IN GAUTENG SOUTH HIGH COURT OF SOUTH AFRICA

JOHANNESBURG CASE NO: 3627/09

DATE: 08/10/2009

In the matter between

MORNE VAN DER MERWE Applicant

and

LOUISA VAN DER MERWE Respondent

J U D G M E N T

WILLIS J:

[1] This is an application in terms of which the applicant seeks an order declaring that the respondent is in contempt of a court order dated 29 July 2008 and committing her to jail for a period of 30 days suspended for a period of 12 months on condition that the respondent complies with the court order. The applicant also seeks an order that

the respondent pays the costs of the application as between attorney and client.

[2] The previous court order in question is one dated 29 July 2008. It was an order made by consent between the parties and was a Rule 43 order relating to pending divorce proceedings. At the same time as making the order relating to access and custody, Tsoka J made an order relating to certain interim proprietary consequences pending the divorce.

[3] The divorce action has not yet been heard. Ms *De Wet*, who appears for the applicant, has submitted that her client no longer persists with the application that the respondent be committed to jail and that that order be suspended. All that the applicant seeks is an order that the respondent is in contempt.

[4] The applicant is an attorney practicing in this town. I wish to record and to state quite emphatically my extreme displeasure that this application should even have been brought before court. The applicant and the respondent are privileged beyond the dreams of probably 99 percent of the population in South Africa. They live in one of the most affluent suburbs in Johannesburg. The extent of interim maintenance way exceeds what most people could ever dream of earning.

[5] There was an order relating to access and custody made by consent and yet the parties continue to squabble over it. This court is one of the busiest motion courts in the Southern hemisphere. It is certainly the busiest court in South Africa. For probably more than 5 hours I had to listen to counsel squabbling over what is the appropriate order to make in this matter. I have begged, I have pleaded, I have

cajoled and exhorted the parties please to come to some kind of sensible arrangement.

[6] Before going further I wish to say that in my *prima facie* view the order relating to access is far too detailed for it to be practically workable. I beg the parties please to consider revising the order as to access in order to prevent skirmishes of this kind.

[7] I regret to say both the applicant and the respondent are behaving like spoiled, over indulged children and it is simply not fair, when there are so many other pressing issues that the courts in South Africa have to consider, that time should be taken up with a matter like this which could easily be capable of resolution.

[8] It certainly is clear on a balance of probabilities that the respondent has indeed been in contempt. It is quite clear that she seems to regard the court order simply as some kind of suggestion as to how she should behave. She has put forward all sorts of weak and petty excuses.

[9] On the other hand, to find a person in contempt of court is a very serious finding indeed. I would also respectfully refer to what was said by the Supreme Court of Appeal in the now well-known of *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at paragraph 42: the requisites of contempt have to be proven beyond reasonable doubt. If the matter could be established simply on a balance of probabilities I would have had no hesitation in finding the respondent in contempt. There are, however, complex issues such as intention *et cetera*, that have to be determined before a finding of contempt can be made.

[10] It therefore seems to me that the matter should be referred to oral evidence. Ms *Liebenberg*, who has appeared for the respondent, has criticised the applicant for bringing this application for contempt of motion proceedings because the disputes of fact were foreseeable. There is merit in this submission. Nevertheless, the court retains a discretion in the matter. In my respectful view, the case of *Wiese v Joubert and Andere* 1983 (4) SA 182 (O) sets out rigorously the position as to the question of the court having a discretion where there are disputes of fact.

[11] One has here a situation where a rule 43 order was granted by consent between the parties. There is a pending divorce action and one clearly has a frustrated father in the form of the applicant, seeking compliance with the order. I do not think it can reasonably have been expected of him to bring the matter before court by way of trial proceedings.

[12] It therefore seems to me that a proper exercise of a discretion is to refer the matter for the hearing of oral evidence. The precise terms of that referral need to be determined. I shall afford the parties an opportunity to settle those terms. If they do not they may approach me in chambers for the appropriate order as to the term of the referral to oral evidence.

[13] I shall also request that the Registrar and the Deputy Judge President allocate this matter for hearing as one of priority. Clearly there can be no costs order at this stage and costs will have to be reserved.

[14] The following order is made:

[14.1] The dispute between the parties as to whether or not the respondent is in contempt of the order granted on 29 July 2008 is referred to oral evidence.

[14.2] The parties are given two weeks from today in order to settle the terms of the referral to oral evidence.

[14.3] If the parties fail to reach agreement on the terms of referral to oral evidence, they may approach me in chambers for a suitable order in this regard.

[14.4] The Depute Judge President and the Registrar are respectfully requested, in view of the urgency of the matter, to allocate a hearing of this dispute as one of priority.

[14.5] The costs of the application are reserved.

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