.

[61] In constructing the editorial Weideman knew that she was addressing herself to a public that wanted an answer to that question. The cover had been designed to stimulate that enquiry.

[62] It is clear from the editorial that the first respondent was irritated by the grant of the interdict and of the opinion that the judge had wrongly interfered with what she perceived as press freedom. Her description of the deleted passages as ‘regstegnies’ and of the changes in the article as ‘gering’ reflected her disdain for the order. She was clearly determined to publish the article. For the reasons already mentioned her resort to ‘the public interest’ must be taken with more than a pinch of salt.

[63] In the second paragraph of the editorial the appellant is identified by name as the applicant for the interdict. He is described as a singer and in the same breath the reader is told that the alleged abuser is a well-known figure in the Afrikaans music world. In the fourth paragraph we learn that the article was submitted to the abuser for comment. The assertion is emphatically made that although the article may not be published the name of the applicant for the interdict could be disclosed.

[64] Weideman provided no rational explanation for mentioning the name of the applicant for the interdict or for her express reference to her right to publish it. Nor was

counsel able to suggest an innocent reason for her doing so. The editorial did not say or suggest that Els had acted on behalf of the alleged abuser. Nor did it say that Els was not the abuser. Any reasonable reader would drawn the inference that the omission to do so was deliberate.

[65] The design of the cover of *Huisgenoot* cannot be divorced from the editorial. The photograph of the abuser was, as I have noted, taken from the cover of a current CD and DVD released by Els which showed a full length picture of him. The reproduction on the magazine cover would be recognised and identified beyond any doubt from a simple comparison of the clothing worn by the subject. Moreover, as the answering affidavit makes clear, there had been an historical association between the appellant and the magazine and its readers. Inter alia *Huisgenoot* had devoted space to the marriage of the appellant to a woman famous in her own right in South Africa and to the birth of their child. The curious and interested reader would have no difficulty in 'joining the dots' between Els's name in the editorial and the reference to 'GESENSOR! se man' on the cover, as indeed he or she was impliedly invited to do.

[66] Thus, when one considers the first respondent's affidavit with the content of cover and editorial one is left in no reasonable doubt that she, while appreciating both the scope and effect of the interdict, set out carefully and deliberately to construct a trail for her readers which would lead them to conclude that Els and the abuser who could not be directly named were one and the same person. That, in my judgment, is the only reasonable inference that follows from the facts and it is consistent with all of them.

[67] That being the conclusion, not only has Weideman failed to adduce credible evidence of her bona fides, but her intention unlawfully to circumvent the court order is manifest.

[68] The legal basis necessary to establish the guilt of the second appellant, her employer and the publisher of the magazines, is by no means so clear. Does its liability depend on proof of its individual mens rea or should a civil court apply the test laid down in s 332 of the Criminal Procedure Act (which renders a corporate body vicariously

liable).[3] In relation to the latter alternative, why should the basis of liability of a corporate body for contempt of court be tested by a standard different from that of an individual employer?

[69] But Weideman deposed as follows:

'Ek is behoorlik deur die Tweede Respondent gemagtig om hierdie verklaring af te lê. Waar van toepassing, is enige verwysing na my in hierdie verklaring ook 'n verwysing na die Tweede Respondent, tensy die teendeel blyk.'

It appears, therefore, that Media 24 accepted that the actions and intentions of its editor were in all respects to be regarded as its own, and that her bona fides or mala fides reflected its own state of mind. On that basis there is no ground of distinction between them and the second respondent also committed contempt of court in publishing the article.

[70] Appellant's counsel conceded that he was unable to establish a direct connection between Venter and the publication of the article. The cost implications of the involvement of the third respondent in the application and the appeal appear to be negligible.

[71] No evidence was placed before the court a quo by either party that would have enabled it (or us) to decide on an appropriate sanction. In my view, the appeal having succeeded, the matter should be referred back to it so that a proper enquiry can be undertaken and an apposite sanction be imposed.

[72] In the result the following order is made:

1. The appeal succeeds in respect of the first and second respondents.
2. The appeal is dismissed in respect of the third respondent.
3. The order of the court a quo is set aside and replaced with the following:

'(1) The first and second respondents are convicted of contempt of court.

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[3] Cf eg *Re Supply of Ready Mixed Concrete (No 2) Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AER 135 (HL) 142b-d, 151f-156f; *Twentieth Century Fox Film Corporation v Playboy Films (Pty) Ltd* 1978 (3) SA 202 (W) 203C-D.

(2) The application against the third respondent is dismissed.'

4. The application is remitted to the court a quo to consider and if necessary hear evidence as to the sanctions appropriate to the offences committed by the first and second respondents, to impose the said sanctions, and to make an appropriate award of costs.

5. The first and second respondents are to pay the costs of the appeal jointly and severally.

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J A Heher
Judge of Appeal

NUGENT JA (Maya JA concurring):

[73] I agree with Heher JA that the Western Cape High Court had jurisdiction in the matter for the reasons that he gives.

[74] It was submitted for the respondents that this case is about the right to media freedom but that is not correct. The time to assert the right to media freedom is while a matter is under adjudication. But once the adjudication is complete and the court had made its order then even the media must submit to the authority of the courts. Without assiduous preservation of that authority all rights become vulnerable – including the right to media freedom.

[75] To the mind of Ms Weideman the allegation by Mr Klay that he had been molested, and the details of the alleged molestation, were not newsworthy. Those had been published before. What was newsworthy was the identity of the alleged molester. Ms Weideman said that she understood the order to prohibit only that disclosure. In that she was wrong. The fact that much of the content of the article was already in the public domain might have provided grounds for Sutherland J to have limited the order but we are not concerned with what ought or ought not to have been prohibited. We are concerned with what the learned judge did or did not prohibit. That is a matter for construction of the

language in which the order is couched, unless the language is ambiguous.[4]

[76] There is nothing ambiguous about the language. It prohibited publication of the article and not only part of the article. There is no suggestion in the language of the order that 'the article' meant only the newsworthy part. Indeed, I have difficulty seeing how the language could possibly have been construed in that way.

[77] It was not disputed by counsel for the respondents that 'the article' contemplates its substance. Merely to black out names and words here and there does not seem to me to alter its substance – even if the article does cease to be news. What was published was in substance the prohibited article and by doing so Ms Weideman contravened the order – even leaving aside the editorial. What remains is only to examine the state of mind with which she did so.

[78] Ms Weideman revealed her state of mind in the editorial that she wrote. She was clearly annoyed that the order had been granted. Her response was to devise what she told her readers was a 'legalistically technical' form in which to publish the article. Reasoning from the premise that the magazine had not been prohibited from identifying the person who had applied for the interdict she went on to tell her readers that once the interdict had been granted the magazine had been left with two options: Either it could publish 'the name of the applicant [for the interdict] but not disclose details of the article'. Or it 'could publish the article with certain changes while retaining the details [of the molestation that was alleged to have occurred]'. Plainly she meant by the latter 'option' that the altered article would be published in addition to publishing the name of the applicant for the interdict because that is in fact what she did.

[79] There was another course that she might also have chosen – which was not to publish the name of the applicant for the interdict at all. The fact that that was not considered to be an option demonstrates ineluctably that she was intent upon having the name of Mr Els in the magazine. What she debated in her mind was only whether to add

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[4] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D-H.

the details of the alleged molestation. The debate could only have been brief because she told her readers that the choice was 'obvious'.

[80] In her affidavit Ms Weideman denied that she 'attempted to disclose the identity of Mr Els or that she had any intention in that regard'. She pointed out that the article itself did not disclose the identity of the alleged molester once portions had been blacked out – which is perfectly true. She also pointed out that the editorial 'did not indicate, or furnish an indication, that the person referred to in the article was the applicant for the interdict'[5] – which is also true in one sense. But what Ms Weideman does not explain is what purpose she intended to serve by publishing the name at all. Clearly she did so intending her readers to make the link.

[81] Ms Weideman was at pains to say in her evidence that the details of the alleged molestation in themselves were no longer newsworthy. They had value only if they were published in conjunction with the identity of the alleged molester. That being so there can be no explanation for her having published those details with the identity blacked out unless she intended her readers to fill in the gaps for themselves. Only the most slow-witted reader would not have identified the applicant for the interdict as the alleged molester. She might just as well have published the article in its original form for the difference that it made.

[82] The only reasonable inference from her conduct in publishing the name of the applicant for the interdict – in the absence of an alternative explanation, which has not been forthcoming – is that Ms Weideman intended her readers to deduce by inference who the alleged molester was. I have no hesitation finding that her denial that that was her intention is untruthful and rejecting it on the papers alone.[6]

[83] The state of mind for contempt of court in the present context is 'deliberate and

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[5] My translation.
[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C.

mala fide' defiance of a court order.[7] In *Fakie*[8] this court said the following in relation to proceedings for contempt of court:

'[O]nce the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.'

[84] Far from laying such a basis the evidence in this case establishes the contrary. Ms Weideman was pertinently aware that she was prohibited from disclosing the identity of the alleged offender yet she deliberately set about to do so. Her denial that she intended to disclose the identity of the alleged molester is palpably untrue. There was no suggestion in her affidavit that she believed that she was entitled to achieve what she knew was prohibited provided only that she achieved it through a ruse or that any such belief would be bona fide. The ineluctable finding in those circumstances is that she published the material deliberately and in bad faith in breach of the order. That is not the pursuit of media freedom – it is contempt of court.

[85] I agree with my colleague that the` act of Ms Weideman must be taken to be the simultaneous act of Media 24. I also agree that Ms Venter cannot be said to have offended. For those reasons I agree with the order that he proposes.

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R W NUGENT
JUDGE OF APPEAL

[7] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paras 9 and 10.
[8] Note 2 above.

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