IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 20638/2013

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: YES
REVISED: YES/NO
8 /09/2022

In the matter between:

T[....] A[....]2 P[....] **Applicant**

and

A[....] C[....] P[....] **Respondent**

REASONS FOR JUDGMENT

PHAHLANE, J

Introduction

[1] On 18 July 2022, the matter came before court on an opposed basis wherein the applicant sought the order in the following terms:

> *"1. An order declaring that the Respondent is in contempt of the order granted by this Honourable Court on 29 February 2016 under case number 20638/2013.*
>
> *2. That the Respondent be committed to jail for a period of 12 (twelve) months for his contempt of the order referred to in paragraph I above, such period of imprisonment to be suspended for a period of 5 (five) years on the following conditions: -*
>
> > *2.1. Within 5 (five) days after the grant of this order the Respondent shall make payment to the Applicant of the sum of R590 472.11 together with interest thereon at the prescribed rate of interest.*
> >
> > *2.2. That the Respondent shall not commit any further breach of the court order relating to the payment of maintenance in respect of the minor children within the period of suspension.*
>
> *3. Alternatively to paragraph 1 and 2 above, an order that the respondent make payment to the applicant of the sum of R590 472,11 together with interest thereon at the prescribed rate of interest.*
>
> *4. By the variation of paragraph 3.3 of the agreement of settlement signed by the parties in and during February 2016 (annexure "B" to the founding affidavit) by the inclusion of the words, "and boarding fees" after the words, "the cost of private tuition fees".*
>
> *5. The Respondent is ordered to pay the costs of this application on the scale as between attorney and client.*
>
> *6. Further and/or alternate relief.*

Background

[2] Briefly summarised, the applicant and respondent were married and the decree of divorce incorporating the settlement agreement was granted on 29 February 2016. Two minor children were born from the marriage, namely R[....] P[....] and A[....]3 P[....].

Issues for determination

[3] It is the applicant's contention that the respondent has deliberately breached a court order as his actions amount to a wilful and *mala fide* disobedience of such a court order.

[4] The basis of the the issues raised on behalf of the applicant which became the centre of the arguments relates to a few of the clauses of the divorce settlement agreement ("DSA") which was made an order of court.

[5] Mr Greenstein for the applicant argued that the respondent's first breach of the court order occurred on 04 March 2016, the month following the divorce when he failed to make payment of certain of the amounts provided for in the DSA, which included amongst others, maintenance and school fees, and as a result thereof, the applicant issued a warrant of execution for the amount of R94 838 69. He further argued that the respondent was again in breach of the DSA in 2017 when he failed to pay the capital amount and another warrant of execution was issued. He submitted that the respondent has failed to produce any evidence which demonstrates that his conduct was not willful and *mala fide,* and as such, his noncompliance with the court order amounts to a violation of the integrity and dignity of the court, and of upholding the court systems.

[6] In dealing with the jurisdictional requirements necessary to hold a party in contempt of court, the Supreme Court of Appeal in ***Le Hanie and Others v Glasson and Others***[1] referred to the decision of ***Secretary, Judicial Commission***

[1] (214/2021) [2022] ZASCA 59 (22 April 2022) at para 26.

of Inquiry into Allegations of State Capture v Zuma and Others[2] where the Constitutional Court held that:

> "*As set out by the Supreme Court of Appeal in Fakie, and approved by this court in Pheko II, it is trite that an applicant who alleges contempt of court must establish that* ***(a)*** *an order was granted against the alleged contemnor;* ***(b)*** *the alleged contemnor was served with the order or had knowledge of it; and* ***(c)*** *the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established".*

[7] Ms Burger argued that the respondent did not wilfully disregard compliance with the court order, and that even though the DSA specifically provides that the respondent is liable for the minor children's fees at a private school for example, such fees should be reasonable. In this regard, she submitted that there was an oral agreement between the applicant and the respondent in which the respondent undertook to pay school fees and boarding fees for the children, and that he will not be making any further cash contributions, while the applicant would be responsible for other expenses. Counsel further submitted that the school fees at Micheal house private school where the children are currently attending cannot be regarded as being reasonable as the school is one of the most expensive schools in the country. The applicant disputed the existence of an oral agreement.

[8] The respondent stated at paragraph 17.2 of his opposing affidavit that he did not consent for the child, R[....], to be placed at Michaelhouse as this is an expensive school and yet he signed the consent application forms with the applicant, for the child to be placed at that school. It should be noted that the consent forms which the respondent signed at Michaelhouse stipulates the terms of payments by the parents. Both the applicant and the respondent bound themselves responsible, as parents, to be liable for whatever fees required, in respect of the child.

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[2] [2021] ZACC 18; 2021 (5) SA 327 (CC) at para 37.

[9] On the other hand, the respondent avers at paragraph 18.1 of his affidavit that they agreed with the applicant to enrol A[....]3 at the same school. He however avers at paragraph 17.3 that: *"the respondent agreed that he will continue to pay the Dinfern fees monthly and the respondent will pay the balance of the costs of Michaelhouse as the respondent is earning an enormous income by selling properties and can afford to contribute".*

[10] The respondent further avers at paragraph 8 of his supplementary affidavit that: *"As stated in the answering affidavit, I admit that in terms of the Divorce Settlement Agreement I have a responsibility for private school fees. However, I emphasise once again, that the responsibility extents to a degree of the private school fee being reasonable".*

[11] It is common cause that the respondent has not brought an application to have the DSA varied, and as at the date of the hearing of this application, no application has been brought before court to have the clauses of the DSA varied, otherwise the respondent would have categorically said so or invoked the provisions of the clauses in the DSA which have been varied.

[12] It was argued on behalf of the respondent that consent to attend a private school is not consent that school fees should be unreasonable, and that based on the aspect of reasonableness alone, the respondent should not be liable for any costs the applicant is claiming from the respondent because the respondent is inevitably paying for all the other expenses such as camp fees and sporting equipment of the children at the school. Further that R17 000 per month cash contribution towards maintenance of the children should not be paid by the respondent, because he is also contributing towards the children's medical aid fees. Counsel insisted that the applicant is automatically claiming that all these expenses become the responsibility of the respondent, which is not the case.

[13] In my view, this argument is misplaced because if one has regard to clause 3.3 and 3.4 of the DSA, the respondent remains responsible and liable for the costs relating to the education and medical aid fees of the minor children.

Clause 3.3. provides that:

> *"A[....] shall be liable for payment of reasonable costs relating to the education of the minor children at private primary and secondary school and university or other tertiary educational institutions. These costs shall include, but not be limited to, the costs of private tuition fees, special levies and debentures, after school fees, extra lessons, au pair, extra mural activities, including sport and cultural activities, both in and out of school, equipment reasonably required for such extra mural activities, school uniforms, books and stationery, sporting clothes and equipment, school functions, tours and outings and camps (in the Republic of South Africa), transport and the requisite computer equipment, including printer cartridges and software. T[....] shall obtain A[....]'s consent to the children' participation in sporting and cultural activities and extramural activities which consent shall not be unreasonably withheld".*

Clause 3.4 provides that:

> *"A[....] shall retain the minor children as dependants on a Discovery Classic Comprehensive plan including Vitality membership or similar scheme, at his cost. A[....] shall be liable for payment of all excess medical expenses including but not limited to dental, orthodontic, ophthalmological, psychotherapy, physiotherapy, homoeopathic, occupational therapy, pharmaceutical and other medical or related costs incurred in respect of the minor children and not covered by the medical aid scheme. A[....] shall provide T[....] with a duplicate medical aid card for the children's use and by his signature hereto also authorises the medical aid scheme to provide T[....] with the aforesaid medical aid card".*

[14] Save to say that it was submitted for the respondent that an amount R70 000 on school fees at Michaelhouse and R35 000 cash contribution per month is not necessarily a reasonable amount, the respondent bound himself to be liable and responsible for the fees at Michaelhouse when he signed an agreement with the school, and he knew how much the fees were.

[15] It may very well be that the respondent is liable for payment of reasonable costs relating to the education of the minor children at a private school as stipulated in the DSA, but it does not appear anywhere from the reading of the DSA what the term “reasonable” mean, and neither does it appear anywhere from the reading of the respondent’s opposing affidavit and supplementary affidavit.

[16] In my view, when the respondent signed with Michaelhouse, he consented and accepted the fees as being reasonable and he is bound by the terms of the DSA to make payments thereto. The respondent indicated in his supplementary affidavit that he did not have any legal representation at the time the oral agreement was entered into. It is for this reason that his counsel submitted that the respondent was under the impression that a new agreement was created between the parties, and that the respondent can therefore not be in contempt of a court order or the provisions of the DSA.

[17] The defence raised by the respondent that there was an oral agreement between himself and the applicant has no merit. I am inclined to agree with Mr Greenstein that the respondent does not fully take the court into his confidence as he is silent about the period or date when the agreement was entered into. The respondent’s counsel submitted that for nine months, the applicant paid Michaelhouse without saying anything to the respondent and has accepted the situation as it was, and that she should not turn around and allege that the she was actually not supposed to pay for those fees, thus holding the view that - because the respondent did not pay for those fees for nine months, he is in contempt.

[18] In my view, this submission is baseless because had there been an agreement between the parties, the applicant would not have, at the first instance, caused a writ to be issued against the respondent. Accordingly, I do not agree with submission that the respondent had no intention to act *mala fide* or be in contempt of a court order when he failed to make payments because he had an oral agreement with the applicant. I am alive to the issue raised that the respondent attempted to have the warrant of execution for the amounts claimed by the applicant set aside.

[19] With regards to the question whether the applicant satisfied the jurisdictional

requirement for the relief sought, there is no doubt in my mind that the applicant did indeed satisfy those requirements for the following reasons:

19.1 The order incorporating the DSA was granted by court on 29 February 2016

19.2 The respondent had knowledge of the order and was served with such an order, hence an attempt to previously set aside a warrant of execution.

19.3 The respondent failed to comply with the order, leading to the applicant causing a writ to be issued against the respondent and ultimately the current application before this court. The applicant had in her founding affidavit furnished the court with a schedule, or evidence to proof noncompliance by the respondent. Having said that, his counsel conceded that the applicant had for nine months been paying for the items which the respondent was liable for, under the DSA.

19.4 With regards to the requirement that the applicant has to satisfy the court that the breach by the respondent was willful and *mala fide,* I have already stated in paragraph 19.3 *supra* that the respondent was issued with a writ, which to date has not been satisfied. I am satisfied that the respondent's actions were willful and *mala fide.*

[20] The respondent's defense flies in the face of an alleged oral agreement which the applicant dispute, and the notion of affordability. As a rule, the respondent had to establish a reasonable doubt that his noncompliance or actions were not wilful and *mala fide*. However, the respondent failed to discharge this burden. In this regard, the applicant submitted, and correctly so, that the respondent has been in contempt for six years and has not discharged the evidentiary burden to show that his conduct was not willful and *mala fide*. In the circumstance, contempt has been established.

[21] In light of the concession made that the applicant had for several months been making payments which are in my view, and as per court order, were supposed to have been made by the respondent, the applicant is in terms of clause 3.5 of the

DSA entitled to be reimbursed by the respondent.

[22] Having considered all the circumstances of this case, the arguments and submissions made on behalf of both parties, I was of the view that the applicant has proved the requisite for contempt and managed to satisfy the court that an order should be granted in her favour. I have also taken due consideration of the submission that the respondent be committed to prison as prayed for in paragraph 2 of the Notice of Motion. It is my view that this is not the case where the respondent should be committed to prison because he has a business to run and children to support. Accordingly, paragraph 3 of the prayers as an alternative set out in the Notice of Motion is in my view, the appropriate remedy to be awarded to the applicant.

[23] In the circumstances, the following order was granted:

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1. The Respondent is in contempt of the order granted by this Honourable Court on 29 February 2016 under case number 20638/2013.

2. The Respondent make payment to the Applicant of the sum of R590 472.11 together with interest thereon at the prescribed rate of interest.

3. The respondent is ordered to pay the costs of this application on a scale as between attorney and client.

PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant	: Mr. Greenstein
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