



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

[REPORTABLE]

CASE NO: 10357/2014

In the matter between:

DANIELA STANDER

Applicant

And

ROGER CHRISTOPHER MARAIS

Respondent

JUDGMENT DELIVERED ON WEDNESDAY, 17 SEPTEMBER 2014

INTRODUCTION

1. The application arises from the terms of the divorce order granted by the Southern Divorce Court on 29 November 2010 under case number CT 6490/2010. The divorce order incorporates a Consent Paper, which sets out in precise terms, the rights and duties of the parties to each other. The applicant seeks orders from this Court arising from the enforcement and implementation of the divorce order of that Court. She contends that the respondent has failed to meet his obligation under the Consent Paper, and is therefore in contempt of

the order of that Court. She further contends that, as a consequence of the respondent's non-compliance with the order of that Court, she has and continues to suffer material prejudice. The respondent, while conceding failure to fully comply with the terms of the court order, nonetheless contends that he is not in contempt in that his non-compliance is not *mala fide* or deliberate. However, the respondent's real defence to the relief sought by the applicant in this Court is that this Court is barred from enforcing the terms of a divorce order granted by the Southern Divorce Court for a number of reasons dealt with below.

2. The first issue therefore is whether this Court has jurisdiction to enforce orders granted by a lower court, the Southern Divorce Court. In order to appreciate the submissions made relating to this Court's jurisdiction it is important to set out the relief sought by the applicant.
3. The applicant seeks the following orders:
 - 3.1. Granting leave that this matter be heard as one of urgency in terms of Rule 6(12) of the Rules of Court and condoning the applicant's non-compliance with the Rules pertaining to form, time periods and service;
 - 3.2. Preventing the respondent from further breaching the order by the Southern Divorce Court, dated 29 November 2010 under case number 6490/2010, as set out in the founding affidavit of the applicant by;

- 3.2.1. Effecting timeous monthly payments in the full amount of the installments due under the loan account with regard to a bond registered over Erf 9..... Cape Town at Marina Da Gama to Standard Bank Homes Loans under account number 2.....
- 3.2.2. Effecting timeous payments in the full amount of the installments due with regard to the rates and taxes and municipal services used with regard to Erf 9..... to the City of Cape Town Municipality under account number 1.....
- 3.2.3. Effecting payment of all arrear amounts due Standard Bank Home Loans and the City of Cape Town Municipality under the respective accounts as referred to above.
- 3.3. That the respondent be held in contempt of the divorce order granted by the Southern Divorce Court on 29 November 2010 in a matter under case number CT 6490/2010;
- 3.4. Ordering that the immovable property, Erf 9....., Cape Town, situated at 1.... R..... C..... M..... Da G....., M....., Western Cape (“Rusten Close”), be sold on auction to the highest bidder as provided in clause 11.6 of the Consent Paper;

3.5. That the respondent be ordered to pay the costs of this application on a punitive scale as between the attorney and own client.

4. On the issue relating to jurisdiction, the respondent opposes the relief sought against him and for that relies on *Dreyer v Welbols*,¹ a decision of the South Gauteng High Court. On behalf of the respondent, Counsel opposes this Court's jurisdiction, mainly on the ground that the applicant has not pursued his remedies under the Magistrates' Court Act 32 of 1994. In terms of section 106 of the Act, a willful failure to comply with an order, *ad factum praestandum*, of the magistrates' court is a criminal offence punishable by a fine, or imprisonment or both.² He contends that the High Court should decline to engage the *process-in-aid* remedy or rely on its inherent jurisdiction to adjudicate this matter. This, he further contends, is because the applicant has failed to provide any grounds for this Court to assume jurisdiction on the basis of inherent jurisdiction or to grant the *process-in-aid* remedy.

5. On the merits of the application, the respondent contends that:

5.1. That the provisions of the Consent Paper on which the applicant relies in support of her prayer that the immovable property situated at Rusten

¹ 2013 (4) SA 498 GSJ at para 4; He also relied on *Bannatyne* (CGE, as *amicus curiae*) 2003 (2) SA 363 (CC) para 20

² section 106 of the Magistrates' Court Act reads as follows:

'106 Penalty for disobedience of judgment or order of court

Any person willfully disobeying, or refusing or failing to comply with any judgment or order of a court or with a notice lawfully endorsed on a summons for rent prohibiting the removal of any furniture or effects shall be guilty of contempt of court and shall, upon conviction, be liable to a fine or to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine.'

Close (“the Rusten Close property”) be sold, have orally been varied or amended by agreement between the parties, alternatively, any application that such property be sold on auction is premature. Accordingly, the respondent is not in breach of the order in this regard.

5.2. In so far as he failed to comply timeously and in full with his obligations in terms of clauses 15.1 and 15.2 of the Consent Paper, the respondent is not in contempt of Court as he has not disobeyed the order willfully and in bad faith;

5.3. In seeking an order that the respondent be compelled to in future comply with his obligations in terms of clauses 15.1 and 15.2 of the Consent Paper,³ the applicant requires this Honourable Court to grant a superfluous or unnecessary order in respect of matters that are in any event *res judicata*;

5.4. There are no arrears owing to Standard Bank and the City of Cape Town in respect of the Rusten Close property; and

³ Clause 15 states that:

- “15. Until such time as the Rusten Close property has been transferred into Defendant’s name, or that of a third party pursuant to a sale, the Defendant will:
- 15.1. Continue to timorously (sic) make payment to Standard Bank in respect of the all bond payments;
 - 15.2. Pay all rates and taxes owing to the City Council in respect of the Rusten Close property, including all sewerage and water charges, insurance and reasonable maintenance expenses.”

- 5.5. This application is brought in bad faith and constitutes an abuse of the process of this Honourable Court. As such the application must be dismissed with costs on a punitive scale.
6. The respondent has given a complete answer to all the allegations and not merely sought to have this matter dismissed on the basis of his preliminary objection to the question of this Court's jurisdiction. The first step therefore is to determine the question of this Court's jurisdiction for it is trite that a Court must operate within the confines of its power.

JURISDICTION

7. Black's Law Dictionary, sixth edition, defines jurisdiction as follows:

"A term of comprehensive import embracing every kind of judicial action. It is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions, and declare judgment. The legal right by which judges exercise their authority. It exists when court has cognizance of class of cases involved, proper parties are present, and point to be decided is within powers of court."

8. This is expanded upon in Anderson's "**A Dictionary of Law, A.D. 1893**" as follows:

"Power to hear and determine a cause. Power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them. (Relates to the exercise of judicial powers.) Refers to the power of the court over the parties, the subject-matter, the *res* or property in contest, and the authority of the court to render the judgment or decree which it assumes to make. (By jurisdiction over the "subject-matter" is meant the nature of the cause of action or relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its

powers or in the authority specially conferred. Jurisdiction of the "person" is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the "*res*" is obtained by seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. Hence want of jurisdiction may be shown as to the subject-matter, the person, or, in proceedings in *rem*, as to the thing."

9. The primary contentions advanced by Mr. Van der Merwe for the respondent against this Court's jurisdiction to enforce the orders of the lower court are the following;

- 9.1. First, it is contended that the applicant has not pursued her remedies under the Magistrates' Court Act 32 of 1944, more particularly in terms of section 106 of the Act, which provides that a willful failure to comply with an order, *ad factum praestandum*, of the Magistrates' Court is a criminal offence punishable by a fine, or imprisonment, or both.

- 9.2. Secondly, the 'process-in-aid' remedy, whereby a court may enforce a judgment of another court, which cannot be effectively enforced through its own process, is not an appropriate remedy in this matter because the Magistrates' Court is capable of securing compliance with its own orders, presumably via the section 106 procedures.

- 9.3. Thirdly, the contempt of court prayer for allegedly violating the terms of the order of the lower court may be heard by a High Court only on the basis of its inherent discretion. The respondent submits that this court must not exercise its discretion because the applicant has, for such

discretion, relied on no exceptional circumstances. There are no ‘*good and sufficient reasons*’⁴ for this Court to exercise its discretion in favour of granting the relief sought by the applicant, so the argument goes. In particular, the respondent contend that the onus of the applicant to make out a case in favour of this court exercising discretion in favour of enforcing the terms of the lower court order had not been met since the applicant was unable to show that the magistrates’ court does not have an effective remedy to protect the rights of the applicant.

10. Whether or not this Honourable Court grants the *process-in-aid* remedy depends on whether the relief sought by the applicant may be enforced through the mechanism of section 106 of the Magistrates’ Court Act. The *process-in-aid* remedy is a discretionary remedy. The Constitutional Court in *Bannatyne v Bannatyne (CGE as amicus curiae)*⁵ held that the *process-in-aid* remedy will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that court which can be used. However the Honourable Court went further and stated that, “*there may be instances in which the facts of a particular case justify approaching a High Court for such relief.*”

According to the Constitutional Court therefore, a Court must be guided by the

⁴ *Bannatyne v Bannatyne (CGE as amicus curiae)* 2003 (2) SA 363 (CC) at para 23 “It is for the applicant to show that there is good and sufficient reason for the High Court to enforce the judgment of another court. What constitutes ‘good and sufficient circumstances’ warranting a contempt application to the High Court will depend upon whether or not in the circumstances of a particular case the legislative remedies available are effective in protecting the rights of the complainant and the best interests of the children. That much is confirmed in s 38 of the Constitution, which permits a court to grant appropriate relief where it is alleged that a right in the Bill of Rights has been infringed or threatened.

⁵ *Ibid* at para 22

peculiarity of the circumstances of each case to determine whether to invoke the *process-in-aid* remedy.

11. The success of the respondent's objection to the jurisdiction therefore depends on a number of issues. First I did not understand the respondent to be suggesting that the principle that he is relying on is inflexible and immutable. It depends on the nature of the relief sought by the applicant. If the relief sought by the applicant may be enforced only through the mechanism of section 106 of the Magistrates' Court Act in the Southern Divorce Court, then this Court must tread carefully to assume jurisdiction. If however the Southern Divorce Court does not have an effective remedy to enforce its orders in terms prayed for by the applicant, then this Court may utilize the *process-in-aid* remedy to assume jurisdiction. Finally, I must determine whether this Court may assume jurisdiction on the basis set out in the Constitutional Court in *Bannatyne v Bannatyne*, based on the peculiarity of the facts of this case. The question is therefore whether there are "*facts of this particular case that justify approaching a High Court for such relief.*"

THE RELIEF SOUGHT BY THE APPLICANT

12. This Court was, by Mr. Spamer for the applicant, encouraged to pay particular attention to the precise terms of the orders sought by the applicant because, so he persisted, it is where the answer to the respondent's objection to this Court's jurisdiction resided. The encouragement bore fruits because as I did, it became

clear that the respondent's objection to this Court's jurisdiction is unsustainable on a number of grounds.

13. The respondent's objection to the Court's jurisdiction, in my view, is based on a failure to fully comprehend and appreciate the scope of the applicant's relief. His approach is based on the belief that the applicant's main relief is confined to the issue of contempt. If the issues were confined to the contempt of court referred to in section 106 of the Magistrates' Court Act, this Court would hesitate to assume jurisdiction.⁶ The relief sought by the applicant is not confined to the issue of contempt, which if it were, could exclude the jurisdiction of this Court.

14. It bears to emphasize that the authorities that I was referred to and those I sought answers from, do not regard the principle that a High Court will not exercise jurisdiction to enforce orders of a lower court, to be immutable and inflexible. A High Court should not be pusillanimous in addressing questions relating to its jurisdiction mainly because to it, is granted the inherent powers now engraved in section 173 of the Constitution to regulate its own processes and to develop the common law, taking into account the interests of justice. Furthermore section 38 of the Constitution gives to a court the power to grant appropriate relief where it is alleged that a right in the Bill of Rights has been infringed or threatened.

⁶ Dreyer v Wiebols and Others 2013 (4) SA 498 (GSJ) at [9]; Els v Weideman 2011 (2) SA 126 (SCA) at [33]

15. The right of the applicant is to dignity, which is guaranteed in section 10 of the Constitution. Any breach of the terms of the Consent Paper exposes the applicant to the indignity of having no choice over when to exercise her rights to dispose of property registered in her name. Furthermore, the applicant has a right in section 34 of the Constitution to have her dispute with the respondent resolved by the application of law decided in a fair public hearing before a Court. The fact that she still has to negotiate with the respondent the enforcement of the court order presents a scenario that justifies this Court invoking its inherent jurisdiction to deal with the dispute. It is clear that the conceded failure by the respondent and the robust opposition to this application will continue to present intractable challenges for the effective implementation of the Court Order and in the process stifle the applicant's attempt to free herself from the trap of her failed marriage to the respondent. Without fully complying with the Court Order, the parties remain prisoners of each other, and cannot enjoy the benefits of their divorce, whatever those may be. The applicant appears determined to enjoy the benefits of the divorce order and seeks to free herself from the consequences of the respondent's failure to give effect to the Court Order. A failure to comply with the Court Order may, if left unchecked, have a deleterious effect on the applicant's plans to live her life beyond the divorce and hamper her attempts to start a new life unencumbered by the burden of her past life.

16. In trying to extricate herself from her past, she has found herself threatened with expenses that the respondent is legally responsible for or decisions about the Rusten Close property, which she has no legal interest in keeping. The

declaratory and directory orders are her attempt to seek redemption from the Court, which has the power to grant the orders. The question relating to jurisdiction is therefore answered by the inherent jurisdiction of the Court to fashion appropriate remedies. Judicial timidity is inimical to the proper administration of justice and a Court ought not to quickly surrender its power or likely defer its authority to exercise jurisdiction on matters that implicate the Bill of Rights. Section 172(1)(b) of the Constitution makes it plain that a Court has discretion to make any order that is just and equitable. This gives the High Court the right to treat with suspicion arguments advanced to constrain its powers to intervene to resolve legitimate disputes involving the protection of constitutional rights, and to advance the effective and proper administration of justice.

17. The respondent's submissions against the jurisdiction of this Court to adjudicate this dispute in this application are therefore misconceived. The submissions overlook the scope of the relief sought by the applicant and that the Southern Divorce Court has nothing in its judicial armory to enforce its order in terms sought by the applicant. The facts of this case therefore call from this Court reliance on its discretionary powers to summon to its aid the *process-in-aid* remedy. In any event, this Court has inherent power to regulate its processes and to grant justice to parties serious about enforcing their constitutional and legal rights. In my view it is constitutionally permissible to rely on the principle of the High Court's inherent jurisdiction to resolve real disputes affecting ordinary people's rights. Inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being the reserve fund of powers, a residual

source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair hearing between them.⁷

THE APPLICANT'S SUBMISSIONS

18. The applicant's submission in support of the relief sought is crisp and expressed with commendable clarity. It is that the respondent has breached the terms of the Consent Paper – an accusation conceded to by the respondent. It is further that the breach is to the detriment of the applicant. The respondent does not deny that accusation. On the strength of this breach the applicant seeks a declaratory order that the respondent is in contempt. She relies on the decision of the Supreme Court of Appeal in *Fakie*⁸ to support the form of declaratory relief. The applicant expressly refused to pursue the route of section 106 of the Magistrates' Court Act in which contempt may result in a criminal sanction. All that she wants is for the respondent to comply with his obligations under the Consent Paper and her approach is to seek an order in the form of specific performance. To the extent that there is ambiguity as to the precise nature of

⁷ G. Sanam, Halsbury's Laws of England, 4th ed. (London-Butterworths); *See Also*, Issac H. Jacob, "The Inherent Jurisdiction of the Court: (1970)

⁸ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 345B

those obligations under the Consent Paper, she seeks a declaratory order similar to that referred to in Fakie.⁹

19. I see nothing wrong with this eminently reasonable and sensible approach. The order sought would be in the nature of an order for specific performance predicated on a declaration that the respondent is in breach of the terms of the Consent Paper. The contempt alleged by the applicant is the breach of the Consent Paper. In her submission, the breach of the Consent Paper is the contempt since the Consent Paper is an order of Court.

20. On that approach I must first determine whether there is indeed a breach of the Consent Paper. If there is a breach, I must declare that such breach has taken place. I must thereafter determine whether consequent relief in the form of directory relief is justified in the sense that it is just and equitable.

HAS THE RESPONDENT BREACHED THE TERMS OF THE CONSENT PAPER?

21. The parties are *ad idem* on the terms of the Consent Paper. The respondent makes it crystal clear that he does not dispute the provisions of the Consent Paper. He also accepts that he has failed to take transfer of the Rusten Close property in breach of the 11.2 of the Consent Paper, which states, “*subject to clauses 11.5 and 11.6 hereunder, Defendant will take transfer of the Rusten*

⁹ See also the judgment of the Constitutional Court in Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (4) BCLR 301 (CC) at para 106-108

Close property. Defendant will present written proof to the Plaintiff that he has secured bond finance with an established bank or other financial institution against registration of a Mortgage Bond on its normal terms and condition over the property, within 40 calendar days of the date of signature of this agreement.” He also concedes that the property has not been sold to date contrary to 11.6 of the Consent Paper which provides that in “the event of the Defendant failing to take transfer of the Rusten Close property, or should it not be sold within six months of being placed on the market, whichever event shall last occur, then the Rusten Close property will be auctioned to the highest bidder by an auctioneer appointed by Plaintiff.”

22. To this concession, the respondent vehemently denies being in contempt since, so he contends, he has not acted deliberately or in bad faith in not complying with the terms of the Consent Paper. He pleads a variation of the Consent Paper in terms of which it is alleged that on 20 November 2010, the parties expressly agreed that the respondent could take as long as he liked to procure the transfer of the Rusten Close property to him and that he could remain in such property pending such transfer. The consequence of this alleged variation according to the respondent is that the parties effectively deleted, alternatively suspended, clauses 11.5 and 11.6 of the Consent Paper which provides for the sale of the property in question to a third party.

23. Even though there is no reply to the allegation of a variation of the Consent Paper, I am not prepared to accept such a variation as binding. The Consent Paper is a Court Order and no variation may be made to a Court Order unless

the Court that granted it authorizes such a variation. I am not prepared to accept that the parties, without the involvement of the Court, can simply change or ignore a Court Order, which is binding on all parties concerned.¹⁰ I believe the principle to be trite. Section 165(5) of the Constitution provides that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. It would undermine the proper administration of Court Orders and consequently the integrity of the Courts, if parties, who have chosen to have their Consent Paper made an order of Court, were to change the terms thereof without the involvement of the Court. A Court has the power to vary its orders but in limited circumstances provided for in its rules. A Court though will not give its imprimatur to the actions of individual litigants who decide, without a proper basis to vary the terms of a Court Order. To do so would result in Court Orders being ignored by parties. As already stated above, a party that wishes to vary a Court Order, must, in a properly considered application set out a basis for it.

24. Even if I am wrong on the principle that parties cannot vary or delete parts of a Court order without its involvement, I am comfortable that there is no evidence to suggest that this Court Order was varied in the terms alleged by the respondent. This means that the parties are bound to the terms of the Consent Paper as they appear in the Court Order.
25. I must consequently hold that the respondent has no answer to the allegation that he breached the terms of the Consent Paper regarding the disposal or sale of

¹⁰ Of course it is open to a party to abandon an order granted in his or her favour

the Rusten Close property. In fact it is a finding made with ease because in essence the respondent has conceded the failure to comply with the terms of the Consent Paper. All that he contends to avoid the consequences of non-compliance with a Court Order is that his failure to comply was not deliberate or *mala fide*. The Court accepts his defence on the issue of contempt. However the applicant is entitled to an order in terms of which it is declared that the respondent has failed to comply with the terms of the Court Order. As a consequence of such declaration, the Court must then grant directory relief relating to the disposal or sale of the Rusten Close property.

26. Having found that the respondent has failed to comply with the terms of the Court Order, what remedy is just and equitable under the circumstances? The issue of the Rusten Close property can no longer be left to the dictates of the parties alone but must be enforced through the Court Order. The operative clause governing the sale of the Rusten Close property must therefore be given effect to, in particular clause 11.6 which provides for the sale of the property by auction in the event of the respondent failing to take transfer within the period of six months referred therein. I am prepared to make that order, more particularly given that the respondent did not display an encouraging attitude towards fully complying with the terms of the Court Order. His attitude in this application was bellicose and it seems to me that a robust approach should be taken by this Court to curb any further non-compliance with the Court Order and more particularly on the disposal of the Rusten Close property.

27. In any event, it is clear from the papers that there is no dispute that the property should be sold by auction in terms of this clause. In his voluminous affidavit, the respondent said in paragraph 320 that *“I never objected to the sale of Rusten Close and remain willing that it be sold, provided that it is sold for its fair market value, which will never be achieved on a forced sale or even an auction, and that a sufficient period is afforded to me to sell such property.”*
28. This reasonable concession is spoilt by the unreasonable demand that the property be sold for a fair market value, and that the manner of its sale must exclude a sale by auction. The respondent’s conditions, in my view, if accepted would constitute a deletion or amendment of clause 11.6 of the Court Order without a proper basis. This Court, as already stated above, will not countenance such a position. A Court cannot be expected to enforce an agreement that is at variance with its order. To order that the Rusten Close property be sold on the respondent’s terms would constitute an unjustifiable and untenable interpretation of the Court Order, more particularly clause 11.6 of the Consent Paper. There are further difficulties with the respondent’s contentions on the conditions for the sale of the Rusten Close property, which if accepted would result in the property not being disposed of in accordance with a Court Order but the market forces. The respondent’s conditions, in my view, would frustrate the proper implementation of a Court Order and undermine the rights of the applicant. That, a Court will not sanction.
29. The machinations of the housing market are fraught with frustrating speculation on the perfect price that could tie the applicant to this property for a time longer

than is reasonable. The conditions, in any event, appear designed only to benefit the respondent and to prejudice the applicant. Any attempt to predict with precision the fair market value of the property would be an exercise in futility. It is also unfair to demand from the applicant that she remains tied to this property as an unwilling registered owner, when she can extricate herself from it by enforcing her rights under clause 11.6 of the Consent Paper. She is entitled to enforce her rights under the Court Order and to insist that the respondent complies with the terms of the Court Order.

30. The respondent's conditions therefore are designed to usurp from the hand of the applicant the only tool that she can utilize to extricate herself from the unenviable position of being an unwilling registered owner of the property. It is clear that she has patiently held the fort for the ungrateful respondent, permitting him to borrow her integrity by remaining the registered owner – with all the risks that go with such ownership. The proposal of the respondent is unimpressive and demonstrates that he is unwilling to release his erstwhile wife from the trap of owning property that she does not really own. I am prepared to accept that she agreed to be the registered owner in order to assist the respondent. The registration of ownership was, in reality to the respondent's benefit and her ownership of the property has shielded the property from the reach of possible creditors.

31. Having said that, this Court would also rely on the principles of ownership to ensure that the terms of the Court Order are fully implemented. As registered owner of the property, the applicant is, in any event, entitled to dispose of the

property as she chooses. Despite the position common to both parties in respect of who the real owner of the property is, it is clear to me that there is no legal impediment from the applicant asserting rights generally accorded to registered owners of property, which includes the right to sell the property.

32. In the circumstances, I am inclined to grant the order directing that the Rusten Close property be sold by auction to the highest bidder by an auctioneer appointed by the applicant and all costs relating to such sale be paid to the respondent on demand thereof and the proceeds of the sale be utilized as set out in the Southern Divorce Court dated 29 November 2010 under case number 6490/2010. This would achieve the objectives of the Court order and in the process ensure the proper administration of justice.

DECLARATORY ORDERS

33. On the concessions made by the respondent himself I am prepared to hold that the respondent failed to comply with the terms of the Consent Paper in so far as they relate to the Rusten Close property. I have already held that the respondent's non-compliance is not contemptuous in the sense that it was not deliberate or *mala fide*. The applicant particularly asked this Court not to make that contempt finding envisaged in section 106 of the Magistrates' Court Act. What the applicant wants is an order akin to that of specific performance in which her rights are affirmed and spelt out succinctly for the world to know.

34. I am content on the evidence that the respondent was not willful and *mala fide* in his failure to comply with the terms of the Consent order. He faced financial difficulties that made it difficult for him to fully comply with the terms of the Consent Paper. I was particularly encouraged that the respondent has paid everything he owes on the property including arrears due to the City of Cape Town. The only issue of contention between the parties is the disposal of the Rusten Close property, which remains registered in the name of the applicant as a consequence of the respondent's failure to take transfer. The position of the respondent is made difficult by a judgment entered against him by the South African Revenue Services. However such difficulty should not saddle the applicant or prevent her from exercising her rights to dispose of the property by way of auction in pursuance of her right under clause 11.6 of the Court Order.

35. Having said so, I am persuaded to follow the guidance of the Constitutional Court in the Rail Commuter Action Group and provide for a *declarator*, which in my view serves not only to clarify the rights of the parties, but also provides a sound justification for the directory relief involving the sale of the Rusten Close property. In the circumstances I would be prepared to make the order:

35.1. That the respondent has failed to comply clause 11.6 of the Consent Paper contained in a divorce order granted in the Southern Divorce Court dated 29 November 2010 under case number 6490/2010;

35.2. Directing that the immovable property known as ERF 9..... Cape Town at M..... D.... G..... and situated at 12 R..... Close,

M..... D..... G....., M....., Cape Town be sold by auction to the highest bidder by an auctioneer appointed by the applicant and all costs related to such sale be paid to the respondent on demand thereof and the proceeds of the sale be utilized as set out in the divorce order of the Southern Divorce Court dated 29 November 2010 under case number 6490/2010.

COSTS

36. The applicant has been successful and should therefore be awarded costs. Both parties asked this Court to make punitive cost order in favour of the successful party. I am prepared to oblige the prayer and to grant the applicant, the successful party, a cost order on a punitive scale for reasons I deal with below. She submitted that the conduct of the respondent warranted a punitive cost order and I agree. First the answering affidavit contained 316 pages in which the respondent conceded that, *“the substantial portion of these facts and circumstances may not be regarded as particularly relevant to the merits of the current dispute between the applicant and myself.”*
37. Secondly, given the concessions made by the respondents, the legal defences mounted against the applicant’s reasonable demands for the proper implementation of the Court Order were extravagant. The respondent adopted a deliberately hostile position in an attempt to frustrate the applicant from enforcing her rights under the Court Order. The soi-disant businessman cannot continue to hold the applicant hostage to an arrangement that is clearly

inconsistent with a Court Order by insisting that she remains the registered owner of the Rusten Close property any longer than was conceived by the parties when they entered into the Consent Paper.

38. The Court is persuaded that the approach of the respondent to the issue of the Rusten Close property is unreasonable and if not stopped will not only cause perpetual prejudice to the applicant but undermine the integrity of the Court and the effective implementation of its Orders. The approach of the respondent is unreasonable for a further important reason. It stands in stark and direct violation of the Court Order. The order of this Court must accordingly restrain this conduct and ensure that Court Orders are obeyed with unquestioning reflex.

39. The respondent's conditions that he seeks to impose on the applicant to prevent the disposal of the Rusten Close property are not only inconsistent with his duties under the Court Order. They are inconsistent with the Court Order and cannot be given effect to without undermining the integrity of the Court. For that I am persuaded that a punitive cost order is justified.

40. In the circumstances, I make the following orders:

40.1. The respondent's preliminary objection to this Court's jurisdiction is dismissed.

40.2. Declaring that the respondent has failed to comply clause 11.6 of the Consent Paper contained in a divorce order granted in the Southern

40.3. Directing that the immovable property known as ERF 9..... Cape Town at M..... D..... G..... And situated at 1..... R..... Close, M..... D..... G....., M....., Cape Town be sold by auction to the highest bidder by an auctioneer appointed by the applicant and all costs related to such sale be paid to the respondent on demand thereof and the proceeds of the sale be utilized as set out in the divorce order of the Southern Divorce Court dated 29 November 2010 under case number 6490/2010.

Acting Judge of the High Court

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Instructed by : VAN EEDEN BEIROWSKI INC, GOODWOOD
(REF. MS V BEIROWSKI 021 592 5560)