IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case number: 7397/2011

In the matter between:

INGRID MAGDALENA DE BEER **Applicant**

and

WILHELM SIEGFRIED ADOLF LICHTENBERG **Respondent**

JUDGMENT: WEDNESDAY, 30 MAY 2012

Le Grange, J:-

[1] The crisp issue for consideration in this matter is whether the Respondent is in contempt of an order of this Court. It is common cause that on 20 April 2011, and by agreement between the parties, an order was granted by this Court incorporating the terms of a consent paper entered into between them on 4 April 2011.

[2] It is not in dispute that the Respondent does not comply with the maintenance provisions of the consent paper. He also fails to comply with certain expenses and costs that he undertook to do as part of the propriety relief. The Respondent maintains that he is not *mala fide* or in wilful disregard of this Court's order. He maintains that he was never able to afford the amounts he undertook to pay in the consent paper and contents that the Applicant is able to work and not entitled to any maintenance at all.

[3] The Respondent has instituted proceedings in the Maintenance Court to vary the maintenance payable in terms of the consent paper. In the Maintenance Court he requests that the maintenance order in respect of the Applicant be discharged. His main reason for this variation is that the Applicant is a qualified doctor and able to earn an income and is able to support herself and contribute towards the maintenance of the children.

[4] The principal submission by Ms L Buikman, SC who appeared for the Applicant is that the Respondent on his own version has surplus funds and his refusal to comply with his maintenance obligations in terms of the consent paper is clearly *mala fide* and wilful.

[5] Ms. T Smit on behalf of the Respondent argued that he is financially unable to make the contribution required by the Consent Paper and there exists good cause to seek a variation of the existing order in respect of his maintenance

obligations towards the Applicant. Furthermore, the Respondent has demonstrated in his evidence that he did not intentionally or deliberately violate this Court's order.

[6] The test for when disobedience of a civil order constitutes contempt was fully discussed by the Supreme Court of Appeal in the matter of Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 333 B- D.

[7] Cameron JA, as he then was, held the following:

"*...The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)".*

[8] In *casu*, the Respondent sought to explain what motivated him in signing the consent paper. According to him he acted impulsively and should have sought independent legal advice prior to signing the agreement. He contends that he has a shortfall in excess of R 83 000 per month and is unable and cannot afford to comply with the maintenance obligation in terms of the consent paper.

[9] The reasons advanced by the Respondent in this instance can hardly be regarded as an acceptable or *bona fide* excuse for not complying with an order of this Court. The Respondent in paragraph 5 of his affidavit states that he offered the Applicant a *"generous settlement"* in the hope that she would reconcile with him. This may be so but the Consent paper was made an order of Court. It does not only

deal with the payment of maintenance by the Respondent but also with, *inter alia* the division of the assets of the parties. As such, it constitutes a composite final agreement entered into by the parties purporting to regulate all their rights and obligations between themselves upon divorce. In my view where parties have agreed that their maintenance agreement shall be final, as a general rule, the Courts must give effect to it unless there is a change in circumstances and or exceptional circumstances exist. In the present instance the Respondent's income during the relevant periods remained the same. Moreover, he must have been aware of his own financial circumstances when he willingly entered into this agreement.

[10] The remarks by Didcott J, in Claassens v Claassens 1981 (1) SA 360 (N) at 371 A-E, is perhaps apposite in this instance where the following was stated.

> *'Agreements governing maintenance often cover other topics too. They are frequently compromises over hotly contested issues of all sorts, and the product of hard and protracted bargaining. Everyone with experience of negotiations in matrimonial cases is well aware of that. Questions of "guilt" and "innocence", fundamental to the wife's claim for alimony while the 1953 Act lasted and not entirely irrelevant to it since then, may have been disputed. So may the amount she needed, and how much of that the husband could afford. Property had perhaps to be settled or divided, maintenance for children to be resolved. The alimony eventually agreed can seldom be isolated from such surroundings. Like the rest of the compromise, it is the result of give and take. Sometimes it is more than the Court is likely to have awarded the wife had there been none and, in return for a concession elsewhere, she has won by contract what she could not have expected from the litigation. On other occasions it is less, but some contractual benefit the Court would never have decreed has compensated her for the difference. The applicant, one recalls, was promised R15 000. I do not know why, or whether she had a good claim to it. That does not, however, matter. Suffice it to say that capital*

payments like that are familiar enough as substitutes for or supplements to regular alimony. The kind of waiver under discussion must be viewed against this background. It may well have been the quid pro quo for something of value which was not otherwise obtainable. Or the parties may simply have wanted certainty, so that they could plan for the future accordingly.'

[11] In this matter, the Applicant avers that the Respondent's income according to his bank statements in her possession amounts to (an amount of) R 241 696.97 per month. According to the Applicant this (amount) was somewhat less for the months of October and December 2011 which can be attributed to the fact that the Respondent took leave during this period. The Respondent does not deny this in his answering affidavit.

[12] The Respondent has annexed a letter from his accountant which states that he earns an average of R196 978 per month. After deducting the amounts for his practice overheads and personal expenses a net surplus of R69 836.39 remains from which to pay his maintenance obligations in terms of the consent paper.

[13] The Applicant takes issue with the Respondent's earnings as referred to by his bookkeeper. In her replying affidavit, deposed to on 23 March 2012, the Applicant, who appears to still have access to the Respondent's bank accounts into which payment by the medical aid is made in respect of his earnings, states that the amount received by the Respondent for the preceding six month period in his bank account averages an amount of R241 696.97 per month.

[14] On the Applicant's version of what the Respondent is earning; and deducting the Respondent's business expenses in the amount of R87 694.30 per month and his monthly personal expenses in the amount of R39 447.46 from his average monthly earnings, it is evident that an amount of R114 555.21 per month is available from which he should meet his obligations in terms of the consent paper.

[15] The Applicant has annexed a schedule to her replying affidavit of the actual payments made by the Respondent each month in respect of the consent paper. Gleaning from these figures, it appears that the Respondent paid an average of R49 699.20 per month for the past four months which includes maintenance for the children, their educational expenses, the arrears in respect of electricity and bond payments and medical expenses. On a simple calculation of these amounts it is evident that the Respondent is not using the surplus of R64 956 per month (being R114 555.21 – R49 699.20) to pay his obligations in terms of the consent paper.

[16] The argument by the Applicant's counsel that even if the amounts listed by the Respondent in his income and expenses list are to be accepted, before he pays his obligations in terms of the consent paper, he still has an amount of R20 137 per month to pay towards his maintenance obligations cannot be ignored.

[17] Taking these calculations into consideration it is clear the Respondent has not presented any proof of how he spends this surplus amount of money each month. The contention by the Respondent that he is doing "*everything possible in*

order to comply insofar as it is within my capabilities to do so" can therefore not be entirely correct.

[18] The Respondent cannot be prevented from bringing an application for a decrease in maintenance when sufficient and cogent reasons exist to do so. In the present instance however on the Respondent's own version there is no material change in his earning capacity. The Respondent's contention that the Applicant is capable of working and contributing to her own maintenance is not on these papers a reason for her maintenance to be reduced unilaterally. According the consent paper the Respondent agreed to pay maintenance to the Applicant until her death or remarriage. In fact in clause 4.2 of the consent paper the Respondent agreed that he would enable the Applicant to complete her studies by paying for them and maintaining her fully at least for the period of the duration of her studies. The Respondent also agreed that the Applicant should not work until her studies were completed. To borrow from Griesel J in Georghiades v Janse van Rensburg 2007 (3) SA 18 CPD at 23D-E:

> *'For the Court now to interfere in that arrangement by varying* one *component of the agreement, while leaving the balance of the agreement intact, would fly in the face of the time-hallowed principle that "(t)he court cannot make new contracts for parties; it must hold them to bargains into which they have deliberately entered". The principle of* pacta sunt servanda *is equally relevant in this context.'*

[19] On these papers I agree with the Applicant's contention that the Respondent's complaint for not complying with his maintenance order due to a lack of funds is without substance. On these papers he failed to demonstrate that his own personal expenses have been curtailed due to the lack of insufficient funds.

The Respondent took some time out and spent two weekend holidays to Mabula Game Lodge, four days in Langebaan and a weekend in Franschhoek during the time that he was not complying with his commitments in terms of the consent paper. This in my view demonstrates the unreasonableness of the Respondent's complaint of insufficient funds and evidences his lack of good faith in complying with the order of this Court.

[20] On a conspectus of all the evidence, the Respondent in my view failed to show any special circumstances present to attack the justness of the divorce order regarding his maintenance obligation in respect of the consent paper. I am satisfied that the Respondent's evidence in this matter that the terms of the consent paper is "completely unaffordable" is without merit. The Respondent's refusal to use the surplus he has each month to meet his obligations in terms of the consent paper is clearly unreasonable and in my view *mala fide*.

[21] I am satisfied that the evidence in this matter establishes beyond a reasonable doubt all the elements of the Respondent's contempt of this Court's order. The Applicant is therefore entitled to the relief sought.

In the result the following order is made:

1. The Respondent is hereby declared in contempt of the order of this Court made on 20 April 2011 under case no 7397/2011.
2. The imposition of an appropriate sanction is hereby postponed for a period of 14 days from date of this order (Wednesday, 13 June 2012) to enable the

Respondent to comply with his obligations in terms of the Consent Paper as follows:

a. by paying the arrears in respect of the minor children's maintenance in the sum of R38 000.00 and to comply with paragraph 3.1 of the order until such time as the order is varied by a court of competent jurisdiction;

b. by paying the arrears in respect of the Applicant's maintenance in the sum of R110 000.00 and to comply with paragraph 4.1 of the order until such time as the order is varied by a court of competent jurisdiction;

c. to take all steps necessary to transfer ownership to the Applicant of the immovable property situate at 51 Doordrift Road, Constantia, Western Cape on the terms and conditions as set out in paragraphs 5.1 to 5.9 of the order;

d. to pay the arrears owing in respect of the existing mortgage bond over the immovable property;

e. to pay the existing and any replacement mortgage bond instalment timeously and in full;

f. to pay the arrears owing in respect of the electricity, water, service charges, rates and taxes in respect of the immovable property and to timeously pay all such future charges;

g. to pay to Applicant the sum of R5 000.00 in respect of his obligation as set out in paragraph 5.11 of the order and to continue making such payments as provided for in such paragraph; and

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

LE GRANGE, J