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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 40381/2015

In the matter between:

BROWN, MICHELLE ANN

Applicant

and

D'ELBOUX, WAYNE STEVEN

Respondent

JUDGEMENT

NCONGWANE AJ:

1.

- 1.1 This is an application where the applicant seeks various forms of relief, essentially ranging from seeking an order rectifying a settlement agreement the parties concluded when dissolving their marriage to each other, the appointment of a professional liquidator with ancillary prayers regarding the powers of the liquidator, and committal for contempt.
- 1.2 Before me, Adv C. Van Der Merwe appeared for the applicant, and Adv K.J. Van Huyssteen appeared for the respondent.
- 1.3 During the course of their marriage, the applicant and the respondent purchased an immovable property known as [...] Street, Extension [...], Klevehill Park ("the Cowley property"). The property was registered in their respective equal shares. The parties' marriage ended in a decree of divorce granted on the 29th of November 2013 and they concluded the written Deed of Settlement ("the settlement agreement") which was, on granting the divorce decree incorporated to it.

2.

- 2.1 In terms of the settlement agreement the respondent was to receive the transfer of the applicant's undivided half share in

the Cowley property to him, subject to the respondent releasing the applicant in respect of her obligations to Nedbank, the bond holder.

- 2.2 The Respondent was obliged to obtain a bond approval within three months of the order of divorce, from which date, he would have assumed liability for all the expenses to the Cowley property, which included, monthly bond payments, rates and taxes, electricity charges, maintenance and general upkeep of the property.

3.

- 3.1 The applicant seeks *inter alia* rectification of Clause 8.9.1 of the Settlement Agreement on the grounds that, the relevant clause as it currently stands, does not record the true, common intention of the parties at the time the settlement agreement was concluded.
- 3.2 Clause 8.9 of the Settlement Agreement contains the following term:

"8.9 Should Defendant:-

8.9.1 fail to receive written approval for a bond of an amount equivalent to the current outstanding bond on the Cowley property within three calendar months of the signing of the decree of divorce the property shall be placed on the market for sale at the value of R1 200.000.00 whereby the net proceeds i.e. after the deduction of the outstanding bond, loan to the plaintiff's father, estate agent, fees and all or any other costs associated with the sale of the Cowley property, shall be shared equally by the parties."

4.

- 4.1 In a nutshell, the terms of the settlement agreement that are relevant for the purposes of this judgement were that the respondent will retain the property as his sole and absolute property on conditions that are couched in the following:

"8.7 Plaintiff shall transfer her undivided half share in Cowley property to Defendant subject to Defendant releasing

Plaintiff in respect of her obligation to the bond holder, Nedbank, which Defendant shall be obliged to do forthwith and within three calendar months of the signing of the decree of divorce by both parties and provide Defendant with satisfactory proof thereof."

4.2 Clause 8.8 reads:

"Defendant shall remain solely liable for the expenses pertaining to the Cowley Property, including but not limited to the monthly bond installment, rates and taxes, electricity charges, maintenance, upkeep and all other expenses and/or liabilities relating to and/or in connection with the Cowley property."

5.

The applicant contends that despite these obligations contained in the settlement agreement, the respondent refused and failed to cause the Cowley property to be transferred in his name within three calendar months, (being 29 November 2013 to 28 February 2014 my own addition).

6.

The respondent, in his counter application, seeks to enforce the agreement by requesting an order compelling the applicant to sign the transfer document necessary to give effect to the registration of the transfer of the applicant's undivided half share in the Cowley property in the name of the respondent.¹

7.

The respondent's counsel argued that there is ambiguity in the applicable clauses of the settlement agreement. The relevant part of criticism by Mr Van Huyssteen is that, the transfer of the Cowley property could only occur after obtaining of the bond. And that, respondent could not release the applicant from her obligation under the bond, but it is only the bond holder that must release the applicant. It was further contended that it was impossible for the respondent to perform in accordance with the settlement agreement, since the three months period was extremely short to obtain approval for a bond and for effecting the transfer of the applicant's undivided half share to the respondent.

8.

¹ See the Counter Application para 1 paginated pg 122

BACKGROUND AND INTRODUCTION

THE ISSUES

- 8.1 The issues in this application appear to be entangled in such a way as to create a possible existence of factual disputes. Consequently, Mr Van der Merwe referred me to leading cases on factual disputes. I restate what has become trite, in that , bald denials do not create factual disputes, even more so when the respondent is the one vested with the facts and evidence to refute the applicant's version. The election to merely rely on bald sweeping statements with absent detail or prove, results in the applicant's version being accepted.
- 8.2 The facts pertaining to the non-compliance with the settlement agreement and in particular the conduct of the respondent in relation to the terms of the settlement agreement are in dispute and there has been no request by either party that the matter be referred for oral evidence or trial. In that instance, I must deal

with the matter on the basis of the respondent's version, the admitted facts in the applicant's papers.²

8.3 In doing so, I am mindful of the avenue in discharging my obligation, to adopt a robust common sense approach in the resolution of the disputed issues on the papers.³ I therefore

² The principle is applied in **Buffalo Freight Systems vs Crestleigh Trading 2011 (1) SA 8 SCA at pp 13 para I-G**, where the principle as applied in **Plascon Events Paints (Pty) Ltd vs Van Riebeck Paints (Pty) Ltd 1984 (3) A (623(A) at 635 E – F** (*Where it was held that the court must deal with the matters on the basis that the respondent's version coupled with the admitted facts in the applicant's papers.*) However, in **Truth Verification Testing Center CC vs PSE Truth Detection CC and Others 1998 (2) SA 689 (W) Elloff AJ stated at 698 H-J**: 'I am also mindful of the fact that the so called "robust common sense approach" which was adopted in cases such as **Soffiantini vs Mould 1956 (4) SA 150 (E) at 154**, in relation to the resolution disputed issues on paper usually relates to situations where a respondent contends himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fenceable and untenable'

The court further stated:

*I respectfully agree. The court should be prepared to undertake an objective analysis of such disputes where required to do so. In **Wightman T/A FW Construction vs Head four (Pty) Ltd and Another 2008 (3) SA 371 SCA [2008] 2 All SA512**, it was suggested how that might be done in appropriate circumstances, the present case falls for a similar analysis.*

*In **Plascon Events Paints (Pty) Ltd vs Van Riebeck Paints (Pty) Ltd 1984 (3) SA 633(A) at 635** "More over, there may be there may be exceptions to the general rule, as , for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.*

³ *In **Soffiantini vs Mould 1956 (4)SA 150 (E) at 154** , the court held, "If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petition by such a device. It is necessary to make a robust common-sense approach to a dispute on motion as otherwise effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue or fact on affidavit merely because it may be difficult to*

proceed, to deal with issues on the basis that I am not satisfied that there is a real, genuine and *bona fide* dispute of facts that can prevent the court to decide the case upon the assumption that the factual elements made by the respondent and the various other important matters not dealt with by him, renders the applicant's account of the events considerably weighty.

9.

The approach I am inclined to adopt in this application is underpinned upon the principle that the respondent has failed to raise real, genuine and *bona fide* dispute to the facts in relation to the evidence of the failure to take progressive steps to enable the applicant to transfer her half share to the respondent. The issues that are before me for determination are essentially the following:

- 9.1 Whether the applicant has made out a case for rectification of the settlement agreement and for the order appointing the liquidator in respect of the property,

do so. Justice can be defeated or seriously impeded and delayed by an over fastidious approach to a dispute raised in affidavits"

9.2 Whether the respondent met a condition for bond approval within the three months period as specified in the agreement and is therefore entitled to enforce the agreement on the basis that the condition has been complied with, and

9.4 Whether the respondent should be held in contempt of Court.

10.

FULL RIGHTS OF OWNERSHIP OF THE COWLEY PROPERTY

The dispute concerns the rights to Cowley property that was jointly owned by the parties. A conditional term was agreed to by the parties that the respondent will retain full ownership of the property upon fulfillment of certain conditions. Clause 8.6 expressly provides that:

“Subject to the terms herein below, defendant shall retain the Cowley property as his sole and absolute property.”

11.

As stated above the conditions applicable are set out in Clause 8.7 of the agreement are the following:-

“8.7 Plaintiff shall transfer her undivided half share in the Cowley property to Defendant subject to Defendant releasing Plaintiff in respect of her obligations to the bond holder, Nedbank, which Defendant shall be obliged to forthwith and within three calendar months of the signing of the decree of divorce by both parties and provide Defendant with satisfactory proof thereof.”

12.

12.1 If simplified, upon the respondent obtaining the bond approval, he had to take ownership of the property and release the applicant. These obligations were to be complied with within three calendar months from date of signature of the “decree of divorce” (sic). I interpret the “signing of the decree of divorce” to mean the granting of the order of divorce by a court, as any other interpretation may lead to absurdity.

12.2 On 29th November 2013, this court dissolved the marriage between the applicant and the respondent. The settlement

agreement was signed on the 27th September 2013, but acquired the power of the court order on the granting of the divorce decree. The three months period therefore lapsed on the 28th February 2014, after the date of the decree of divorce. The respondent however, had the knowledge of the obligation to obtain the approval for a bond on 27th September 2013.

12.3 The respondent contends that the property is his sole and absolute property and purports to derive his entitlement to take transfer of the half share in the property from Clause 8.6 of the settlement agreement. On the other hand, the applicant's case is that the respondent has not fulfilled all the obligations precedent to the property vesting to the respondent, and if conditions are not met, the respondent cannot retain the property as his sole property in terms of Clause 8.6. In the premise, applicant seeks an order that the property must be sold due to the respondent's failure to meet any of the conditions set out in the agreement.

13.

THE APPROVAL OF THE BOND

13.1 The respondent insists that he has complied with Clause 8.9.1 of the settlement agreement in that he has duly received a written approval on the 24th November 2013, for a bond of an amount equivalent to the outstanding bond on the property at the time the approval was received. This approval according to the respondent, was received within three months of the *“signing of the decree of divorce”*.⁴

13.2 The caveat contained in Clause 8.9.1, so the respondent’s version goes, was therefore never triggered and the property was never to be placed on the market for sale at the value of R1 200 000.00. The applicant simply has no rights to the property whatsoever, having relinquished any right in terms of the property when the respondent obtained approval and the applicant has no right to any share of the property. I disagree. In terms of Clause 8.9.1, the bond approval is not decisive of the dispute. The difficulty with the document dated the 25th of November 2013 (“the 2013 document”) as the written approval for a bond is that, the same document refers to a single facility approval that will be available on signature of the bank’s agreement of loan and once the bank has been provided with the securities approved by the bank’s

⁴ See page 90, Annexure FA 20 to the founding affidavit.

credit committee. The so called approval relied on by the respondent is in fact not a final approval as it still had to be confirmed as it appears from the heading of the subject matter in the document.

13.3 The 2013 document confirms therefore that RMB Private Bank approved an RMB Private Bank's single facility which still had to be confirmed and for that reason the document does not equate to compliance with the bond financing as envisaged in Clause 8.9.1, as the document does not confirm that finance for the property in question has been granted. Over and above this consideration, it is clear that the 2013 document purporting to refer to a finance agreement, granted in favour of the respondent, lapsed as another document purporting to confirm a mortgage redemption loan is annexed to the papers, dated the 17th June 2015 (which document was obtained from the same RMB Bank / FNB, well passed the three months deadline in terms of the settlement agreement.)⁵ It therefore follows that there was never an approval of a "bond" as required by Clause 8.9.1.

⁵ See page 91 Annexure to the founding affidavit, letter issued by the First National Bank

13.4 In any event, the mere application for a bond does not release the respondent of his obligation in terms of the agreement. It is therefore not surprising that no meaningful steps followed from November 2013, when the 2013 document was issued, to ensure that the applicant's half share was transferred to the respondent. The obligation to appoint a conveyancer to attend to the transfer of the applicant's undivided half share in the Cowley property to the respondent, rested with the respondent in terms of Clause 8.10 of the settlement agreement. An approval of the bond should at least have been followed by the appointment of the transferring conveyancers and no explanation that has been finished by the respondent for his failure to comply with Clause 8.10. His assertion is that it was objectively impossible to transfer the property within the time limits stipulated in the settlement agreement due to various factors that were beyond the respondent's control. There is not, in my view, any evidence that show that the respondent has done anything even beyond the period of three months to ensure that the transfer in terms of Clause 8.7 is achieved within a reasonable time after approval of the bond in terms of Clause 8.9.1.

13.5 Even if I take the respondent's two approvals for the single banking facility into consideration, there is no evidence that makes out a case for the respondent as it seems to be common cause that the draft offer to purchase entered into between the respondent and the purchaser, pending the applicant's signature, to enable her half share to be transferred to the respondent, had lapsed on the 20th January 2016.⁶ The offer to purchase may include a clear provision that it will lapse and will have no force or effect should any of the conditions contained therein not be fulfilled. The suspensive condition payment of the deposit by the purchaser to the conveyancing attorneys and raising of the bond to be secured from a financial institution or guarantees to be furnished to the conveyancing attorneys, the availing of the copy of the duly signed sale agreement to the conveyancing attorneys within forty eight hours of the acceptance of the offer and the special condition in relation to the approval of the building plans, resolving of the dispute in relation to the boundary on the property and the submission of the application to the local municipality in respect of the water meter and payment thereof prior to the transfer of the property, have all not been complied

⁶ See the respondent's answering affidavit pg128 , para 14 and See also pg 162 para 20.4 of the offer to purchase

with. It is therefore correct to accept, as the respondent has stated in the answering affidavit that the offer to purchase lapsed in January 2016. For this reason the respondent's counter application cannot succeed.

14.

THE RELEASE

14.1 The is no real *bona fide* factual dispute that the respondent failed to release the applicant in respect of her obligation to the bond holder Nedbank as it is common cause that this can only be effected upon registration and transfer. Although the respondent contends that it was impossible to meet the terms of the settlement in that the settlement agreement stipulated that ought to have obtained bond approval within the period of three months of the date of the decree of divorce but also had to transfer the property within the same period of three months from the date of the decree of the divorce. He concedes that the transfer of the Cowley property is required in order to release the applicant.

- 14.2 The respondent then in contradiction to the foregoing version asserts that he did release the applicant as per:

Paragraph 8.2 of the answering affidavit where he states that “ *I have released the applicant from any obligation in respect of property in that neither I nor the bank have required any payment of any nature from the applicant in relation to the property*”, and the respondent further states that the applicant has had no exposure whatsoever to any liability in terms of the property, the respondent further contends that the applicant was protected against any liability for bond payment and utility accounts and then concludes that:

“In practical terms she had been released from any obligation and her refusal to sign transfer document is holding up her becoming released in the legal sense.” This argument is of no assistance to the respondent as the “release” can only take place upon registration and transfer of the Cowley property. The fact that the applicant is not liable for municipal charges and bond installment does not flow from the “release” as suggested by the respondent, as same is expressly catered for in Clause 8.8 of the settlement agreement.

14.3 Clause 8.8 states that:

“defendant shall remain solely liable for all expenses pertaining to the Cowley property, including but not limited to the monthly bond installments, rates and taxes, electricity charges, maintenance, upkeep and all other expenses and/or liabilities relating to and/or in connection with the Cowley property.”

14.4 In the premise, the respondent is not the sole owner of the Cowley property until the applicant’s undivided half share has been formally transferred to the respondent or the Cowley property has been sold to a third party and the proceeds of such a sale be applied as per Clause 8.9.1 of the settlement agreement.

15.

IS THE APPLICANT ENTITLED TO THE RECTIFICATION OF THE SETTLEMENT AGREEMENT ?

15.1 The settlement agreement expressly refers to the sum of

R1 200 000.00 in Clause 8.9.1 and I infer that it was clearly inserted on the acceptance that the three months period will lapse on 27 December 2013 alternatively February 2014, the property would immediately be put up for sale.

15.2 Now that the purported compliance with the two primary obligations, as conditions stated beneath Clause 8.6 of the settlement agreement is out of the way, the next issue is whether the rectification sought by the applicant is permissible.

15.3 The applicant seeks the rectification of the settlement agreement to reflect that the property is to be sold at the open market on a market value, since Clause 8.9.1 did not record the true and common intention of the parties at the time that same was concluded.

15.4 The applicant then continues in paragraphs 19.2 to 19.2.2 of the founding affidavit to illustrate that the common intention of the parties were namely, that the Cowley property, if not sold and transferred in the three months period as envisaged, that the property be sold at market value as there was no anticipation that it would take more than two years for the registration and

transfer of the property to take place and in the meantime obviously, the property has increased in value since the conclusion of the settlement agreement. The respondent has denied these allegations.⁷

15.5 In my view the bold denial proffered by the respondent does not create a bona fide factual dispute and the respondent's version is seriously unconvincing and far fetched and is susceptible to rejection out of hand in terms of the Plascon Event Rule and Soffiantini supra. There is no conceivable reason why the respondent would oppose the rectification and would not accept that the sale of the Cowley property at the market value will also be equally beneficial to him as both parties will derive a higher selling price. In this regard, his opposition for the relief for rectification is unreasonable and frivolous and stands to be rejected.

15.6 Even if it is accepted that his bald denial constitutes a *bona fide* factual dispute, the sale of the property at market value must be a tacit term of the agreement as it can hardly be contended that a delay, as occasioned largely by the respondent, could justify the

⁷ See respondent's answering affidavit pg 133 para 10.1 - 10.5

respondent profiting from his bridge. It is trite that the party may not derive any benefit from his failure to abide by the provisions of the contract.⁸

16.

APPOINTING A PROFESSIONAL LIQUIDATOR NOMINATED BY THE APPLICANT

16.1 The necessity to appoint the liquidator as prayed for by the applicant is premised upon the basis that the applicant and the respondent are at loggerheads and cannot work together. The only way in which the Cowley property can be marketed and be sold as if same is done by an independent third party (a liquidator) with clearly specified powers as proposed by the applicant and which powers and the allegations made by the applicant in support of her relief for the appointment of the liquidator are not challenged in the answering affidavit.

⁸

See Scott and Another vs Poupard and Another 1971 (2) SA 373 (A)

16.2 In this further regard, applicant asserts that the appointment of a liquidator to dispose off the property is prudent under the circumstances as:

1. There is no effective communication. This state of affairs is discernable from the plethora of allegations made by the parties against each other, raising various disputes without substantiation which matters, can easily be resolved if the parties co-operated with each other. Both parties cannot obtain finality to the divorce and are unable to give effect to the settlement agreement. From the reading of the papers and the litigious history between the parties, which involves the exercise of visitation rights by the respondent to the children of the parties, the criminal proceedings that the parties have instituted against each other, the current application and the divorce proceedings themselves, there can be no doubt that the parties cannot effectively communicate and the appointment of a liquidator will be prudent.

In my view, a proper case is made out for the relief claimed in prayer 2 in so far as the appointment of the liquidator, the liquidator's powers and the costs of the liquidator is concerned. I do not find any reason why, in the circumstances of this matter, the applicant should pay the fees occasioned by the appointment of the liquidator and the performance of the liquidator's functions in circumstances where the respondent has neglected to comply with the settlement agreement for such an inordinate period of two years.

18.

In terms of the settlement agreement, Clause 8.8 thereof, the obligation to pay all the outstanding expenses for the usual charges for electricity, water, property rates, sewage, refuse removal and all ancillary charges on the Cowley property rendered by the local municipality or supplier of services rests upon the respondent. Without payment of all these charges that are payable under the provisions of Section 118 (3) of the Municipal Systems Act, Act No: 200 of 1999, no clearance certificate can be issued by the municipality and no registration and transfer of the property can take place and this therefore, necessitate the granting prayer 4 of the notice of motion.

19.

There are other two remaining and contentious issues between the parties, the one relating to the boundary wall of Cowley property and the other being non approval of building plans by the municipality.

19.1 The applicant alleges that the boundary wall to the property infringed on the boundaries of the neighbour and that the wall should be moved to give effect to the plans of the property.⁹ In the answering affidavit, the respondent admits that the boundary wall transgresses the boundaries.

19.2 The absence of the building plan by the City of Johannesburg, registration and transfer of the property is bothersome since the approval of the building plans has to be disclosed to the prospective purchaser, and the disclosure will negatively impact on the purchase price achievable. The respondent gives two versions regarding the building plans. One version is that he has resolved to obtain approval of the building plan in relation to the property and other hand he asserts that the building plans for approval were submitted on or about September 2015 to the

⁹ See founding affidavit pg 20, para 24.1

municipality and that he has been advised (presumably by the City of Johannesburg) that the approval of the building is imminent.¹⁰ In answer to the applicant's repeated assertion that the plans have not been approved¹¹, the respondent states :

1.1 that he took steps necessary to obtain approval from the City of Johannesburg Planning Department and Surveyor General to re-mark the boundary pegs of the property and that all regulatory requirements relating to the above had to be prepared, lodged and approved.¹²

1.2 that he entered into a certain sale agreement with a neighbouring property to purchase their land and these plans has also been submitted to the City for approval and that the building and improvements and the roofed areas conform with local authority building plans, but astonishingly the respondent jettisons that version then he asserts that the plans are currently with the City for approval.¹³

¹⁰ See the answering affidavit pg 136 para 11.11

¹¹ See the founding affidavit pp20 para 26, pp23 para 35, pp28 para 53.3, pp 32 para 70.1

¹² See answering affidavit pp 139 para 13.3 and 13.3.5

¹³ See answering affidavit pp 141 para 15.5 and 145 para 20.3.

20.

As is the case with version postulated by the respondent, he again has failed to annex any such plans to his papers and more importantly failed to annex any proof that the plans have been submitted. In the premise the respondent's version is susceptible to rejection and the applicant's relief in this regard is properly made out.¹⁴

21.

21.1 In the light of the fact that Clause 8.9.1 envisages the sale and the split of the proceeds, after deduction of all the expenses that stem from the settlement agreement and repayment of the loan sum to the applicant's father, which is also specifically catered for in the settlement agreement, the net profits have to be divided equally between the respondent and the applicant and in order to give effect to that, the granting of the relief for the equal payment of the dividends to each of the parties is prudent.

21.2 The loan, as acknowledged by both parties, was obtained for their joint benefit and the respondent's assertion that the loan was

¹⁴ *Wiegthman, Buffalo, Soffiantini and Plascon Authorities, supra.*

initiated by the applicant at the time when an attempt was made to purchase the property, is of no assistance to the respondent the property is co-owned by the parties.

21.3 In view of the conclusions I have reached, in that the conditions in Clause 8.9.1 have not been met and no bond approval was obtained within three months period of the granting of the decree of divorce, a proper case is made out that the parties are jointly and severally liable for the loan incurred by the applicant.

22.

IS THERE ANY CONTEMPT BY THE RESPONDENT ?

22.1 The applicant seeks that the respondent be committed or be fined for contempt of court because the respondent did not comply the settlement agreement, there been no dispute, that there is an order of court.

22.2 In the founding affidavit the applicant does not seriously deal with the issue as there are no discernible facts are alleged that can entitle the applicant to this relief.

22.3 The respondent also took this issue light. It is said that the applicant seeks to apply an incorrect interpretation of the settlement agreement and in light of the interpretation, deems the respondent to be in contempt of court.

23.

23.1 The critical default that is alleged by the applicant is the failure of the respondent to take the necessary steps to transfer the applicant's undivided half share of the Cowley property to him. If I can attempt to give context to the current controversy, it is not clear from papers before me whether the respondent's apparent inordinate delay to comply with Clause 8.9.1 of the settlement agreement was deliberate and constitute *mala fides*. Some explanation, though not sufficient, has been given by the respondent. The uncooperative attitude emanating from the both parties have not ameliorated matters for the respondent.

23.2 It is no wonder that Mr Van der Merwe has not pressed vigorously for this relief against the respondent. From what I glean from the papers, and the relationship between the parties who have children with each other and have just emerged from a divorce, a lot more would be required to prove contempt.

23.3 It is trite that the requirement for a contempt must be established beyond a reasonable doubt if enforcement sought by way of a criminal sanction. The leading authority on contempt is **Fakie no vs CCLL Systems Pty (Ltd) 2006 (4) SA 326 (SCA)** where the SCA stated that a wilful and *malafide* defiance must be established beyond a reasonable doubt in order to successfully prove contempt. No onus of prove rests on a person accused of contempt, but a burden to adduce evidence from which an inference of absence of wilfulness or *malafides* can be deduced thus rest on such a person. Once prove is adduced of the existence of an order, service of the person and compliance. These words have been expressed by Sutherland J, in the matter of **Ray Adam SA (Pty) Ltd vs BSB International Link CC and Two Others, Case No: 2016/27211** unreported¹⁵. The reason of

¹⁵ In paragraph 10 of the same authority, the learned judge states the following:
 “10 – Generally, where, as in this case, non compliance calls for an explanation

the excuse proffered by the respondent is the assertion that it was impossible for him to comply because the period within which to comply was too short for both the securing of the bond and in particular the registration of the transfer. This contention has merit, but I have already found that the respondent still had a reasonable period after the lapse of the three months, to comply with Clause 8.9.1, although technically, the period regularized by the settlement agreement had lapsed and weakened the legal enforcement of Clause 8.9.1 after ninety days period.

24.

CONCLUSION

that points away from defiance, a party might plead an impossibility of performance, or the existence of an impediment inhibiting performance, however BSB does nothing of that sort. What it does is frankly converse to taking more steps towards compliance and more over confesses to doing so deliberately. Does the conscious decision to act thus, therefore mean that the element of wilfulness is proven? The word 'wilful' is a dangerous one, it is a pejorative term. It embraces more than just a notion of 'intentional' but also the mantle of rebuke, i.e the intention is unsavoury , in this sense the usual mantra which requires both "wilful" conduct "malafide" conduct seems to be tautologous. And negligence failure to perform can never be wilful. A malafide failure is always wilful. "

25.1 I therefore conclude that the respondent has not been acting *mala fide* in his approach and contempt is not proven.

24.2 In relation to the other prayers I have dealt with supra, the relief in the notice of motion is largely a pragmatic mechanism to be availed to the parties in their venture to find a resolution to the dispute. It is a pragmatic and prudent relief, in my view, and a proper case is made out in the papers.

25.

COSTS

The parties were involved in a marital relationship and regrettable sequence of events leading to acrimonious litigation, both civil and criminal cases, have made the parties antagonistic towards each other. I have weighed the interests they both intended to protect in this litigation. They are both not of entirely irreproachable conduct. Due to the tension that exists between them, I deem it undesirable to make matters worse by granting a costs order against the respondent. The history of the dispute compels me to find that it will serve justice and fairness if no costs order is granted in this case.

26.

THE ORDER

26.1. In the result the following order is made:

1. The settlement agreement concluded by the parties on the 27th of September 2013 is rectified by replacing the phrase “ *at a value R1 200 000.00*” in Clause 8.9.1 to read “... *at market value...*”

2. A professional liquidator nominated by the applicant be appointed and the costs of the professional liquidator be paid from the proceeds of the sale of the property known as [...] Street, Klevehill Park, Extension 2 (“the Cowley property”):

2.1 The liquidator shall have the power and is authorised:

2.1.1 to take control of Cowley property and to sell the Cowley property on auction or

privately at a date and time to be determined by the liquidator for not less than the current market price;

2.1.2 to sign any written deed of sale on behalf of the applicant and the respondent;

2.1.3 to sign the power of attorney to pass transfer on behalf of the applicant and respondent to any potential purchaser;

2.1.4 to sign all transfer documents necessary to effect transfer of the property to any potential purchaser;

2.1.5 to do all that is necessary and to sign all documents on behalf of the respondent and the applicant to ensure the transfer of the property to any potential purchaser;

2.1.6 to do all that is necessary to apply for and effect the installation of any municipal service on the property on behalf of the applicant and respondent.

3. That the respondent be ordered to pay all the outstanding expenses for the usual charges for electricity, water, property rates, sewerage, refuse removal and all ancillary charges on the property rendered by any municipal or supplier of service to the property within 7 (seven) days from the date of this order;
4. That the respondent pays in full any rates clearance figures on demand which was obtained by the Conveyancer in compliance with section 118 of the Local Government Municipal Systems Act 2000;
5. That the respondent be compelled to do all that is necessary to ensure and effect compliance with any building regulations imposed by the City of Johannesburg and all by laws. In that;
 - 5.1 The respondent must apply and ensure that the plans are drawn and approved by the City of Johannesburg or any other entity tasked with the Compliance and approval of building plans;

6. That the respondent be compelled to do all that is necessary to ensure that the plans for the Cowley property are approved by the City of Johannesburg within 3(three) months from the date of the order;
7. That the net profit after the respondent pays the expenses as set out in Clause 8.8 of the settlement agreement be divided equally between the respondent and the applicant;
8. That should the respondent refuse to pay all expenses payable in terms of the settlement agreement that such payments due by the respondent be offset against respondent's portion of the net proceeds of the Cowley property;
9. That the loan amount of **R 45 394.50 plus interest thereon of 9% per annum** be paid to the applicant's father , from the net proceeds of the sale of the Cowley property and if such net profit is insufficient, be paid by both parties

jointly and severally the one paying the other to be absolved;

10. The respondent's counter application is dismissed.

11. No order as to costs is made.

Thami Ncongwane AJ

Acting Judge of the High Court

Matter heard: 29 August 2016

Judgement delivered : 05 April 2017

For the Applicant : Adv C. Van Der Merwe

Instructed by: ASG Tserkezis Inc

For the Respondent: Adv K.J. Van Huyssteen

Instructed by: Fluxmans Incorporated