IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 15818/2009

In the matter between:

SAMUEL HENRI PELLISSIER	**Applicant**
and	
EULOGY PELLISSIER	**First Respondent**
THE SHERIFF, STELLENBOSCH	**Second Respondent**

JUDGMENT DELIVERED ON 24 MARCH 2010

ALLIE, J

[1] On 6 August 2009, applicant brought an urgent application to set aside a warrant of execution against movable property and attachments made in accordance with the warrant.

[2] On 10 September 2009, the first respondent filed a counter application seeking a variation of the order of divorce by removing joint decisions about the nature and extent of remedial assistance and extra tuition required and about the participation of their children in extra-mural activities. First respondent also seeks the removal of joint decisions and the substitution of her as the sole decision maker on issues concerning the appointment of a remedial tutor and the counselling of the children with regard to their future use of Ritalin. Finally first

respondent seeks the removal of applicant's liability to pay education related expenses and medical costs and the substitution for that liability with a globular maintenance payment by applicant of R8 000 per month per child plus R1 300 per month per child for school fees and R250 per month per child in respect of prescription medication.

[3] On 30 October 2009, the application was postponed by agreement for the hearing of oral evidence on certain defined issues.

[4] In the counter application, the first respondent seeks an order declaring applicant to be in contempt of the court order dated 5 December 2008 in terms of which applicant had the obligation to pay education and medical costs. First respondent prays for an appropriate sanction for the alleged contempt.

[5] It is common cause that the three younger sons of the parties have been diagnosed with Attention Deficit Hyperactive Disorder (ADHD) and require ongoing treatment as well as remedial education.

[6] The parties were divorced on 21 June 2005. On 5 December 2008, by agreement they varied the terms of the order of divorce to provide for, *inter alia* joint decision making concerning the needs of their children and for first respondent to be their primary caregiver. Until August 2008, the children had lived with the applicant, his current wife and her two daughters.

[7] First respondent now lives on a farm with her partner and her four sons.

[8] First respondent sells designer clothing on a small scale and owns the former common home from which she derives a modest rent.

[9] Applicant is a qualified architect who scaled down his large architectural practice in Johannesburg which he operated from his own building to the small practice he now conducts from his home in Stellenbosch.

[10] Applicant admitted that by the time the warrant was issued and the attachments made, he was in arrear with the payment of school fees and had failed to pay the fees of the children's paediatrician, Doctor Van der Walt.

[11] Applicant denies that he was obliged to pay the following amounts allegedly forming part of the maintenance which first respondent alleges were in arrear and for which she had the warrant authorised.

11.1 Remedial tutors because first respondent appointed different ones to those that he chose.

11.2 The pole vaulting tutor's fees because they orally agreed to each pay half.

11.3 School clothes for 2009 because he purchased sufficient at the end of 2008.

11.4 The repair of a computer because there are other computers available.

11.5 School stationery as he already paid for stationery in January 2009.

11.6 Soccer coach fees as it is a sport in addition to what is offered at the school.

11.7 For the cost of a locker as he considered it to be an additional expense.

11.8 Dentistry fees because he believed it was unnecessary for the children to visit a dentist.

11.9 The applicant indicated that he does not wish to pay for the prescribed medication for ADHD if the children are not using it regularly and he alleged that he became aware that they were not using it as prescribed.

11.10 Samuel's bicycle and related equipment as he chose to purchase an expensive bike from his spending money.

11.11 The cost of travel of the children from Johannesburg to Port Elizabeth during part of a school holiday because he alleged that the respondent had to pay.

11.12 The cost of vitamins and supplements which he believes is unnecessary.

11.13 The cost of a life coach about which he claims to have no knowledge.

11.14 The cost of sporting equipment which he said he could not afford.

[12] Applicant also argued that he could not afford the cost of the items mentioned above and he did not receive proof of the expenses incurred. On behalf of the first respondent, it was argued that applicant did not raise the issue of requiring proof previously.

[13] Applicant was not initially forthcoming with the documents required by first respondent to prove his alleged substantial decline in income since the beginning of 2009. After a court order compelling applicant to make certain documents

available for inspection, applicant provided some and alleged others were with his accountant.

[14] On a perusal of the bank statement and invoices presented by applicant, it emerged that in December 2008 shortly after the applicant agreed to the variation of the final order of divorce, he made huge withdrawals and payments. He argued that the money was used, primarily to pay his arrear accounts but it was pointed out that he dined extravagantly, purchased expensive Christmas gifts and incurred holiday expenses then.

[15] On 26 January 2009, applicant wrote to the first respondent saying that he would like her understanding and assistance with the amount of maintenance payments that he will have to pay. He stated that the economic recession placed his financial position under pressure.

[16] First respondent answered the letter by saying that they should each honour their obligations and not discuss the financial situation with their sons.

[17] First respondent's legal representative subsequently established that applicant's account did not have the necessary documents, that he had not completed income tax returns and that he owed SARS money for VAT that he recovered from his clients but failed to pay over to them.

[18] In his evidence -in -chief, Mr Pellissier attempted to show that he did not receive substantial work requiring his architectural expertise during 2009 and so he decided to take on project management work where he could charge a fee for managing building work based on the total value of the work.

[19] He commenced managing the project of his neighbour, Mrs Du Preez. He alleged that he initially allowed Mrs Du Preez to pay the money required for the building work into his bank account from which he would make payments for labour and material. He later opened sub-accounts on the internet which he used for project purposes. He agreed that this method of operating caused him to incur huge amounts of bank fees and that it made it very difficult for his accountant to extract which payments were for his fees earned and which were disbursements for the project.

[20] Mr Pellissier also testified that he tried to earn extra income by moving his wife, her daughter and himself into a flat on his property and by renting his main house out to someone who later vacated his home.

[21] He sketched a situation where his income was irregular and unpredictable as well as considerably lower than previously.

[22] He admitted that his cash flow was good in December 2008.

[23] He admitted that on 5 December 2008 he had dinner at a smart restaurant in Franschoek at a cost of approximately R800 and that he spent considerable amounts on Christmas gifts. He also paid for airline tickets on 12 August 2008.

[24] He pointed out that he entered into a fee-sharing arrangement with another firm of architects to work on the construction of a medical centre. He said that the firm had already commenced the project when he joined and had already received certain payments. He then gave testimony which clearly did not accord with the probabilities, namely that the representative of the client who wished to construct the medical centre had already paid out R217,690,00 without signing any written agreement.

[25] He also asked his parents in May 2009 to assist in paying the school fees. He admitted during cross examination that there were already signs of the economic recession in the decline in new work that he received by December 2008 but he could not explain why he agreed to the variation of the divorce order whereby he assumed liability for certain payments.

[26] Mr Pellissier produced a summary of his financial position reflected in exhibit "C" which shows that over the period January 2009 to January 2010 he earned an irregular income. During cross examination when he was presented with an analysis of the financial movement in his bank accounts, he admitted, that in January 2009, for example, he earned R23,196.68. He could not

remember where a deposit of R10,000.00 came from on 18 August 2008 when asked about it during cross examination.

[27] In his evidence-in-chief, he said that his aunt, Therese Drostde lent him some money. During cross examination he admitted that he also did some work for his aunt.

[28] He agreed largely with the analyses of the financial movement in his bank accounts that were put to him during cross examination. Those analyses reveal an average monthly income of R58,000.00 for applicant.

[29] Respondent closed her case without leading any evidence.

[30] On behalf of the respondent it was submitted that the amount due and owing to her under the warrant of execution stands to be reduced by the sum of R24,100.00, being the amount paid by applicant subsequent to the issue of the writ and before the hearing of oral evidence.

[31] Applicant admitted that certain amounts are due and owing under the writ such as the doctor's account, the dentist's account and certain stationery expenses.

[32] In the case of **Butchart v Butchart 1997 (4) SA 108 (W) at 115 F – I** the WLD as it then was, held as follows concerning the issue of a writ for the failure to pay expenses undertaken as part of maintenance obligation: *"I consequently come to the conclusion that a writ may be validly issued based on an "expense clause" contained in a maintenance order on condition that the amount is easily ascertainable and is ascertained in an affidavit filed on behalf of the judgment creditor. In this regard I agree with the requirements as set out by Stegmann J at 48 in the Block matter as to what has to be contained in the affidavit: "I consider that the respondent was required to state the names and the price of each book, and to name each item of stationery and to state its price. Had she done that, she would have provided (a) the requisite certainty about the amount due under the judgment for the purposes of the writ and (b) that the applicant (as the judgment debtor) had a fair opportunity to consider whether the amount included in the writ in respect of books and stationery was indeed within the terms of the judgment."*

[33] At **116 A – B** the court in **Butchart** continues as follows: *"A difficulty which may be envisaged in matters such as these in the fact that a judgment debtor may not be aware that substantial expense have been incurred and are payable under the court order. He or she may then be faced with a writ without any prior knowledge."*

[34] In *casu*, the applicant alleged that he received no invoices setting out how the amounts claimed were arrived at. It is common cause that most invoices were not sent to applicant by first respondent and that none were attached to the affidavit accompanying the writ. A schedule compiled by the respondent setting out the category of items and amounts claimed was annexed to the affidavit.

[35] On behalf of respondent it was argued that applicant failed to request invoices. That may well be so but in the **Block** case and the **Butchart** case the view is expressed that particularity of the amounts must be in the affidavit.

[36] Paragraph 1.20.1 of the varied order of divorce provides that the educational costs shall be borne by the applicant and that those costs will, *inter alia*, include the **reasonable** cost of extramural activities and the **reasonable** cost of all or any books, stationery, computer equipment, school uniforms, sporting equipment and attire relating to sporting and/or extramural activities.

[37] Similarly paragraph 1.20.3 provides that the application shall bear the medical costs which shall include the children's **reasonable** medical, dental, surgical, hospitalisation and pharmaceutical expenses.

[38] The term "**reasonable**" clearly qualifies the obligation. In the circumstances the onus was on the first respondent to satisfy the Registrar of this court that the amounts owing fell within the terms of the court order when she

applied to have the writ issued. In her affidavit accompanying the writ, the first respondent states obliquely in paragraph 4:

> *"In terms of the aforesaid order, defendant is obliged to pay the education costs (Clause 1.20.1) and the medical costs (Clause 1.20.3) in relation to the children"*

[39] In her schedule annexed to the affidavit, first respondent includes as part of the amounts she allege that applicant is liable for, an amount of R2,400.00 for vitamins and supplements. This item is singled out because it is a clear example of why particularity is required when amounts are claimed as expenses forming part of a party's maintenance obligation. The Registrar of this court, could clearly not establish from the affidavit and accompanying schedule whether the vitamins and minerals, for example, constitute a reasonable medical expense as contemplated by paragraph 1.20.3 of the court order.

[40] The authorities cited above clearly contemplate sufficient particularity in the form of invoices so that the party against whom the writ is authorised cannot claim prejudice.

[41] In this case, the applicant justifiably claims prejudice, in as much as, he has not received invoices for most of the items making up the sum claimed as due and payable. First respondent has also not shown in the affidavit that the

amounts claimed in addition to prescribed medicines, doctor's fees and school fees are reasonable.

[42] Turning to the issue of whether the first respondent could claim the payment of school fees for which she was not liable to the schools and for which applicant assumed liability.

[43] In the case of **Governing Body, Gene Louw Primary School v Roodtman 2004 (1) SA 45 (C) at 54 A – C** the liability of a non-contractual parent is discussed:

> *"Where the parents of a child are divorced, the third party who provides goods or services for the support of the child would appear to have a contractual claim only against the parent or other person with whom the third party has contracted. Although both parents do remain liable to support their child in accordance with their respective means, the third party who wishes to sue a non-contracting party would, it seem have to base this claim on some other ground (such as unjust enrichment or negotiorum gestio) and would have to satisfy the requirements of such a claim (see* ***Boberg's Law of Persons and the Family, 2nd ed (1999) at 248****)"*

[44] The schools to which applicant assumed liability for the fees of their children were clearly not demanding payment from first respondent.

[45] In **Butchart v Butchart 1996 (2) SA 581 (WLD) at 585 I – J** it was said that:

> *"Certain procedural prerequisites have to be complied with before a writ can be issued, but it will be seen that there is no notional or practical difficulty in using a writ to recover money which the judgment creditor is obliged to pay to a third party and which inter partes the judgment debtor has to bear a writ can, of course, be issued for the judgment creditor to recover amounts which have actually been paid, but payment is not a prerequisite to the issue of a writ."*

[46] In *casu*, the applicant is the judgment debtor and the first respondent, the judgment creditor. The first respondent, as judgment creditor, was not obliged to pay the third party, namely, the schools at the stage when the writ was issued.

[47] It is clearly the third party that has a right of recourse against applicant for the payment of school fees. The first respondent was accordingly not entitled to claim R24,100.00 by way of the writ as payment of school fees to her as there is no right of recovery *inter partes* where she had no liability to pay.

[48] The situation of the medical costs is somewhat different. Clearly a pharmacy dispensing medication is entitled to refuse to supply further medicines if it is not paid. Should that situation arise, the first respondent would have been

able to bring contempt of court proceedings and apply for a mandatory interdict as a means for obtaining relief.

[49] I am accordingly of the view that the writ has been justified in respect of the R700 contribution that application was obliged to pay towards the fees of doctor Van der Walt in terms of paragraph 3 of the order of court and may have been justified in respect of other amounts claimed excluding school fees provided that invoices for the expenses were attached to the affidavit requesting the issue of the writ.

[50] The applicant has not explained why his failure to comply with the court order of 5 December 2008 was not wilful. If anything, he considers himself entitled to unilaterally suspend compliance with the order when he believes he cannot afford the payments or he believes the expenses claimed are unreasonable.

[51] His contempt of court requires a sanction which will reflect that its order must be complied with, while affording him an opportunity to make good the arrear payment and continue to honour his current maintenance obligations. In the circumstances it is appropriate to order a term of 3 months imprisonment suspended for 1 year on condition that applicant is not found in contempt of a court order regulating his child maintenance obligations during the period of suspension.

[52] Parental powers should only be disturbed where this is in the best interest of the children. It is apparent from the papers that the parties have different parenting styles when it comes to the remedial teaching required for 3 of the children. Applicant has not been able to show that the first respondent's approach to this aspect has resulted in a significant deterioration in the educational progress and results of the three children concerned. In the light of the clear impasse that occurred with regard to the appointment of remedial tutors, I am of the view that respondent as the primary care giver is best placed to assess their needs and should have sole authority to appoint remedial tutors provided that their cost remain on the same standard that applicant maintained when he was a party to their appointment.

[53] Accordingly, paragraph 1.12 of the court order of 5 December 2008 should be varied by substituting the words "the plaintiff" for the words "the parties".

[54] Paragraph 1.16 deals with Jean Pierre's need to consult with and be assessed by doctor Van der Walt. Jean Pierre has already had the assessment and there appears to be no difficulty with the children diagnosed with attention deficit disorder being treated by doctor Van der Walt. This paragraph should therefore remain unchanged.

[55] Paragraphs 1.17 and 1.18 deal with the parties' undertaking to consult doctor Van der Walt with regards to the children's future use of Ritalin, the appointment of a life coach and the parties undertaking to follow the recommendations of doctor Van der Walt. The necessity for joint decisions on these matters is obvious. Should they not make joint decisions the acrimonious relationship between the parties will result in unilateral action by one party causing further disputes affecting the general wellbeing of the minor children. Paragraph 1.17 and 1.18 should therefore remain unchanged.

[56] I am not persuaded that the applicant's refusal to pay the amounts claimed were not foreshadowed by an intransigent stance adopted by the first respondent as evidenced by correspondence between the parties' respective legal representatives. Applicant's request that first respondent should explain the amounts claimed by using the words "verduidelik asseblief" are not unreasonable. First respondent's responses are the short, cryptic notes contained in annexure "EP2" to the affidavit accompanying the writ. First respondent's responses are loaded with emotive language. I cannot conclude as first respondent's counsel urged me to, that unless a globular maintenance amount is paid by applicant, the problem of arrear payments will recur.

[57] Although applicant has been less then forthcoming to this court about his true income and financial position, his evidence that the economic recession has caused a decline in the building industry and accordingly a decline in his field of

work rings true. That decline may well not be to the extent that he claims but the reduction in globular maintenance originally claimed by first respondent in her counter-application from R15 000,00 per month per child to R8 000.00 per month per child is a recognition of a decline in the financial position of applicant.

[58] As the global recession dissipates, applicant should be able to improve his financial position.

[59] He no longer has very young children for who he has to make the sacrifice of reducing his architectural practice so that he can spend more time with them. He has to balance that need with their need to be properly maintained in the standard of living that they are accustomed to.

[60] I would therefore not vary the court order by removing his current payment obligations and replacing them with globular payments as prayed for in the counter-application.

It is ordered that:

1. The writ was justifiably issued in the amount of R1700,00 only and is set aside for all amounts exceeding R1700,00.

2. The Applicant is in contempt of court for failing to pay the school fees and the amount of R1700,00 being his share of the doctor's fees and the reasonable dental fee.

2.1 The Applicant is accordingly sentenced as follows for such contempt: To a term of 3 months imprisonment suspended for 1 year on condition that applicant is not found in contempt of a court order regulating his children's maintenance obligations during the period of suspension.

3. Paragraph 1.12 of the order of court dated 5 December 2008 is amended to read as follows:

3.1 "The plaintiff shall appoint a remedial tutor, who shall be at least a third year education student from Stellenbosch University to assist the children with revision and home work everyday after school. In the event that the tutor becomes unavailable or resigns, the plaintiff shall appoint a similarly qualified replacement;

3.2 *The defendant shall pay the costs of the tutor."*

4. Each party is ordered to pay its own costs.

Allie

ALLIE, J