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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE: 19/02/2014
CASE NO: 24384/2009

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

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DATE

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SIGNATURE

In the matter between:

J S O

APPLICANT

And

H W O

RESPONDENT

JUDGMENT

MAGOTSI, AJ

Introduction

- [1] The applicant seeks an order that the respondent be declared in contempt of the court order dated 15 September 2010 under case number 24384/2009.
- [2] The respondent had failed to pay maintenance, medical aid contribution and or had failed to keep his minor children on medical aid and lastly respondent has failed to pay reasonable short falls relating to medical expenses.
- [3] The respondent filed a counter-application seeking a variation of the maintenance order and further interim order suspending portions of the decree of divorce until he has obtained employment.

Both parties claimed costs.

Background

- [4] The applicant and the respondent were married to each other on 19 December 2003. Twins were born of the marriage on 11 December 2008. The marriage between the parties was dissolved by the High Court on 15 September 2010. An agreement of settlement

between the parties was made an order of court. Custody of the minor children was awarded to the plaintiff, subject to the right of reasonable access to the children by the respondent.

[5] The order (loosely translated) provided for the maintenance of the two minor children. The respondent was ordered to pay maintenance at R1 900.00 per month per child and payment was to be made directly into the account of the plaintiff.

[6] Over and above payment of maintenance the respondent was further ordered to keep his minor children in his medical aid scheme at his costs and to pay the reasonable shortfalls not covered by the medical fund on demand, the shortfalls to be paid into the applicant's account within ten days of the applicant furnishing the respondent with documentary proof of payment of such shortfalls by registered post.

Issues

[7] The applicant contends in her founding affidavit that the respondent has failed to comply with the court in that:

- 7.1 The respondent has removed or failed to retain the children as dependents on his medical aid scheme. The first respondent has not made any medical contribution in respect of the minor children since 18 October 2010, save in respect of a Garnishee or Emoluments attached order.
- 7.2 The respondent has fallen into arrears with the payment of maintenance in cash from November 2012 up to probably February 2013 and he is in arrears of R15 200.00.
- 7.3 The respondent failed to keep his minor children in his medical scheme resulting in the applicant retaining the children in her medical aid scheme and thereby incurring costs for the months of December 2012 to February 2013 and the total amount of costs incurred is R3 696.00
- 7.4 The respondent has failed to pay shortfalls in respect of medical expenses for the minor children as ordered by court. Applicant incurred costs in an amount of R45 664.00 as a result.

Applicant alleges that the respondent failed to honour any of the terms of the Deed of Settlement despite demands addressed to the respondent and respondent's attorney.

7.5 The minor children were born prematurely and as a result they are sickly and they lack behind with developmental milestones.

[8] The respondent has now taken a voluntary retrenchment package and he is according to the plaintiff supposed to be receiving pension interest.

[9] The respondent shows no interest in fulfilling his parental responsibilities and rights that is why he has not kept any form of contact with his minor children for years.

[10] The order that the applicant seeks is as follows:

10.1 That the respondent be found to be in contempt of court.

10.2 That the respondent be sentenced to imprisonment for a period of sixty days or for such period or in such a manner as the court may deem just and appropriate.

10.3 That the entire sentence imposed be suspend on such terms and conditions as the court may deem just including that:

10.4 The respondent forthwith pays all arrears owed in respect of his obligations arising from the aforesaid order of divorce;

10.5 The respondent continues to meet his future obligations arising therefrom.

10.6 That the respondent be ordered to pay costs.

10.7 Further and/or alternative relief.

[11] The respondents in his opposing affidavit states that:

11.1 All employees were offered voluntary retrenchment otherwise they would face the risk of forced retrenchment and of losing some of the benefits the voluntary retrenchment had to offer. Forced retrenchment would diminish prospect of a new employment.

11.2 That from July 2002 he started seeing a psychiatrist due to severe depression. He was as a result put on different medication from 2002 to 2012 and stopped taking such medication due to financial reasons. That affected his performance level even more. This would have been a reason to place him on forced retrenchment.

11.3 He also took the voluntary retrenchment offer so that he could pay his legal fees.

11.4 The respondent confirms the provisions of the settlement and a court order.

11.5 The defendant confirms that he paid maintenance until October 2012 when a garnishee order was made against him.

11.6 The children were kept on the respondent's medical aid until he got unemployed and that is when he stopped to be a member of medical aid as he could not afford the premiums. The defendant argues that the medical expenses and shortfalls incurred are unreasonable and that is why he says he is not in breach of this term of the settlement agreement.

11.7 The following amount was deducted from the respondent's salary as a result of a garnishee order:

(a) R3 800.00 towards maintenance; and

(b) R1 200.00 towards the alleged arrear medical costs.

11.8 The applicant is claiming an amount of R45 664.00 as medical expenses shortfalls which the respondent finds to be excessive and unreasonable. The applicant has a tendency of even buying medication over the counter a day before she takes children to a doctor and buy some on prescription.

11.9 The applicant can afford paying the medical contributions because she pays and claims afterwards.

[12] The respondent prays that the children be placed on the applicant's medical aid scheme while he is still seeking employment.

[13] The respondent denies that he is in arrears for the maintenance of November 2012. He settled maintenance arrears for December 2012, January 2013, February 2013 and March 2013.

[14] The respondent request that his duty to pay maintenance be suspended until he obtains gainful employment as his actions are not wilful and/or *mala fides* but merely because he does not have the necessary funds.

[15] That it would be reasonable to make an order that the respondent pays R500.00 per month or a maximum of R6 000.00 per year as medical expenses.

[16] As the respondent did not consent to the recommended therapy by the psychologist (for the children) he cannot be liable for the costs incurred.

[17] The respondent admits that their children were born prematurely but denies that they have not been healthy since birth.

[18] The respondent has two major sons from the previous marriage. The first one is 21 years old, doing BSC IT and the respondent contributes R2 800.00 per month for his accommodation and R595.81 towards his study loan. The respondent also has to provide food and amenities for the said child.

The second one is 18 years old and unemployed. He lives with the respondent and is totally dependent on him for his living expenses which include accommodation and transport.

[19] Due to financial constraints, the second child will relocate with the respondent to Klerksdorp to reside with the respondent's mother.

[20] The respondent's monthly expenses from 1 April 2013 include groceries of R3 500.00, insurance for his vehicle and that of his eldest son is R1 617.00. The respondent pays R3 971.53 for his Pajero vehicle and R2 125.10 for his son's Isuzu. Newspaper and magazines R115.00. The

second child's maintenance R2 800.00 and R150.00 for cat food and care.

[21] Out of a total voluntary retrenchment package of R333 146.11 the respondent is left with approximately R146 000.00.

[22] The respondent submits that both parents have a maintenance responsibility and the applicant whose financial position exceeds his should maintain according to her means.

[23] The respondent contends that he suffers from severe depression which entails a severe lack of self confidence amongst others and he as a result does not think the he will be a good father. Furthermore the applicant has a male friend who threatened the respondent that is why the respondent is not exercising his right to contact with his children.

[24] That maintenance contributions can only be made in accordance with a person's means and the respondent does not have means to pay.

[25] Wherefore the respondent prays for a final order in terms of the following:

[26] That the settlement agreement be replaced and/or amended as follows:

- (a) That the respondent will monthly reimburse the applicant for the reasonable medical aid contribution the applicant pays for each child as a child dependant on her medical aid scheme.
- (b) The applicant is ordered to supply the respondent with proof of the amount payable towards child dependants.
- (c) The applicant is ordered to inform the respondent one calendar month in advance of any increase pertaining to the child dependants.
- (d) That the applicant would pay a maximum of R500.00 (five hundred rand) per month for any shortfalls of reasonable medical expenses incurred for the minor children and not covered by the medical aid scheme.

- (e) That the reasonable shortfalls of such medical expenses will not exceed R6 000.00 (six thousand rand) per year.

[27] The respondent furthermore prays for the following interim order:

27.1 That the court suspends paragraph 2.1 of the settlement agreement pertaining to the maintenance payable until such time the respondent obtains new employment.

27.2 That the court suspends the order as set out above in paragraph 2(a) to 2(e) until such time the respondent obtains new employment.

27.3 That the applicant and/or respondent may approach this court on the same papers for the lifting of the interim order upon such time the respondent obtains new employment.

27.4 Applicant be ordered to pay the costs.

Evaluation of evidence

[28] *Burchel v Burchel* (ECJ 010/2006) [2005] ZAECHC 35.

The question whether the respondent should be committed to goal for non-compliance with his court ordered maintenance and other obligations to his ex-wife and children depends on what the true nature of the current proceedings is under the constitution.

Conflicting decisions under the Constitution

[29] In the case of *Uncedo Taxi Service Association and Maninjwa and Others* 1998 3 SA 417 (E) the court held that the common law civil committal for contempt procedure was in conflict with the constitution insofar as an *onus* was placed on the offender and proof of guilt was required only on a balance of probabilities. It was nevertheless held that civil contempt proceedings for committal are competent provided that the proceedings are conducted fairly in accordance with the principles of fundamental justice measured against the yardstick of the provisions of section 35(3) of Act 108 of 1996 (the Constitution).

[30] The first *Uncedo* case was followed in *Uncedo Taxi Service Association v Mtwana and Others* 1999 2 SA 499 (E) and in *Victoria Park Ratepayers*

Association v Greygenow CC [2004] 3 All SA 623 (SE). It was referred to with approval in *Chinamasa* 2001 2 SA 902 (ZSC). In the unreported judgment *Kamma Park Properties (Pty) Ltd v Ngesi and Others* case no 12220/1997 ECD JONES J held that where committal is sought in civil contempt proceedings the *onus* of proof in civil cases is applicable. In the unreported case of *Burchel and Burchel (supra)* referring to *S v Beyers* 1968 3 SA 70 (A) it was held that ever since this case it has been accepted that under the common law contempt of court in the form of non-compliance with a court order to do or not to do something (*ad Factum Praestandum*) is a criminal offence which may, however, be enforced or prosecuted either by way of civil or criminal contempt proceedings.

In the matter of *Laubsher v Laubsher* 2004 4 SA 350 (T) DE VOS J held that pre-constitutional common law of civil contempt was still good law and accordingly declined to follow the new approach in the first *Uncedo* case.

Onus

[31] Compliance with court orders is an issue of fundamental concern for a society and seeks to base itself on the rule of law. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure as far as possible with the provisions of section 35(3) of the Constitution civil contempt proceedings for committal may still be used but the *onus* is on the applicant to show beyond reasonable doubt that all the requirements for the offence have been met.

[32] In order to succeed in civil contempt proceedings the applicant should prove the terms of the order, knowledge of these terms by the respondent and a failure by the respondent to comply with the terms of the order. Upon proof of these requirements the presence of wilfulness and bad faith on the part of the respondent would normally be inferred, but the respondent can rebut this inference by contrary proof on a balance of probabilities.

[33] In terms of section 28(2) of the Constitution the best interest of the children are of paramount importance. The medical expenses and shortfalls ordered by the divorce court are part of maintenance of the

minor children. The Maintenance Act defines a maintenance order as any order for the payment of sums of money towards the maintenance of any person issued by the court in the Republic including a high court. Section 26 to 28 provides for enforcement of maintenance orders by way of warrant of execution, attachment of emoluments or attachment of debts.

[34] Section 31(1) provides that any person who fails to make any payment in accordance with a maintenance order shall be guilty of an offence. Section 31(2) provides that if the defence is raised in a prosecution for an offence under this section that the failure to pay maintenance in accordance with maintenance order was due to lack of means on the part of the persons charged, he or she shall not be merely on the grounds of such defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness.

[35] In terms of section 40(3) the prospective means of the convicted person, the financial needs and obligations of the person in so far as it may be relevant concerning his or her failure to pay in accordance with the maintenance order. Section 40(4) provides that notwithstanding

anything to the contrary contained in any law, any pension annuity, gratuity or compassionate allowance or similar benefit shall be liable to be attached or subject to execution. *De Haas v Fromentein* (499/12) [2013] ZASCA 144 (30 September 2013).

[36] The respondent took a voluntary retrenchment package almost two (2) years after a maintenance court order was made against him. After receiving a notice demanding compliance with a court order the respondent chose to comply with the order selectively. He only paid arrear maintenance and left out medical expenses despite the fact that he could afford to settle everything.

[37] In the respondent's version he found medical expenses and shortfalls unreasonable. He does not ask for clarification or for further information and or approach the court for a variation of the court order. He on the "advice" of his lawyer stops to comply with the court order. In addition to that the respondent deregisters the minor children from the medical aid without informing the applicant or obtaining a court order.

[38] The respondent states that he is unable to comply with a court order due to lack of resources but he maintains his major children from the previous marriage. He has brought one child Isuzu bakkie. He puts money aside for cats, newspaper and magazines.

[39] The respondent suggests alternative amounts for medical shortfalls expenses but he does not pay a cent of that. He insists that he did not consent to the recommended play therapy and can therefore not be held liable for the costs.

[40] Out of a total voluntary retrenchment package of R33 146.11 the respondent is left with approximately R146 000.00

Conclusion

[41] There is no indication that the respondent is endeavouring to co-operate with the court and or to comply with the order particularly the medical shortfall expenses. There is also no indication that the respondent is looking for a new employment which will enable him to meet his monthly financial obligation.

[42] The respondent asserts that he is not in a wilful default of the court order.

However, when he received a voluntary retrenchment package he did absolutely nothing to show interest to settle or to contribute what he may regard as the minimum medical expenses or arrears. The respondent was retrenched about two (2) years after a maintenance order was made against him.

[43] The respondent confirmed knowledge of the settlement agreement and the court order in his pleadings.

[44] In the respondent's version he found medical expenses and shortfalls to be unreasonable. When the proceedings started he deliberately wanted to frustrate or delay the proceedings by not interacting with legal aid or a lawyer defending him *pro bono*. He knew that the matter was previously postponed for his lawyer but he only went to consult just before the trial date. He did not advance a reason for that.

[45] I am therefore satisfied that this is not only a simple default by the respondent. There is same element of bad faith beyond mere indifference to pay. The respondent needed only to pure his *bona fides* by showing a reasonable doubt that he did not comply with the court order wilfully and he is not *mala fide*. The truth of the matter is that he does not want to comply with the court order.

[46] One the conspectus of all the facts this court finds that the applicant has shown beyond reasonable doubt that the respondent has intentionally avoided to pay reasonable medical shortfall expenses and is therefore in arrears of R45 664.00 and I make the following order.

Order

1. The respondent is declared in contempt of the court order dated 15 September 2010 under case no 24384/2009.
2. The respondent is sentenced to sixty (60) days imprisonment which is wholly suspended for a period of two (2) years on condition that the respondent pays R45 664.00 (shortfalls of

medical expenses) into the account of the plaintiff on or before 1 April 2014.

3. All matters pertaining to the payment of maintenance (including medical expenses) that may be due and payable and all other matters related to the dispute between the applicant and the respondent concerning payment of maintenance are referred to the maintenance court having jurisdiction for its determination.
4. A copy of this judgment should be brought to the attention of the maintenance officer dealing with the dispute between the applicant and respondent.
5. The respondent is ordered to pay costs on party and party scale.

D D MOGOTSI
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA