

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO.: 35072/2021

REPORTABLE: NO.

OF INTEREST TO OTHER JUDGES: YES.

REVISED.

Date of hearing: 7 February 2023

Date of Judgment: 17 February 2023

In the matter between:

REGINA ELIZABETH TERBLANCHE

Applicant

and

PIERRE TERBLANCHE

1st Respondent

PIERRE TERBLANCHE N.O.

2nd Respondent

JUDGMENT

1. This application turns on the enquiry whether the applicant has discharged the onus to prove that the respondents are in contempt of court. The applicant seeks, ancillary to a contempt of court order, a suspended sentence of committal to jail. The applicant also seeks an order for payment of the amount of R1 700 000.00.

2. The relief for contempt, committal, and payment of an amount of R1 700 000.00 is premised on a divorce settlement agreement that was made an order of court on 29 October 2019. The content of the settlement therefore requires this court's scrutiny.

3. The relevant clauses in the settlement agreement are this:

"1. The property known as Erf [...] M [...], Pretoria, Gauteng, held under title deed number [...]and with street address situated at [...] L [...] Street, Murrayfield, Pretoria, Gauteng, remains the registered and exclusive property of the Plaintiff."

and

"3. The First and Second Defendant will pay the Plaintiff an amount of R1 800 000.00 (one million eight hundred thousand rand), jointly and severally, the one paying the other to be absolved, as follows ..."

4. It then stipulates that the first R100 000.00 is to be paid in the trust account of the present applicant's attorney of record within 30 days of the settlement agreement. Important for purposes of the adjudication of this application is paragraph 3.3 of the settlement agreement:

"3.3. The balance of R1 700 000.00 (one million seven hundred thousand rand) (hereinafter referred to as 'the balance') out of the sale of the property known as the remaining extent of portion [...] of the farm T [...] [...] JR, Pretoria, held under Title deed number: [...], and with address situated at [...] Graham (M6) Road, T [...] Smallholdings, Tierpoort, Pretoria (hereinafter referred to as 'the propetty')."

5. The settlement agreement further required the respondents (seemingly erroneously referred to as the plaintiff) to register a caveat over the property for payment of the balance of R1 700 000.00. It is common cause between the parties that the caveat was registered and the R100 000.00 was paid. Paragraphs 6 and 7 of the settlement agreement stipulate:

"6. The property will be sold within 90 (ninety) days from the date hereof, failing which it will be sold by public auction, with a reserve price of R3 402 975.00 (three million four hundred and two thousand nine

hundred and seventy-five rand);

7. For purposes of the above, the parties hereby nominate and appoint Van's Auctioneers to attend to the publication and arrangements with reference to the sale of the property;"

6. I assume that the word "publication" constitutes a reference to "public auction", since it is common cause that the parties intended to appoint Van's to attend to the auction. On a proper interpretation of the settlement agreement, the respondents would pay the R1 700 000.00 from the proceeds of the sale of the T [...] property. This was presumably premised on the fact that the first defendant did not have the required cash at hand.

7. Having regard to the settlement agreement, it is necessary to first deal with prayer 2 of the notice of motion that is before this court. The applicant requests this court to order the respondents to pay the applicant the amount of R1 700 000.00, allegedly per the court order granted on 29 October 2019 under case number 35555/2013. In my view that relief is plainly incompetent because the order of 28 October 2019 prescribed a mechanism on how the money was to be paid. The interpretation of the settlement leads to the inescapable result that the property must be sold, and if the property cannot be sold by private treaty, it must be sold by public auction (with a reserve price). The auction was to be conducted by Van's Auctioneers. I cannot alter this method at the request of one party into a direct payment order. As such, prayer 2 cannot be granted.

8. That leaves this court with the question whether there is contempt of the court order of 29 October 2019. Prayer 1 of the notice of motion is formulated as follows:

"1. That the First and Second Respondents be held to be in contempt of the court order granted on 29 October 2019 under case number 35555/2013 and ordered, within 10 days, to sign the necessary documents to transfer their undivided half share in the immovable

property known as Erf [...] Murrayfield, Pretoria, Gauteng, with title deed number [...]also known as [...] L [...] Street, Murrayfield, Pretoria, Gauteng, to the Applicant, failing which the Sheriff is authorized to do all things necessary and sign all necessary documents to give effect to the above."

9. From a perusal of that prayer, it seems that the applicant envisaged to premise the order for contempt on a failure to have signed transfer documents in respect of the property that would become solely the property of the applicant. If one, however, considers the founding affidavit, it appears that the request for a contempt order is premised both on the failure to sign the transfer documents so that the half undivided share held by the respondent be transferred to the applicant, and because of the failure to have paid the outstanding balance of R1 700 000.00.

10. I deal first with the failure to have signed the so-called transfer documents. It was alleged and argued in court that demands were made for the signing of such transfer documents which demands were ignored. One of such demands was contained in a letter of the applicant's attorney, dated 17 January 2020. The demand reads as follows:

"We shall also be pleased to receive an indication from you whether your client is amenable to sign the necessary documents in order to cancel the bond registered over the property which is the residence of the plaintiff."

11. This does not constitute a request to transfer a half undivided share in a property but merely a request to consent to the cancellation of a bond. The other demand, so it was argued, was premised on an earlier request made on 20 December 2019 where it was explained why the bond had to be cancelled. The relevant electronic mail states:

"We refer to the above matter and confirm that our client has requested that the bond registered over the Murrayfield property be cancelled. It appears that the mortgage loan account was opened in both Mr and Mrs

Terblanche's names jointly and as a result Mr. Terblanche's signature is also required for purposes of cancellation of the bond.

Please be so kind to indicate whether your client would be amenable to sign the necessary form for cancellation of the bond."

12. How any of the above constitute demands to transfer a half undivided share in immovable property, escapes me. The settlement agreement that was made an order of court did not require the respondents to sign documents to cancel a bond allegedly registered over the Murrayfield property. All that it did is that it confirmed that the applicant would retain full ownership of the Murrayfield property. Whether both parties held an undivided equal share in that property at some stage is not clear from the papers. Be that as it may, there was no demand ever made for the transfer of a half undivided share in the property from the respondents to the applicant.

13. In the answering affidavit the first respondent admits that he saw the correspondence to the effect that the applicant wished to cancel a mortgage bond, but no one ever contacted him to arrange for the signing of documents. The first respondent states further that he has absolutely no issue with signing the necessary documents and tenders to do so, and that the applicant merely had to contact the first respondent to arrange for the signature of the documents.

14. At the hearing of the application, it was confirmed that it is common cause that the consent to cancel the bond was signed. The envisaged relief in the notice of motion in any event did not envisage contempt premised on the failure to sign a consent to cancel a bond. It was premised on a failure to sign transfer documents in respect of a half undivided share in the property. Whatever the case may be, there was on the first respondent's version absolutely no unwillingness to sign whatever documents he had to sign.

15. In the premises, it follows that the allegation that the first respondent refused to sign the necessary documents to transfer his half undivided share in the property into the name of the applicant is incorrect. It does not concur with

the objective evidence and/or the letters exchanged.

16. The second basis upon which an order for contempt is sought is the failure to have paid the R1 700 000.00. I already alluded to the fact that there was a payment method agreed upon between the parties. It entails that the first respondent had to attempt to sell the property himself by private treaty and should that not materialize within 90 days then the property would be auctioned off by Van's Auctioneers and the proceeds utilized for the purposes of the payment of R1 700 000.00.

17. The applicant tells this court, in the founding affidavit, only this:

"11. ... For sake of completeness, it is pointed out that the auctioneer sought payment of the amount of R45 000.00 which the First and Second Respondents refused and/or neglected to pay and the contemplated auction could not proceed."

18. The respondents tell this court, on the other hand, that it is admitted that the balance of R1 700 000.00 has not been paid. It has become impossible due to circumstances created by COVID-19. They state that it is apparent from the settlement agreement that the amount was to be paid from the proceeds of the sale of the immovable property, and that 90 days would be permitted for the respondents to find a private buyer for the property, whereafter it would be sold on auction.

19. The first respondent tells this court that he attempted to sell the property to three individuals, whose names are listed in the answering affidavit, but who could not obtain the necessary loans to finalize the sale.

20. In respect of the alleged obligation that the respondents had to make payment of a deposit of R45 000.00 the first respondent correctly tells this court that it ought to be emphasized that the settlement agreement does not make provision for this expense and who should pay the same. I agree with that proposition. There is nothing stipulated in the settlement agreement that requires

such payment to be made by the first respondent.

21. I proceed to deal with the applicable legal principles.

22. The Constitutional Court in the case of *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC) confirmed the test laid down in *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) where the Supreme Court of Appeal, in paragraph 42, confirmed that the test is this. Once it is proven that an order exists and that was served on a litigant who did not comply therewith, the respondent bears an evidential burden in relation to wilfulness and *ma/a fides*. The overall onus to prove the requisites for contempt remains with the applicant who must do so beyond reasonable doubt.

23. Therefore, an applicant who alleges contempt of court must establish that:

23.1. an order was granted against the contemnor.

23.2. the alleged contemnor was served with the order or had somehow knowledge of it; and

23.3. the alleged contemnor failed to comply with the order.

24. One these elements are established; wilfulness and *mala fides* are presumed, and the respondent bears an evidentiary burden to establish reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established. It should be borne in mind that the applicant does not merely request an order for civil contempt but also asks this court for the incarceration of the first respondent. Although the respondent is not an "accused" person, prove beyond reasonable doubt, is thus the applicable test.

25. In this case the applicant does not even meet the threshold of the first requirement in that she failed to establish that, save for knowledge of the order, which is common cause, the first respondent had failed to comply with the order.

In this case I am unable to make such a finding. Everything that the first and/or second respondents had to do in terms of the order they did. The R100 000.00 was paid. A caveat was registered against the property and the first respondent has attempted to find purchasers for the property.

26. The execution of the order stopped at a simple dispute, namely who is liable to pay the R45 000.00 deposit requested by Van's Auctioneers. The court order, however, did not foresee that predicament arising, namely what would happen if a deposit was required. It was obviously not in the contemplation of the parties when they agreed to settle that such a requirement would ever arise.

27. Insofar as expenses in relation to the auction are envisaged in the settlement, the only indication that the settlement agreement gives is that the costs of publication and advertisement of the auction must be paid from the proceeds. Both parties must contribute equally should there be a shortfall. The positive allegation that the respondents ought to pay the deposit is therefore incorrect.

28. As such, the applicant has failed to establish the requirements for contempt, and I do not have to consider whether the respondents did establish reasonable doubt in respect of willfulness and *mala fides*.

29. This judgment obviously does not resolve the outstanding issue between the parties. The property must be sold. At the hearing of this application, I enquired with the parties whether I could not make an order that would facilitate the sale of the property and the finalization of the outstanding issues and disputes between the parties. This would have avoided the inevitable necessity of the parties having to return to court with applications for alternative relief, but the parties could not meet each other in this regard. Considering the relief that was sought by the applicant, I have no discretion to venture into the issue of alternative relief, because there is no evidence before this court what could or would be a practicable alternative solution.

30. As such, I am duty-bound to dismiss the application. A request was made

by the applicant's counsel that, if I were to dismiss the application, I make an order that each party pays its own costs, because of the failure of the parties to work together to find a solution.

31. It is only in exceptional circumstances that a court may deviate from the general rule that a successful party be granted the costs of the litigation. I am unable to find such exceptional circumstances in this case and the normal costs order ought to follow.

32. I therefore make the following order:

32.1. the application is dismissed with costs.

D VAN DEN BOGERT

Acting Judge

High Court of South Africa

Gauteng Division, Pretoria

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