

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

[MATRIMONIAL]

Suit No. DOMHMT2014/0022

BETWEEN:-

AUGUSTUS JEFFERSON MAXIME

Petitioner /Respondent t

and

LISA MONDESIRE MAXIME

Respondent/Applicant

Appearances: Mrs. Gina Dyer Munro for the Petitioner/Applicant
Mrs. Dawn Yearwood Stewart for the Respondent

2019: June 28;
July 3; 4.

ORAL RULING OF THE COURT DELIVERED ON THE 3 JULY 2019 :

[1] **STEPHENSON J.:** Ms Maxime whom we shall call Lisa has been in contempt of an order of this court made on the 22nd May 2015 not to remove the minor children of the marriage from The Commonwealth

of Dominica. She now applies to the court to purge her contempt. I granted her application and made a oral ruling these are my reasons for that decision; the parties on the following day fully settled the matter and I have made mention of the said settlement later down.

The background:

- [2] There was a trial of the ancillary proceedings in the divorce matter which culminated in the court rendering its written judgment¹. In the said judgment it was pointed out to this court that the Court declined to make an order regarding the said minor children of the marriage because the said children were out of the jurisdiction².
- [3] The court in its judgment in the ancillary proceedings also made an order regarding the appointment of a valuer for the property to be done by the court in the absence of agreement between the parties.
- [4] That application is still pending before the court.
- [5] Lisa being dissatisfied with the judgment of this court on the ancillary relief appealed the said judgment. She later on applied to the Court of Appeal for a stay of execution which was heard before the Court of Appeal on the 5th October 2018.
- [6] It was submitted by both Counsel that the application for the stay of execution pending appeal was withdrawn by Lisa on the basis that she was in contempt of court and based on the case of **Hadkinson -v- Hadkinson** ³ she could not be heard until she purged her contempt. This court was also informed by both counsel that there was also an order of costs made against Lisa. Regretfully neither party presented to this court an order of the Court of Appeal or a Certificate of Result.
- [7] Lisa subsequently brought the children back to the Commonwealth of Dominica and presented them to the court to purge her contempt. She also filed an application with supporting affidavits. The

¹ This Judgment was handed down 21 November 2016

² Ibid at paragraph 58

³ [1952] P. 285

respondent who we shall call Augustus objected to the application being heard and filed an affidavit in response to Lisa's application.

[8] There being no order from the Court of Appeal or certificate of result this court turned to the Court of Appeal Digest which I have been advised is the approved record of the Court of Appeal's sitting in Dominica. It is noted that a perusal Court of Appeal Digest minuting the Court of appeal hearing in the application for stay of proceedings pending appeal in this matter indicates that the withdrawal of the application was on a totally different point as stated by Counsel and no mention was made of the contempt issue.

[9] According to the Digest the matter was withdrawn on the point of law that the Affidavit sworn in support of the Appellant's application to stay proceedings was sworn by her agent who based on the contents of the Agent's Power of Attorney did not have the authority to so swear. It is clear to this court that it was found that the person seeking to prosecute the appeal on Lisa's behalf clearly did not have the power and or authority to do so, hence the withdrawal of the application.

[10] Learned Counsel Mrs Dyer Munro on behalf of Augustus is saying that Lisa has to purge her contempt before the Court of Appeal where the matter is now engaged and that this court should not be hearing the application to purge.

[11] Learned Counsel Ms Yearwood Stewart on behalf of Lisa disagreed with Mrs Munro and is submitting that there are pending applications before this court in the form of the application by Augustus to appoint a valuer and that the court has in its judgment reserved the right to deal with the children. That therefore the matters and issues still in part before this Court. Learned Counsel Stewart submitted that this case is to be distinguished from the situation as existed in the **Hadkinson case** as the only case that was engaging the court's attention in that case was the appeal and therefore the contemnor in that case had to purge her contempt before the court of appeal.

[12] Mrs Yearwood Stewart submitted that in producing the children to the Court here in Dominica that Lisa has purged her contempt and it is now for this court to decide the punishment so to speak to be rendered to the contemnor.

[13] Mrs Dyer Munro vigorously opposed the application and she submits that by virtue of the notice of appeal and the grounds of appeal this court by its order would be interfering with or limiting the court of appeals jurisdiction in respect of this matter. Counsel contends that the live issue before the high court cannot be looked at in oblivion that there is a live issue before the Court of Appeal and in the interest of the administration of justice that the application should be determined and dealt with by the Court of appeal.

[14] Mrs Dyer Munro also submitted that even if this court were to consider the pending application to appoint a surveyor to value the matrimonial property that she understood that the fact that Lisa is in contempt does not affect her as the respondent in that matter and she relied on and quoted Romer LJ in the **Hadkinson Case** when he said

“...that a person who is in contempt cannot be heard, prima facie applies to voluntary applications on his part - when he comes and asks for something; and not to cases in which all that he is seeking is to be heard in respect of matters of defence ...”⁴.

The Issues

[15] The issue is whether or not:

- a) Whether this court being the court of first instance should entertain the application to purge her contempt? and
- b) If so what action should the court take?

The court's consideration

[16] The term contempt of court is used to describe conduct which undermines or has the potential to undermine the course of justice. Contempt of court is a serious offence which can result in a costs order, fine or even custodial sentence being imposed on the offending party. The ruling in the **Hadkinson case**⁵ was designed so to speak to remedy actions which were done in defiance of

⁴ Ibid at page 290

⁵ Op cit

court orders by limiting if not barring the wrongdoers access to the court until they rectify the breach. This order became known as the Hadkinson Order.

[17] In Rayden & Jackson⁶ the authors had this to say
“A Hadkinson Order, or ‘an unless order’, is not strictly a method of enforcement, but rather a case management order. In Hadkinson –v- Hadkinson it was established that the Court may, at its discretion, refuse to hear a party to ongoing proceedings who remained in breach of an extant order unless and until that party remedied such breach”.

[18] Rayden and Jackson went on in the following paragraph⁷ to say that

“Such orders are draconian in effect and so necessitate a rigorous adherence to the rules. Hadkinson orders are not, and should not be, commonplace; they constitute case management orders of last resort in substantive proceedings where a litigant is in willful contempt.

[19] The Hadkinson order has been also described as an order of last resort. In 2017 in the case of **Assoun –v- Assoun**⁸ the Hadkinson Order was described thus

“Such an order is draconian in its effect because it goes directly to a litigant's right of access to a court. It is not and should not be a commonplace. As developed in case law, it is a case management order of last resort in substantive proceedings (for example for a financial remedy order) where a litigant is in willful contempt rather than a species of penalty or remedy in committal proceedings for contempt.”

[20] In the case of **Mubarak -v-Mubarak**⁹ the court outlined six questions which should be considered by the court to wit:

- (a) Is the party in contempt?
- (b) Is there an impediment to the course of justice?

⁶ Relationship Breakdown, Finance and Children/Relationship Breakdown and finances/Division D at Paragraph 23.805

⁷ Ibid at Paragraph 23.807

⁸ No1. 2017 EWCA 21 at para 3

⁹ 2006 EWHC 1260 (Fam)

- (c) Is there any other effective means of securing compliance with the court's orders?
- (d) Should the court exercise its discretion to impose condition having regard to the question?
- (e) Is the contempt willful?
- (f) If so what conditions would be appropriate?

[21] In **M –v- M (Financial Provision)**¹⁰ the Court ruled that

“It was a strong thing for a court to refuse a party to a cause, and it was only to be justified by great considerations of public policy. It was a step which a court would only take when the party itself impeded the course of justice and there was no other effective means of securing his compliance. The fact that a party has disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued to impeded the course of justice in the cause by making it more difficult for the court to ascertain the truth or enforce the orders which it might make, then the court in its discretion, refuse to hear him until the impediment was removed or good reason was showed why it should be removed.”¹¹

[22] In the **M –v- M**¹² case the husband was the contemnor and the respondent and based on the facts of the case the court found that he “had set out to deprive the court of the information which it needed and to which it was entitled ...” the court held “...the fact that the contemnor in the instant case was the respondent husband, as opposed to the applicant wife did not preclude the court from declining to hear him.”¹³

Can this court entertain the application to be purged of contempt?

[23] I am of the view that this court is not *functus* in the matter primarily because of Augustus' application to appoint a surveyor to value the matrimonial property. This application is still pending it has not been

¹⁰ [2010] EWHC 2817 (Fam)

¹¹ Paragraph 1 of the Held.

¹² *ibid*

¹³ *Ibid* Held paragraph 1

dealt with neither has it been withdrawn or discontinued. Secondly there is no stay of execution pending appeal as that application has been withdrawn by counsel. It is trite law that such an application can be made to either this court or the court of appeal and therefore the door is still open so to speak for this court to make an order as it regards Lisa's contempt.

[24] Does the Hadkinson Order serve to bar only a applicant from taking part in court proceedings? Or can it be extended to a respondent or defendant? "A Hadkinson Order is draconian in its effect because it goes directly to a litigant's right of access to court"¹⁴. In the case of **M-v-M**¹⁵ it was clearly stated that "the fact that the contemnor in the instant case was the respondent husband, as opposed to the applicant wife, did not preclude the court from declining to hear him". I therefore disagree with Learned Counsel Dyer Munro's submission that the Hadkinson Order only applies to the applicant and not the respondent.

[25] Therefore in the pending application by Augustus for the court to appoint a surveyor to value the matrimonial property in furtherance of the judgment handed down by the court the court has the option whether or not to muzzle Lisa as the respondent as a result of her contempt of court because she is the respondent. This is an even stronger case for this court to consider Lisa's application to be purged of her contempt.

[26] Applying my mind to the case at bar, the law which has been briefly referred to above and I hereby, reserve the right to flesh out my ruling at a later date if necessary:

- a. Is Lisa in contempt? I am of the view that Lisa is in contempt of this court having disobeyed an order of this court. It is noted that there was no application by Augustus to have Lisa held in contempt neither was there an application by Augustus for a Hadkinson Order.
- b. Is her contempt deliberate and continuing? While based on the evidence before the Court Lisa did make a willful decision to remove and keep her children out of the Commonwealth of Dominica in disobedience to this court's order she has purged her contempt by returning to Dominica with them and presenting them to this court.

¹⁴ Per Lord Justice Peter Jackson in **de Gafforj –v- de Gafforj [2018] EWCA Civ 2070 at paragraph 9**

¹⁵ Op cit

- c. Is there an impediment to the course of Justice? No, as the real issue between the parties before the court at this point in time is a question of the share in the matrimonial home that each other is entitled to. The presence of the children in Dominica in my view will not interfere with the parties being able to participate fairly in Lisa's appeal. I am of the view that the children being out of Dominica is not an insuperable impediment to the course of justice in the case at bar.
- d. Is there another realistic remedy? Yes, as it regards the custody of the children, this court in its judgment declined to make any order as to custody of the children because they were not within the jurisdiction of the court. The children are here albeit briefly and this is an opportunity for this issue to be dealt with. The order forbidding their removal can be revisited. It is to be noted that Lisa coming face to face with being held in further contempt if she leaves with the children has informed the court that she will leave the children with the father. The father on the other hand was hesitant to accept full custody of the children. It is this court's view that Lisa's decision was not a well thought out one and the court used this opportunity to vigorously encourage the parties to pursue settlement of their matter.

[27] That being said, what is the situation? Lisa has produced the children subject of the court order to the court and has therefore prima facie purged her contempt, which the court accepts. The issue that now arises is how shall the court deal with Lisa the contemnor? It is important that this court crafts an order that is tailored to meet the needs and justice of this case and as has been said by the Court of Appeal (UK) in the **de Gafforj** case "what is important is that the sanction is no stronger than it need be to remove the impediment of justice"¹⁶

[28] After some persuasion from the court the parties agreed to adjourn the hearing on the 3rd July 2019 and to attend a mediation session in the hopes of settling all the matters between them. Learned Counsel for both parties along with the parties appeared before the court on the 4th July 2019 and informed the court that the parties attending the mediation and that a settlement on all outstanding issues between the parties were settled and that there was a signed mediation agreement.

¹⁶ Ibid at paragraph 15

[29] This court was extremely happy to hear that and wish to congratulate the parties and counsel on the effort made as this is the most realistic remedy in this matter.

[30] Taking into consideration all the circumstances of the case and the law as has been perused and reviewed Lisa's application to purge her contempt is granted and in view of the fact that the parties have settled all their pending matters before the court and also that they have indicated to this court that they will be discontinuing all pending applications this court is of the view that it is in the best interest of all parties and the most realistic remedy in the case at bar to decline to make any further order in this matter would be best and I so do.

[31] This brings an end to the matter. I once again wish to thank Counsel and the parties for their great effort to settle the outstanding matters; their decision will be beneficial to all concerned.

M E Birnie Stephenson

High Court Judge

(SEAL)

BY THE COURT

REGISTRAR