Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 7308/2010

In the matter between:

LEONARDUS-MARIA WILDENBURG Applicant

and

KAROL LODGE Respondent

JUDGMENT DELIVERED ON 20 MARCH 2012

ZONDI, J:

[1] The applicant seeks an order declaring that the respondent is in contempt of an Court Order made by this Court on 1 September 2010 and that the respondent be committed to prison for a period of 30 days alternatively conditionally suspending the committal for a period of one year.

[2] The respondent opposes the application and has filed a counter-application seeking an order that the applicant be ordered to furnish security for the respondent's costs and that the proceedings be stayed pending the final determination of the security for costs application.

[3] It is common cause that the applicant and the respondent have been living together as husband and wife since 1982. There is one child born out of their relationship namely Lars, a boy born on 3 August 1984. There are two other children involved in the parties' relationship, namely Ross Lodge born on 17 September 1998

and Dané Lodge born on 11 August 2003 ("the minor children") whom the respondent adopted. The applicant could not co-adopt them as at the time of their adoption he and the respondent were not married. Section 17 of the Child Care Act, 1983 did not allow for the joint adoption of a child by the parties unless they were married. Applicant alleges, however, he had always regarded himself as *"their father"*.

[4] The parties' relationship has irretrievably broken down and they have been living apart since April 2008. On separation the respondent retained custody of the two minor children but she allowed the applicant telephonic contact with them which arrangement continued until the respondent terminated it in February 2009. This forced the applicant to bring an application on an urgent basis on 13 May 2010 for an order granting him contact with the minor children.

[5] On 1 September 2010 Desai, J granted an order which was by agreement between the parties, in terms of which the applicant was allowed contact with the minor children twice per month for a period of six months which would thereafter be reviewed by the facilitator to be appointed by the parties. The order provided for contact to take place in Mossel Bay for three hours of one weekend day, by the applicant only and without the respondent being present.

[6] In terms of clause 2 of the Court order the contact by the applicant with the minor children would initially be under the supervision of Ms Anita Rautenbach, a social worker at the applicant's expenses and the social worker was required to provide feedback in respect of each of the aforementioned contact sessions to the facilitator appointed by the parties. In this regard the parties agreed to appoint a facilitator who would be a qualified and registered clinical psychologist with at least five

years' experience of working with children and families and who is a member of FAMAC.

[7] Clause 7 of the Court Order authorised the facilitator to:

"7.1 regulate, facilitate and review the contact arrangements in respect of the minor children in general, and more specificially, to undertake the review of the contact arrangements referred to at paragraph 1 hereinabove;

7.2 make recommendations in respect of any issue concerning the welfare and/or affecting the best interests of the minor children;

7.3 issue directives binding on the parties in any issue concerning the minor children's welfare and/or affecting their best interests (subject to a Court of competent jurisidiction holding that such directive is not in the minor children's best interests);

7.4 co-opt the services of a co-facilitator when reasonably necessary.

7.5 Insofar as the facilitator has the power to make decisions in respect of the minor children, the power shall be exercised in the best interests of the minor children and shall be binding on the parties, unless the High Court, as upper guardian of the minor children, orders otherwise.

7.6 The facilitator's services involve elements of mediation, expert opinion and counselling, but do not purely fall into any of these categories. The facilitator is not appointed as a psychotherapist, counsellor or attorney for the minor children or parties. No psychotherapist/ patient or attorney/ client relationship is created by this appointment or otherwise exists between the facilitator and any or the parties or minor children."

[8] In terms of clause 10 of the Court order if the facilitator was unable to resolve a dispute by way of mediation, he/she could resolve it by issuing a directive which would be binding on the parties. Clause 18 of the Court order required the parties to provide the facilitator with all information he or she required relating to the minor children.

[9] The applicant alleges that it became necessary for the parties to appoint a facilitator to regulate the contact arrangements as he and the respondent were unable to agree on their implementation. He points out that the facilitators who were appointed to do so attempted to mediate the dispute between the parties and issued directives but all their attempts were in vain as the respondent lacked a will to co-operate. A lack of co-operation on the part of the respondent forced the facilitators to withdraw from the process. The applicant alleges that the facilitators issued directives on 10 June 2011 and 22 August 2011 directing that he be allowed to have contact with the minor children as it was in their best interest that they bonded with him. In this regard the applicant refers to a letter addresses to the respondent by the facilitator on 24 June 2011 expressing his concern that the respondent had failed to honour the appointment he had with the respondent.

[10] The applicant further alleges that the respondent is in breach of the Court order of 31 August 2010 and in support of that allegation he refers to the letters sent to the respondent by the facilitators on 5 May 2011 and 25 August 2011respectively. He also relies on a letter addressed to the respondent by his former attorney of record on 5 September 2011.

[11] On 5 May 2011, Ian Gillespie, a facilitator sent an email to the respondent pointing out to her that she was in breach of the Court order by failing "*to copy*

communications to the other party" and to advise him of her availability.

[12] In reply thereto the respondent sent an email to the facilitator informing him as follows:

> *"Dear Karol*
>
> *Of course you are fully at liberty to speak with your attorney on whatever you wish, but in the meantime I must draw your attention again to the fact that you, yourself, are disregarding the Court Order in certain matters, one of which is that you are persistently failing to copy communications to the other party as is clearly mandated in the Court Order, despite the fact that I have pointed this out to you on more than one occasion. I am sure your attorney will confirm this. There are other matters which I could raise but as I have just returned to Cape Town I will not deal with them now as I am hoping to finalise with you and the other party the arrangements for meetings next week and there will be opportunities therefore to discuss them face to face. In the meantime please urgently respond to the question of available dates as it is already too late for the first possible date and I have to assume from your reply that you in fact to advise dates to Ms Bok as timeously requested by me. I look forward to your prompt reply."*

[13] The applicant contends that the respondent's breach of the Court order is wilful and intentional and is indicative of *mala fide* on her part.

[14] In response to the applicant's application the respondent, on 11 January 2012, brought on an urgent basis an application for hearing on 17 January 2012, being the date on which the applicant's application was set down, for an order, first, directing the

applicant to furnish security for her costs in the sum of R150 000.00 within 10 days of the granting of the order and secondly, staying the applicant's application for contempt of Court pending the determination of the security for costs application. The applicant opposes the respondent's application for the security for costs.

[15] The application for the security for costs and the stay of the contempt of court proceedings is brought on the basis that the respondent should not be called upon to defend the application which amounts to nothing else but an abuse by the applicant of the Court's process and in circumstances where she would not be able to recover her costs should she succeed in defending it.

[16] In this regard the respondent points out that on 13 April 2010 the applicant brought an application against her for her removal as a trustee of the Derwin Trust. The respondent says she opposed that application. On 11 June 2010 that application was postponed for trial in accordance with Rule 6 (5) (a) of the Uniform Rules to 23 November 2010 and the applicant was ordered to pay the wasted costs. The application was not heard on 23 November 2010 but was postponed *sine die*.

[17] The respondent alleges that she thereafter caused a bill of costs to be taxed. It was taxed and allowed in the sum of R62 140.61. Her taxed bill of costs was presented to the applicant for payment but the applicant neglected to pay. In consequence of the applicant's failure to pay the amount of the taxed costs the respondent caused a writ of execution to be issued against the applicant's movable property. The Sheriff of the Court attended at the applicant's residential address to have the writ executed. The writ of execution was served on the applicant and the Sheriff rendered a *Nulla Bona* return in which he set out how the writ was handled.

[18] The Sheriff reports in the *Nulla Bona* return that: "*after I demanded payment of the amount due, I was informed by the party served that it was impossible to pay the amount claimed or any sum*". No property or assets could after diligent search be pointed out to him to satisfy the writ. The respondent contends that the *Nulla Bona* return is a clear proof that the applicant has committed an act of insolvency and is in fact insolvent.

[19] The respondent points out further that simultaneously with the application for her removal as a trustee, the applicant launched a further application against her for the contact with the minor children which application she opposed. By agreement between the parties an interim order was taken on 1 September 2010 affording the applicant certain supervised contact with the minor children. The interim order was to be reviewed after a period of 12 months and a facilitator appointed in the interim. That application has not been finally determined.

[20] The respondent further alleges that it is for these reasons that she, on 15 December 2011, caused a notice in terms of Rule 47 to be served on the applicant calling on him to put up security in an amount of R150 000.00 for her costs of opposing the contempt of Court proceedings.

[21] In response thereto, the applicant filed a notice in terms of Rule 47(3) contesting his liability to furnish security for her costs. Thereafter on 14 December 2011 the respondent's attorneys of record wrote to the applicant's attorneys of record suggesting to them that the contempt of Court proceedings be stayed pending the final determination of the application which the respondent intended to bring to compel the applicant to furnish security for her costs. The applicant in a letter dated 21 December

2011 rejected the respondent's suggestion for the stay.

[22] The respondent contends that she has a reason to believe that should she be successful in opposing the applicant's contempt of Court proceedings she will not be able to recover substantial costs that she will have been obliged to incur in so doing. She points out that she has no prospect of recovering her costs from the applicant in light of the Sheriff's *Nulla Bona* return.

[23] In opposing the respondent's application for security for costs the applicant denies that the application was urgent and goes on to say the following in paras 6 – 9 of his answering affidavits:

> *"6. I take notice of the contents of these paragraphs but state that it is totally irrelevant. The allegation's relate to another cause of action under another case number and has nothing to do with the Applicants continuous and mala fide failure to obey the Court order granted under this very case number on 31 August 2010 to afford me contact with the minor children. I deny that I am factually insolvent, or that I have committed an act of Insolvency. I was advised that the Applicant is the author of her own urgency in that my application granted her ample time to oppose, which should have taken place on or before 28 November 2011, after being served on her attorneys on 16 November 2011.*
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> *7. Applicant only served a notice to oppose my application on 29 November 2011, and has ample time to bring an Application for security. I was advised that even if the present application to compel me to furnish security to the amount of R150 000 was brought timeously, it would still have been without any basis whatsoever.*

8. *By entertaining the present application before Court, the Honourable Court would in effect, by granting the prayer for security to be furnished and staying the proceedings regarding the Applicant's contempt of this Court, divest himself of the power to investigate alleged contempt of its Orders, unless money is paid, thereby making it even more difficult to have contact with the children as ordered and so protecting the Applicant to remain in further contempt of the Order granted.*

9. *I have no doubt at all that the application for security is brought to frustrate my desire to have contact with the children, as the documents presented to the Honourable Court will prove."*

[24] The applicant rejects the suggestion that he is insolvent or has committed an act of insolvency. To substantiate his denial he has this to say in para 10 of his affidavit:

"10. If annexure "B" of the Application for security is perused, i.e. the so called Nulla Bona return of service by the Sheriff of Court, it can be seen that the Sheriff of Court wrote: "DO NOT OWN IMMOVABLE PROPERTY". My wife has given a statement to the Sheriff of Court and I am the owner of a variety of very valuable movable antique property. Annexure F and G to my own application is annexed hereto for the benefit of the Court, indicating that both the Applicant and her attorneys are very much aware that I am the owner of movable property. As stated, I am not sequestrated or insolvent and there is no reason why I should be expected to furnish any security at all. All I ask is that Applicant adheres to the Court order granted by this Honourable court on 31 August 2010. I have tried my utmost to be in a position to have contact

with the children, together with the help of the appointed facilitators but because of Applicants wilful failure to co-operate, had no choice but to approach Court for relief, especially after the facilitators have resigned in desperation. The court may verify this in my application, and refer to the annexures thereto."

[25] The issue to be determined is whether the applicant should be ordered to furnish security for the respondent's costs in the contempt proceedings and whether the contempt proceedings should be stayed.

[26] The Courts have discretion to grant or refuse an application for security for costs and, in coming to a decision, will consider the relevant facts of each case. (*Silvercraft Helicopter (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd*, and Two Other Cases 2009 (5) SA 602 (C) at para 26). In deciding whether to grant an order compelling the plaintiff to furnish security the merits of the plaintiff's action are not always decisive, but simply a factor to be taken into consideration. (*Davidson's Bakery (Pty) Ltd v Burger* 1961 (1) SA 589 (0)).

[27] Where there is abuse of its process the Court has inherent jurisdiction to prevent it by staying proceedings or ordering security in certain circumstances (*Ecker v Dean* 1938 AD 102 at 111) In *Crest Enterprises (Pty) Ltd and Another v Barnett and Schlosberg NNO* 1986 (4) SA 19 (C) this Court had an occasion to consider the circumstances in which plaintiff or applicant may be compelled to furnish security. At 20 B – D Berman J expressed himself as follows in this regard:

"The law, however, relating to the provision by a plaintiff (or applicant) security for the costs of the opposing party is well-settled in our law and may be

succinctly stated as follows, viz no hurdle should be permitted to stand in the way of any person's access to a court in seeking relief at its hands, and no court should - in the case of an impecunious litigant - by requiring him as plaintiff, or applicant, to provide security for his opponent's costs, lend support to the canard which likens its doors to those of the Ritz Hotel. To the general principle, enunciated over a century and a half ago in Witham v Venables (1828) 1 Menzies 291, there are a number of well - recognised exceptions to be found both in the common law and as laid down by statute.

[28] The learned Judge pointed out that the well-recognised exceptions under the common law are, peregrine plaintiffs, persons bent on pursuing vexatious and reckless actions and those who resort to proceedings which are an abuse of the process of the court. He further pointed out that the mere fact that a party suing is an insolvent is no ground for obliging him to provide security for his opponent's costs. In his view the test whether or not an insolvent plaintiff should be compelled to furnish security for costs is whether his action is vexatious or reckless or amounts to an abuse of the Court's process.

[29] I intend determining the issues before me on the basis of the aforegoing principles. In other words, the question of the applicant's liability to provide security must be approached on the basis of whether he can be said to be a person who is bent on pursuing vexatious and reckless actions in the sense that it is one standing outside the region of probability altogether and is therefore incapable of succeeding (*Fitchet v Fitchet* 1987 (1) SA 450 (ECD) at 454 B) and whether the proceedings he has thus far brought against the respondent might be characterised as an abuse of the Court's process as described by the Supreme Court of Appeal in *Phillips v Botha* 1999

(2) SA 555 (SCA) which at 565 E – F described it as the process that is employed for some purpose other than the attainment of the claim in the action.

[30] In my view, on the papers, there is no factual support for the finding that the applicant is a person who is bent on pursuing vexatious and reckless actions or that the three applications he had brought against the respondent are an abuse of the Court's process. In relation to the contact application the applicant succeeding in persuading the respondent to agree to an interim order affording him contact with the minor children. The trust application was postponed and has not been finalised. In the circumstances there can be no basis for compelling him to furnish security on the ground that the applicant is bent on pursuing vexatious and reckless actions.

[31] What then remains to be considered is whether the respondent has made out a case for furnishing security for costs based on the applicant's inability to pay her taxed costs. In this regard Ms **Maass,** who appeared for the respondent persuaded me to find that the applicant's failure to pay the respondent's taxed costs in an amount of R62 140.61 constituted inability to pay which would therefore afford a basis for a finding that the applicant should be compelled to furnish security as he will be unable to pay the respondent's costs should the respondent succeed in defending the contempt of Court proceedings. To support her argument Ms **Maass** placed a great deal of reliance on the Nulla Bona return which the Sheriff rendered when he attempted to execute the writ which had been issued against the applicant's movable assets.

[32] The applicant denies that his failure to pay the taxed costs is due to his impecuniosity and that on the ground thereof he should be compelled to furnish

security for costs of the respondent. The applicant disputes the correctness of the Sheriff's *Nulla Bona* return which suggests that he does not have assets with which to satisfy the respondent's costs. He alleges that he is the owner of a variety of valuable movable antique property. The applicant denies that the informed the Sheriff that he does not own immovable property. He says it is his wife who made that statement to the Sheriff. I reject the applicant's denial as false as the *Nulla Bona* return makes it clear that the Sheriff served the writ on the applicant and that when the Sheriff requested the applicant to "*declare whether he has any immovable property which is executable*" he said he had none. The applicant has not filed a confirmatory affidavit from his wife to confirm what he alleges she communicated to the Sheriff.

[33] In argument before me Mr **Smit,** who appeared for the applicant rejected the suggestion that the reason for the applicant's failure to pay the taxed costs is due to the applicant's impecuniosity. Mr **Smit** submitted that the applicant refused to pay the respondent's costs because he felt that it was unfair to pay the respondent's costs when the respondent consistently refused him contact with the two minor children. I find the applicant's conduct very astounding. His failure to comply with the Court Order is deliberate and borders on malice. He may not treat the Court Order as if it does not exist. He has to comply with it until it is either set aside or nullified. Although I am unable to find, on the papers before me, that the applicant's failure to pay the taxed costs is due to impecuniosity which would, together with other considerations, justify the security for costs order being made against the applicant, I am of the view that something needs to be done to compel the respondent to comply with the costs order which on his own admission he is able but not willing to meet.

[34] While there is no basis for compelling the applicant to furnish security for the

respondent's costs, I, however, do find that there is a basis for ordering the stay of the applicant's contempt of Court proceedings pending payment of the respondent's taxed costs by the applicant. According to the applicant he has sufficient means with which to satisfy the respondent's taxed costs relating to the trust application which is intrinsically linked to the two applications which the applicant has brought against the respondent. It is correct that the Court has a discretion in deciding whether a stay of action should be granted, or not. A factor which in the present matter has weighed with me in deciding to order a stay is that the applicant has contumaciously refused to pay the costs awarded against him which in my view is also vexatious (*Argus Printing & Publishing Co. Ltd v Rutland* 1953 (3) SA 446 (C) at 449 E).

[35] In the result the following order is made:

1. a stay of the applicant's contempt of Court proceedings is ordered pending payment by the applicant of the respondent's taxed costs relating to the trust application which the applicant brought also under case number 7308/2010.
2. the applicant is ordered to pay the costs of this application.

D H ZONDI