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REPORTABLE  
IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 6073/2000

DATE: 09/12/2010

IN THE MATTER BETWEEN:

G J F APPLICANT

AND

S L D H FIRST RESPONDENT  
THE SHERIFF OF THE COURT: SANDTON SECOND RESPONDENT

IN RE:

S L D H APPLICANT

AND

G J F FIRST RESPONDENT  
THE SHERIFF OF THE COURT: SANDTON SECOND RESPONDENT  
TURQUISE MOON TRADING 309 (PTY) LTD THIRD RESPONDENT

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JUDGMENT

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KOLLAPEN, AJ

[1] The applicant and the first respondent became married to each other on 21 March 1992. Two minor children were born of the marriage, a son named D

in 1995 and a daughter named A in 1997.

[2] On 22 August 2002 the applicant and the first respondent were divorced by an order of this court and in terms of the order of divorce the written settlement agreement entered into between the parties was made an order of court.

[3] In terms of the settlement agreement custody of the minor children was awarded to the first respondent subject to the applicant's reasonable rights of access. In addition the settlement agreement provided that the applicant was to pay maintenance at the rate of R5000-00 per month per child escalating annually at the consumer price index rate. In addition the applicant was to pay for all the educational and medical expenses incurred in respect of the minor children.

[4] Following the divorce the parties appeared to have had ongoing problems and disputes that related to the payment of maintenance, timeousness and the adequacy of such payments as well as well as issues relevant to the parenting of the children including decisions related to their upbringing and wellbeing. It is not necessary for the purposes of this application to document that dispute or to offer any comment or view with regard to such dispute save to say that it progressively became intense and acrimonious.

[5] On 15 April 2010 the first respondent caused a warrant of execution in the sum of R303 154-62 plus interest and costs. to be issued out of this court for arrear maintenance and non-compliance with their divorce order. Following the issuing of the warrant the second respondent attached certain goods from the home of the applicant and belonging to the applicant. In consequence of the attachment, a company Turquoise Moon Trading 309 (Pty) Ltd (the third respondent) claimed ownership of the goods attached by the second respondent.

[6] The applicant as a consequence of the issuing of the writ and the attachment effected by the second respondent has brought an application in which he seeks that: -

“1. The warrant of execution issued out of this Honourable Court under case number 6073/2000, is set aside.

2. Alternatively to prayer 1 above, the warrant of execution issued out of this Honourable Court under case number 6073/2000, is stayed pending the final adjudication of an action to be instituted within 30 days of the date of this order.

3. Further alternatively to prayers 1 and 2 above, the warrant of execution issued out of this Honourable Court under case number 6073/2000, is stayed pending the final adjudication of this application.
4. Directing that the First Respondent pays the costs of this application on a scale as between attorney and client.
5. Directing that the second respondent, in the event of its opposition to this application, to pay the costs of this application on the scale as between attorney and client, jointly and severally with the first respondent, the one paying the other to be absolved.”

[6] The first respondent has opposed the application and the relief sought and has brought a counter application in which she seeks an order in the following terms:

“1. Declaring the applicant (in convention) to be in contempt of Court in that he has and is continuing to deliberately, intentionally (wilfully) and in *mala fides* breach the maintenance provisions in paragraphs 4 and 5 of the order of the above Honourable Court handed down

by His Lordship Mr Justice Stafford on 27 August 2002 in case number 6073/2000.

2. Committing the applicant (in convention) to imprisonment for a period of six months, or such other period as the above Honourable Court may deem fit, *further alternatively* imposing a suspended sentence on the applicant (in convention) on such terms as the Court may deem fit.
3. Joining Turquoise Moon Trading 309 (Pty) Ltd as the third respondent in these proceedings.
4. Ordering the second respondent (in convention) to proceed with the sale in execution of goods attached pursuant to the warrant of execution issued by the registrar of the above Honourable Court on 15 April 2010; *alternatively* to proceed with the sale of those goods which belong to the applicant.
5. Ordering the applicant (in convention) and/or the third respondent to pay the costs of this applicant on an attorney and own client scale.”

[7] The applicant's contention in seeking the relief he seeks is that following changes made by himself and the first respondent to the residency arrangements in respect of the minor children which changes became operative from March 2008 until about June 2009 his liability to pay the maintenance provided for in the court order of 27 August 2002 had been varied by agreement between himself and the first respondent.

He further contended that in terms of the change of residency arrangements reached in March 2008 the parties agreed to have the minor children with them for alternate weeks. In addition there was a further mediated agreement with regard to a new payment regime insofar as it related to the payment of maintenance in terms of which regime the applicant would not be required to pay any maintenance directly to the respondent but instead would cover all expenses incurred in respect of the maintenance of the minor children and make such payments directly to third parties or in appropriate instances to service providers and the children. In this regard it appeared that the parties were assisted by one Charles Cohen a mediator with expertise in the area of family law.

[8] The respondent's contention was that even though there may have been changes to the residency arrangements insofar as it related to the minor

children it did not absolve the applicant from complying with the express provisions of the court order and settlement agreement of the 22<sup>nd</sup> of August 2002 relating to maintenance payments. In this regard it was the respondent's stance that to the extent that the written agreement of settlement provided that there would be "save for the above, the provisions of this agreement shall not be capable of being varied (save by a court of competent jurisdiction), amended, added to, supplemented, novated or cancelled unless this is contained in writing and signed by both parties", any oral or informal arrangement was of no force or effect and not binding on the parties.

Alternatively the first respondent contended that even if there was a variation that it only applied in respect of a trial period of August 2008 to November 2008 and that at best the applicant would be absolved from paying maintenance for the three months (August 2008 to October 2008) and the warrant of execution, if incorrectly issued, was only incorrect to that extent and that extent only.

#### [9] ISSUES FOR DETERMINATION

At the hearing of this matter the following issues arose and were identified as

relevant in the determination of the dispute between the parties.

- (a) Condonation of the late filing of the applicant's replying and answering affidavits. These affidavits were filed out of time and the application for condonation was opposed by the respondent.

The relief sought in respect of condonation for the late filing of the applicants replying and answering affidavits was granted but the question of costs in respect of such application was held over until the final determination of the application in its entirety.

- (b) Application to strike out. The applicant brought an application in terms of Rule 6(15) of the Uniform Rules of Court in respect of various paragraphs and annexures of the respondent's answering affidavit and replying affidavit on the ground that such paragraphs and annexures were vexatious, scandalous and/or irrelevant.

The court granted some but not all of the relief sought in this application and held over the matter of costs in respect of such application until the final determination of the application in its entirety.



- (c) Whether the original maintenance obligations were capable of being varied by the purported mediated agreement and if so whether in fact they were so varied.
- (d) Whether the applicant failed to comply with the maintenance obligations be they imposed by divorce order or the purported mediation agreement.
- (e) If there was non-compliance or was such non-compliance *mala fide* and wilful.
- (f) The joinder of Turquoise Blue Moon Trading 309 (Pty) Ltd and whether execution was possible in the circumstances.

I now proceed to deal with the issues as they have been enumerated.

#### WHETHER A VARIATION OF THE DIVORCE ORDER WAS POSSIBLE

[10] The principle of the non-variation of a written agreement in the context of a non-variation except in writing clause was firmly established in the matter of *Shifren and Others v Zuid-Afrikaanse Sentrale Kooperatiewe Graan Maatskappy* 1964 (2) SA page 343(O). The stance which essentially proceeds from the premise that any attempt to agree informally to vary a contract containing a non variation clause except in writing must fail was affirmed by

the Supreme Court of Appeal in *Brisly v Protsley* 2002 (2) SA page 1 SCA.

[11] Leaving aside the facts and disputes that have characterised this matter, the crisp question to be determined is does the *Shifren* principle apply without exception, and if not, under what circumstances may a departure from them be warranted. In *Brisley supra*, the Supreme Court of Appeal upheld the *Shifren* principle as advancing a “doctrinal and a policy choice, which on balance was sound as it contributed to considerations of commercial reliance and social certainty.”

However the SCA also reaffirmed the principle that in appropriate circumstances an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. The court went on to affirm that public policy is, having regard to the constitutional state, firmly rooted in our constitution and the fundamental values it enshrines which values include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racism and non-sexism. In the judgment of His Lordship Mr Justice Cameron he also expressed the position with regard to the *Shifren* principle as follows at paragraph 95:

“The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual ‘freedom’, and securing a framework within which the ability to contract enhances rather than diminishes our self-respect. The issues in the present appeal to not impede that balance.”

[12] In a Full Bench decision of the Eastern Cape High Court in *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 ECM the court held that:

“Public policy (as underpinned by constitutional norms) dictates that the *Shifren* principle, which holds that a contractual non-variation clause is valid and effectively entrenches both itself and all other terms of the contract against oral variation, should be relaxed so as to bar a party from relying on it where it was invoked for purposes other than the vindication of legitimate rights.”

Thus even though the *Shifren* principle is firmly entrenched in our law it is subject to the consideration that in appropriate cases the demands and the requirements of public policy may well permit or indeed justify a departure from such a principle.

[13] In the context of the determination of what would constitute public policy one must as Lord Atkin in *Fender v Saint John-Mildmay* [1936] AC 1 (HL) (referred to in *Brisley (supra)*) said be mindful that: -

“The doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds.”

[14] In order to maintain the balance alluded to by Cameron AJA (as he then was) it is important therefore that those considerations of public policy not lead to unpredictability or uncertainty, in circumstances where certainty and predictability is both necessary and desirable. It may well be that the adoption of a constitution underpinned by certain fundamental values provides the framework to determine indeed those considerations of public policy that would ultimately determine whether a departure from the *Shifren* rule is justified or not.

[15] It must thus be clear and apparent that the risk alluded to by Lord Atkin that public policy should not depend on the determination of subjective judicial minds is unlikely to materialise in the constitutional dispensation of our society as the constitution and its values provide, in the most compelling

fashion, a framework to determine the scope and parameters of such public policy.

[16] Having said that the question for determination then is [having found that under certain circumstances a departure from the *Shifren* rule may well be justified and warranted by the dictates of public policy] do such public policy considerations apply broadly in the context of the present dispute and indeed at a more broader level in the context of disputes that may be characterised as disputes falling within the broad domain of family law.

[17] While the *Shifren* principle was not articulated at being confined to contracts of a commercial nature and on the face of it would have general application it must also be evident that in matters that relate to the rights and obligations [in the context of family law] different and other considerations distinguishable from the world of commercial contracts may well warrant consideration.

[18] Those considerations include: -

18.1 The Constitutional imperative that in all matters concerning children the principle of the best interest of the child must apply as a guiding and

paramount principle.

18.2 Parents have the obligation to maintain their children in accordance with their ability as well as the need of the minor children. It should follow that it is indeed a matter of public policy to ensure that those guiding principles insofar as they relate to the reciprocal and mutual reinforcing obligations of parents are maintained and are not sacrificed as it were at the altar of ensuring certainty at all times.

18.3 In the real world parents entrusted with the responsibility of ensuring that the best interests of their minor children are always advanced must invariably make and take decisions that may warrant a departure from or a variation of the express terms of a settlement agreement. It would be impractical and inconvenient to suggest that in all such instances, and in the face of a non-variation except in writing clause, parents should then be constrained in their ability to take decisions and to do things, even by mutual agreement that would advance the interests and the wellbeing of such minor children.

[19] Certainly and for the considerations alluded to above there must be instances where public policy may justify a departure from the *Shifren* principle in the

area of family law. Without suggesting that such departure should be easily justified or readily countenanced, there must be due regard for the context within which parenting takes place and within which decisions that may on the face of it vary in express obligation are arrived at towards some other socially desirable objective – the best interest of the child. In all the circumstances the demands and the consideration of public policy in the context of ensuring the development of family law that is consistent with the values of the constitution including the values of equality, non-discrimination as well as the insuring the advancement of the best interest of the child would in my view in appropriate instances and where a proper case is made out certainly justify a departure from what has become known as the *Shifren* principle.

[21] In conclusion I find that while such principles remain a firm entrenched and necessary part of the law the departure may not only be Constitutionally permissible but perhaps even Constitutionally required.

[22] If indeed the *Shifren* principle was entrenched and did not apply in the context of family law it may well have the effect of achieving all kinds of unintended consequences that may well militate against the development of a public policy consistent with the norms and values of our Constitution. In particular

a strict adherence to those principles may well mean that parents become saddled with the disproportionate share of their responsibility in respect of the maintenance and upbringing of a minor child. It may well have the effect of restricting the ability of parents to do that which the best interest of the child demand as opposed to that which they are obliged to do in terms of an agreement of settlement which terms and provisions may well have not kept in touch with the changing times and developments relevant in the context.

WAS THERE A VARIATION OF THE DIVORCE ORDER AND WOULD SUCH A VARIATION FALL WITHIN THE TESTS AS REQUIRED HAVING REGARD TO THE REQUIREMENTS OF PUBLIC POLICY

[23] It appears to be almost common cause that during the period March 2008 to June 2009 the applicant and the first respondent effected a variation of the residency arrangements with regard to the two minor children. During this period the arrangement was that the children would spend alternate weeks with the applicant and the first respondent. While there is some dispute with regard to the financial arrangements that would apply, there hardly is a dispute relative to the residency arrangements that came into force.

[24] When the residency arrangements changed there appears to be no express



agreement with regard to the financial arrangements even though the applicant contends that at that stage there was an agreement that he would “wean” the first respondent off maintenance in the period immediately following the conclusion of the new residency arrangements and in March 2008 he effected decreasing maintenance payments as part of this “weaning off” arrangement. The respondent denies that such an arrangement was arrived at and it appears that on the papers that there is a dispute of fact between the parties which is incapable of being resolved on the papers before me.

[25] However, there appears to be broad agreement that certainly for the period August 2008 to October 2008 there was an agreement with regard to the financial arrangements relative to the maintenance of the minor children and this agreement is captured in a letter dispatched by Charles Cohen, the mediator engaged by the parties to both the applicant and the first respondent on 13 August 2008 in terms of which he purports to record the understanding arrived at, at the mediation session held between the parties on 11 August 2008. That communication in broad terms confirms that the applicant would pay various third parties in respect of his maintenance obligations which third parties would include the school, payment of horse riding, stabling costs, pocket money transport etc. in the total amount of R27

650-00. The communication from Charles Cohen also purports to confirm that the applicant will no longer pay any direct maintenance to the first respondent for the children.

While the respondent disputes whether this letter from Charles Cohen constitutes an agreement between the parties it must however, be evident at the very least that following the mediation session held the mediator would not have recorded an agreement had such an agreement not been entered into.

[26] Following various difficulties the parties encountered with regard to the variation of the residency and financial arrangements it was finally agreed either late in 2009 or early in 2010 that the obligations of the parties would revert to that which was set out in the original maintenance settlement agreement of August 2002.

[27] It was necessary to capture some of this history in order to illustrate the attempts by the parties over periods of time to attempt to take into account the current context and the difficulties they were respectively experiencing and to find ways of resolving those in both their best interest as well as the interest of the children. Such efforts even to the extent that they fell outside the scope and the terms of the settlement agreement between the parties

cannot simply be ignored because they were not reduced to writing and signed by the parties or made an order of court.

[28] They in real and substantive terms represent the efforts and the conclusions reached by the parties with regard to how they would engage with each other in respect of their reciprocal obligations towards the minor children and therefore under those circumstances such agreements that indeed were reached would fall to be considered as constituting a valid basis for the departure from the *Shifren* principle.

In particular to the extent that the letter of Charles Cohen of 13 August 2008 evidences a new (albeit) temporary financial arrangement which by all accounts the parties gave effect to and complied with in broad substantial terms, it would constitute a gross inequality if it was open to the first respondent to having been part of both concluding such an agreement as well as giving effect to such agreement to purport to ignore the existence of such an agreement simply on account of the fact that it was not reduced to writing and signed by the parties.

[29] Such a stance would certainly offend considerations of public policy to the extent that its effect and consequence would be to totally ignore the *de facto*

contribution made by one party simply on the account of the fact that such contribution did not constitute a contribution consistent or in line with the agreed divorce order and settlement.

It is my view that the evidence on the papers certainly reveals that there was a variation of the residency and financial arrangements between the parties. The nature and the full extent of such variation may well still be in dispute but the fact that there was such a variation and certainly that such variation resulted in a change of the financial arrangements albeit for a limited period cannot be in dispute.

[30] Under such circumstances it would indeed be inequitable to require of the respondent to continue complying with his maintenance obligations in terms of the court order while at the same time having their expectation that he would have to comply with his obligations in terms of the mediated agreement. Exposing the applicant to such double jeopardy would certainly offend against considerations of public policy, and would offend against considerations of fairness, and equality.

For these reasons I am satisfied that indeed there was a variation and that the variation was of such a nature that having regard to the considerations of

public policy, insisting on compliance with the court order in the face of such a mediated agreement would offend notions of fairness and equality.

#### THE CONSEQUENCE OF SUCH A VARIATION

[30] It is evident that following the variation of residency and financial arrangements the obligation of the first respondent in terms of the court order and in terms of the amounts that he was required to pay in terms of such a court order adjusted for inflation would have changed. He was now required to pay maintenance through a different mode and on his version it appears that the amounts that he was required to expend would be considerably more than that which he was required to pay in terms of the court order but that he accepted such increased and heightened obligations.

Under these circumstances and while it appears that at the time the warrant of execution was issued the applicant may well have defaulted with regard to both his payments in terms of the mediated agreement as well as his payments in terms of the undertaking to revert to the original court order, it must be apparent that when the warrant of execution was issued in April 2010 in the amount of R302 000-00 such amount did not take into consideration the mediated agreement and the consequences of such a

mediated agreement.

On that ground alone the warrant was issued for an incorrect amount and would fall to be set aside. I have considered whether one could simply adjust the amount reflected in the warrant to reflect the correct amount but given the dispute of fact between the parties which dispute relates precisely to the payments that have been made during the mediated period it would have been speculative and probably irresponsible to arrive at such an amount purely on the papers before me.

[31] Under those circumstances and while the first respondent may well have been entitled to approach the registrar of the above honourable court to issue a writ it is also abundantly clear that the amount in respect of which the writ was issued was incorrect.

Under those circumstances there are good reasons to set aside the writ on this ground alone. In doing so I am not unsympathetic to the predicament that the first respondent found herself in when she sought this cause of action. As indicated and in all likelihood the respondent had already defaulted both in terms of the mediated agreement as well as the original court order which the parties agreed to revert to. The problem was that the quantification of the

writ was not properly addressed and for that reason it is the proper to set aside the warrant of execution.

DID THE APPLICANT FAIL TO COMPLY WITH THE DIVORCE ORDER AND/OR THE  
MEDIATED AGREEMENT

[32] There appears to be a considerable dispute with regard to the financial arrangements that would be in place for the period March 2008 to June 2009 except for the period August 2008 to October 2008 (the three month trial period).

Accordingly it would be on the papers before me and in the light of the various disputes of fact that have emerged impossible to determine precisely what was paid and what was not paid during this time. It may well be that a maintenance court tasked with this function and upon consideration of both documentary as well as *viva voce* evidence may well be in a position to provide greater clarity and greater accuracy in determining these issues.

However in respect of the period when the mediated agreement had ceased to operate different considerations would certainly apply. In this regard it is clear that the parties had agreed to revert to the original divorce order and

settlement agreement. There may be some dispute when this would have taken effect but even on the applicant's version the effective date of such a reversion to the original maintenance obligations was 1 February 2010. It is clear on the papers before me and indeed from the first applicant's own version that for the period 1 February 2010 to the period 28 October 2010 (the date on which he deposed to his replying and answering affidavits) that there was a failure to pay maintenance either at all in respect certain months or partially in respect of other months. In this regard the maintenance obligations for the months of February to October 2010 would be in the sum of R15 428-17 per month. The applicant has on his own version paid only R4 000-00 for the month of April 2010, has not made any payments for the month of June and does not in his affidavit on 28 October 2010 indicate whether any payments were made for the months of August, September or October.

[33] Under those circumstances one must be able to draw the relative simple conclusion that the applicant has certainly failed to comply with the divorce order at least for the period February to October 2010 and the nature and extent of such non-compliance will be dealt with later.

WAS THE NON-COMPLIANCE WILFUL OR *MALA FIDE*



[34] In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 the Supreme Court of Appeal in dealing with the concept of civil contempt of court expressed itself as follows in capturing the test to be applied:

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

It is abundantly clear that the consequences of a committal for contempt impacts on the freedom and liberty of the individual at the same time orders of court create with them serious obligations and should not be lightly disregarded. At the end of the day the court in considering an application for committal must indeed be satisfied that there is no reasonable doubt that the party whose committal is being sought acted *mala fide* or wilfully.

[35] In the present matter there is much on the part of the conduct of the applicant that concerns the Court. He has on his own version not paid maintenance at all or adequately during the period April to October of 2010. His justification where it is offered is that following the voluntary liquidation of the company he was engaged he no longer enjoys the position he previously enjoyed and that his position has changed for the worse. He further contends that he had to dispose of assets in order to bring in the income he requires for his living expenses.

What is missing from the applicant's explanation is any detail with regard to his present earning capacity. The court has absolutely no idea of what his income is, of what assets he may be possessed of that could be disposed of in order to supplement his income and in particular in order to ensure that he is able to comply with his maintenance obligations. Under these circumstances and given the importance of the obligation that attaches to the maintenance of minor children one almost draws the conclusion that his attitude in explaining his default is rather cavalier and borders on disrespect of the order of court. In particular he indicates that he was unable to pay the full amount for April 2010 but only paid R4000-00. He gives no explanation or no indication of how and when he intends to pay the outstanding balance in respect of April 2010. In respect of June 2010 his explanation is that he

simply did not have any funds to pay, no explanation is offered in respect of how he intends to make good of his default in respect of the June 2010 payment.

During July 2010, the applicant went on a holiday to Mauritius. He used his credit card to make payment and alleged that his girlfriend paid for the holiday and she refunded the cash to him as it was more convenient to pay by credit card. No proof of such refund is provided but in any event it provides evidence that the applicant had access to funds at a time when he failed to pay his maintenance obligations.

In addition and during the period in question the applicant was engaged in financial transactions that ran into millions. He certainly had access to resources evidenced by the fact that he was offering to provide various tenders as part of an attempt to settle this matter. This clearly must indicate to the extent that he was able to offer a tender in excess of the sum of R300 000-00 that he should have been in a position to have paid maintenance in an amount that was considerably less. His failure to do so and his failure to provide a satisfactory explanation with regard to his financial affairs must lead to the conclusion that he failed to discharge on a balance of probabilities the onus to prove that his default was not wilful and/or *mala fide*.

Under these circumstances I am satisfied that a proper case has been made out for contempt in respect of the failure by the applicant to pay maintenance in respect at least of the divorce order and settlement that the parties had agreed to revert to with effect from February 2010.

The amount in respect of such a failure excluding what may be due in respect of medical expenses and other expenses is computed as follows:

|              | DUE        | PAID       | SHORTFALL  |
|--------------|------------|------------|------------|
| FEB 2010     | R15 428,17 | R 9 600,00 | NIL        |
| MAR 2010     | R15 428,17 | R12 000,00 | NIL        |
| APR 2010     | R15 428,17 | R 4 000,00 | R11 428,17 |
| MAY 2010     | R15 428,17 | R12 000,00 | NIL        |
| JUN 2010     | R15 428,17 | NIL        | R15 428,17 |
| JUL 2010     | R15 428,17 | R12 600,00 | NIL        |
| AUG 2010     | R15 428,17 | NIL        | R15 428,17 |
| SEPT<br>2010 | R15 428,17 | NIL        | R15 428,17 |
| OCT 2010     | R15 428,17 | NIL        | R15 428,17 |

|  |  |  |            |
|--|--|--|------------|
|  |  |  | R73 140,85 |
|--|--|--|------------|

[36] I will for the months of February, March, May and July assume i.f.o the applicant that he believed he was entitled to deduct the stabling fees from the payment made. I make such an assumption purely in respect of the contempt application only. A maintenance court may have to make a proper determination and in due course whether those deductions were justified as well as to determine what may be due in terms of medical and educational expenses.

[37] On that basis the amount in arrears totals: R73 140,85.

[38] In so far as the dispute with regard to the period prior to February 2010 is concerned I have already indicated that there is a dispute of fact on the papers which cannot be resolved and the applicant is entitled to approach the Maintenance Court if she so wishes, alternatively deal with it through mediation. The same would apply in respect of the deductions made by the applicant which are dealt with in paragraph [36] above.

[39] COSTS

The applicant was substantially successful in the main application while the first respondent was substantially successful in the counter application. With regard to the application for condonation which was granted, my view is that the first respondent was justified in opposing the same on the grounds of the vagueness and uncertainty of the applicant's financial position which I have already alluded to. Under those circumstances an adverse costs order against the first respondent is not warranted. The application to strike out was only partially successful.

For the above reasons an appropriate order of costs would be one that required each party to pay their own costs in respect of the main application, the counter application, the application for condonation and the application to strike out.

In all the circumstances I make the following order:

- (1) The warrant of execution issued out of this Honourable Court under case no 6073/2000 is set aside.
- (2) The applicant is declared to be in contempt of Court that in relation to the provisions of the order of this Honourable Court handed down on 27

August 2002.

(3) The applicant is sentenced to six months imprisonment, wholly suspended for three years on condition that the applicant pays the amount of arrear maintenance in the sum of R 73 140,85 as follows:

3.1 R20 000 by the 20<sup>th</sup> December 2010

3.2 R20 000 by the 20<sup>th</sup> January 2011

3.3 R20 000 by the 20<sup>th</sup> February 2011

3.4 R13 140,85 by the 20<sup>th</sup> March 2011

(4) Each party is to pay its own costs in relation to the main application, the counter application, the application for condonation and the application to strike out.

FOR THE APPLICANT: Adv M. feinstein and Adv L. FIAI-COLETTI

INSTRUCTED BY: BAILLIE ATTORNEYS

FOR THE RESPONDENTS: Adv J CANES SC

INSTRUCTED BY: FELDMAN & NANCE-KIVELL ATTORNEYS