



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: **44013/2020**

In the matter between:

M [....] O [....]

Applicant

and

J [....] C [....] O [....]

Respondent

CORAM: TSANGARAKIS, AJ

HEARD ON: 26 JANUARY 2023

DELIVERED ON: 16 FEBRUARY 2023

INTRODUCTION

- [1] The controversy in this opposed application, as is often the case in proceedings concerning civil contempt, arises from of a deed of settlement concluded between the parties which was made an order of this Court on 25 May 2022 (“the 25 May order”).
- [2] The deed of settlement was concluded pursuant to the institution of a divorce action prosecuted by the applicant (as plaintiff) against the respondent (as defendant).
- [3] At issue in this application, over and above the aspect of civil contempt, is also the question as to the manner in which the content of paragraphs 4 to 4.2 of the deed of settlement ought to be interpreted. The paragraphs, as aforesaid, read thus:

“4.

Dat die Verweerder aan die Eiseres oordra as haar eiendom die Mercedes Benz motorvoertuig met registrasie nommer 320 [...] FS (hereinafter referred to as “the motor vehicle”) en verder onderworpe aan die volgende voorwaardes:

4.1 Dat die verweerder aanvaar om Kunden Motors se rekening te betaal ten einde ‘n diagnostiese toets te doen en alle redelike herstelwerk soos diagnosties bepaal te doen.

4.2 *Dat sodanige diens verrig sal word binne 'n periode van 30 dae vanaf datum van egskeiding."*

THE FACTUAL MATRIX

- [4] The more pertinent facts have as their provenance a previous application for contempt between the applicant and the respondent (*"the first contempt application"*).
- [5] The first contempt application was issued by the Registrar of this Court on 1 August 2022 and was also prosecuted by the applicant against the respondent. By way of the first contempt application the applicant moved for an order that the respondent be found to be in contempt of paragraphs 1.1, 1.2, 4.1 and 4.3 of the 25 May order.
- [6] The first contempt application was, pursuant to the granting of the rule *nisi*, subsequently withdrawn by way of an order to this effect granted on 15 September 2022.
- [7] In the first contempt application, which was also partly pivoted upon a proposition of contempt on the part of the respondent in respect of *inter alia* paragraph 4.1 of the deed of settlement aforesaid, the respondent met this part of the applicant's case in that application on the following basis:

"9.

Repairs on vehicle:

- 9.1. *In terms of paragraph 4.1. of the Deed of Settlement, it makes specific reference to a diagnostic test to be conducted on the Applicant's vehicle and that reasonable repairs, based on the outcome of the diagnostic test, should be conducted wherefore I would be liable for payment.*
- 9.2. *I submit that to date, I have not received any report or outcome of a diagnostic test that was conducted on the Applicant's vehicle nor have I received a quotation and/or invoice that needs to be paid before the diagnostic test can be conducted.*
- 9.3. *I have merely received a quotation from Kundendienst Trust in the amount of R47 995.00 with items listed. The quotation does not give any indication that a diagnostic test was conducted and based on the outcome thereof, the listed items on the quotation were identified as necessary repairs to the vehicle. I attach hereto the quotation as **Annexure 'RA10'**.*
- 9.4. *Further to this, I have arranged for the Applicant's vehicle to be duly serviced at Kundendienst Trust in June 2022, of which I have made payment in the amount of R1 957.75 for this service. I attach hereto the Tax Invoice as **Annexure 'RA11'**.*
- 9.5. *I have arranged and paid for the service of the vehicle which constitutes reasonable and necessary repairs.*

9.6. *Once I have received the outcome of the diagnostic test, I will be able to identify further reasonable repairs that are necessary on the vehicle and arrange for those repairs to be made.”*

[8] The respondent, by way of his answering affidavit, initially joined issue with the applicants requested incorporation of the evidence evident from the first contempt application in her founding papers. During argument, however, counsel for the respective parties were in agreement that judicial cognisance ought to be taken of paragraph 9.6 of that answering affidavit as reproduced above.

[9] To my mind it is inappropriate to fail to also take judicial cognisance of the allegations made in the founding, answering and replying affidavits, relevant to paragraph 4.1 of the deed of settlement, in the first contempt application. This is so because context is everything, the evidence relevant thereto is readily available and such evidence is reliable in the sense that it constitutes evidence deposed to under oath by the parties and relates to one of the very issues which has arisen for adjudication by way of the present application.

[10] In ***Grootkraal v Botha 2019 (2) 128 (SCA)*** Wallis JA explained the position as follows at paragraph [21] (footnotes omitted):

“Much of what follows is drawn from these sources and has been used to complete and correct the picture drawn by the parties in their affidavits. The court may take judicial notice of such material when it is readily available and reliable, however it comes to the court’s attention..... In the present case the

problems with the evidence and summary of its impact where put to counsel in the course of argument and left unchallenged.”

[11] The allegations made by the applicant in her founding affidavit, deposed to in support the relief which she sought by way of the first contempt application, are uncontentious and the same need not be dealt with in detail other than to record that the necessary jurisdictional requirements to establish civil contempt were pleaded on this particular score.

[12] By way of her replying affidavit in that application, the applicant replied to the afore-reproduced paragraphs of the respondent’s answering affidavit as follows:

“27. **AD PARAGRAPH 9 THEREOF:**

27.1 *I took the motor vehicle to Kundendienste Trust in order to determine what must be repaired and the latter inspected the motor vehicle whereafter they prepared a “report” containing eight (8) entries and six comments. They have also prepared a job card which contains a summary of the “repair/ services required” and a quotation. I append copies of the aforementioned documents hereto and I mark them annexure “K”, annexure “L” and annexure “M” respectively.*

27.2 *Mr Botha, who is employed by Kundendienste Trust, informed me that the aforementioned documents were sent to the Respondent who, after having received the same, unilaterally instructed the Kundendienste Trust to perform an oil and filter service. The latter*

complied with the aforementioned instruction and after having performed the same, it rendered a 'Technical Report of Work Done', a copy of which is appended hereto and marked annexure "N", as well as the invoice referred to in the Opposing Affidavit to the Respondent.

27.3 The fact of the matter is that for the last 15 years or so the Kundendienste Trust was responsible for providing the necessary mechanical services to the Respondent's vehicles while the Respondent trusted their judgment and expertise. The Kundendienste Trust examined the motor vehicle and indicated as to what repair work is necessary. Surely the Respondent is not suggesting that his mechanic of choice is all the sudden quoting for unnecessary expenses. This is once again indicative of the fact that the Respondent is simply obstructive.

27.4 Be that as it may, the Respondent has no basis to reject their report and if he was bona fide, he could have discussed the same with the Kundendienste Trust to satisfy himself that the repair work is reasonable and necessary. It is further clear from the invoice itself, i.e. annexure "RA11" to the Opposing Affidavit, that not all necessary work was performed because the bonnet shocks must be replaced, the rear brake pads will not last until the next service, boot lock to be replaced, front lower control arms and ball joints to be replaced, rear ac control units to be replaced. If the Respondent was bona fide, he

would have attended to these expenses, yet he refused to do so and insists that I must drive with this defective car.

27.5 On 1 July 2022 my Attorney of Record addressed a letter to the Respondent's former Attorney of Record requesting the latter to attend to the repair work mentioned identified by the Kundendienste Trust and I append a copy thereof hereto marked annexure "O". No meaningful response was forthcoming from the Respondent raising a real and bona fide concern regarding the aforementioned report and work to be rendered."

[13] I will deal with the further pertinent facts more fully under the headings "EVALUATION" and "CONCLUSION" below.

THE REQUIREMENTS FOR CIVIL CONTEMPT AND THE INTERPRETATION OF THE 25 MAY ORDER

[14] The principles of civil contempt are well established and have formed the subject-matter of numerous judgments.¹

[15] An applicant who alleges contempt of court must establish that:

15.1 An order was granted against the respondent;

15.2 The respondent was served with the order or had knowledge of it; and

15.3 The respondent failed to comply with the order.

[16] Once these elements have been established, willfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish reasonable doubt. If the respondent fails to do so, contempt will be established.

[17] A refusal to comply that is objectively unreasonable may, however, be shown to be *bona fide* which will then avoid a finding of civil contempt although unreasonableness could establish evidence of a lack of good faith.²

[18] Insofar as to the manner in which the 25 May order ought to be interpreted the Supreme Court of Appeal stated the general principles applicable to the interpretation of documents, whatever their nature, in ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** as follows:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax: the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or

undermines the apparent purpose of a document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

*All this is consistent with the “emerging trend in statutory construction”. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges* NO and another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.”³*

[19] The Constitutional Court approved the aforesaid exposition of the law in ***University of Johannesburg v Auckland Park Theological Seminary and Another***.⁴

[20] In the more recent decision of ***HLB International v MWRK Accountants***⁵ the Supreme Court of Appeal was called upon to consider the principles

applicable to the interpretation of a court order that was granted by the Gauteng Division of the High Court, Pretoria (Davies AJ).

- [21] Having considered significant developments in the law which, *inter alia*, included a consideration of the judgments historically delivered in the matters of ***Firestone South Africa (Pty) Ltd v Genticuro AG***,⁶ ***Natal Joint Municipal Pension Fund v Endumeni Municipality***⁷ and ***Bothma-Batho Transport EDMS Bpk v S Bothma Seun Transport (Edms) Bpk***,⁸ the Supreme Court of Appeal concluded in paragraphs [26] to [28] thus:

“[26] *The now well-established test on the interpretation of court orders is this:*

‘ . . . The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. . . .’

[27] *The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made. For as was said in KPMG Chartered Accountants (SA) v Securefin Ltd and Another, ‘context is everything’.*

[28] *A fairly recent illustration of the linguistic, contextual and purposive*

approach to the interpretation of a judgment or order is to be found in Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd, in which it was said that '[a]n order is merely the executive part of the judgment and, to interpret it, it is necessary to read the order in the context of the judgment as a whole', and-

'... [a]s part of the "usual well-known rules" of interpretation, according to Olivier JA, is-

"dat mens jou nie moet blind staar teen die swart-op-wit woorde nie, maar probeer vasstel wat die bedoeling en implikasie is van wat gesê is. Dit is juis in hierdie proses waartydens die samehang en omringende omstandighede relevant is". (Footnotes omitted.)

Loosely translated:

'One should not stare blindly at the black-on-white words, but try to establish the meaning and implication of what is being said. It is precisely in this process that the context and surrounding circumstances are relevant.' "

EVALUATION

[22] During the hearing of this application the respective parties' positions as to that which fell to be adjudicated (or not adjudicated) upon by me crystallised as follows:

22.1 There exists no dispute on the papers that the 25 May order was granted against the respondent and that the respondent had knowledge of such order. These facts are therefore common cause; and

22.2 In issue is whether or not the respondent failed to comply with the 25 May order. The answer to this question lies in the interpretation of the 25 May order in respect of which there exists a dispute between the parties. If such failure is established on an objective interpretation of such order, then and in that event the respondent's case is that he has discharged the evidentiary burden which rests upon him by raising reasonable doubt in the sense that he at all times acted in good faith.

[23] I therefore deal with the aspect of interpretation of the 25 May order first.

[24] The founding affidavit, filed in support of the relief by way of the present application, makes the usual allegations relevant to the jurisdictional elements required to establish civil contempt.

[25] It is further evident from the allegations made, and annexures referred to, in the founding affidavit that the diagnostic test was only conducted on the motor vehicle on 5 October 2022. At first blush, it would therefore appear that this test was conducted several months outside the period of time envisaged in the 25 May order.

[26] On a synopsis of the respondent's case, as to the manner in which the order of 25 May order falls to be interpreted, the respondent pleads that the purpose of paragraphs 4.1 and 4.2 (as reproduced in the "**INTRODUCTION**" to this

judgment) is to ensure the finality of the matter and that the respondent is not liable for any further repairs after the 30 days have passed. Moreover, so the respondent pleads, the respondent only received a quote within the 30-day period provided for in the order and no diagnostic test was timeously submitted as this agreed to test was only performed on 5 October 2022.

[27] The respondent further alleges that he has consequently complied with the 25 May order, insofar as it placed any obligations upon him to do so, and that the repairs arranged and paid for by him (in the amount of R1 957.75) were reasonable, sufficient and in satisfaction of the 25 May order.

[28] In reply the applicant contends that upon a sensible and business-like interpretation of the paragraphs in issue of the 25 May order, they illustrate that their purpose was to ensure that:

28.1 The applicant receives a good and roadworthy motor vehicle upon divorce;

28.2 The respondent's liability to repair the motor vehicle is limited to those defects which existed as at 24 June 2022 i.e. thirty days pursuant to the 25 May order;

28.3 The purposes of the diagnostic test was to determine and identify any defects in the motor vehicle which were in existence up and until 24 June 2022, to identify the nature and repair of work required to repair the aforementioned defects, to provide the costs thereof to the

respondent and to ensure that the respondent is not liable to repair any defects which may have arisen pursuant to 24 June 2022;

28.4 In due compliance of the 25 May order the Kundendienst Trust inspected the motor vehicle and prepared a job card, which contained a summary of the “*repairs / services required*”, a report as well as a written quotation which all transpired within the 30-day period; and

28.5 In and because of the evidence deposed to by the respondent, in paragraph 9.6 of the first contempt application, the content of which has been reproduced above, logic dictates that if the respondent truly and honestly believed that he was relieved of the duty to render any repair work, because the diagnostic test and the subsequent repair work were not rendered within the 30-day period, then there would have been no need to tender performance upon receipt of the report because the 30-day period has already prescribed without the repair service being rendered when the aforementioned affidavit was deposed to. The respondent’s submissions as the manner in which the court order falls to be interpreted, so the argument of the applicant goes, constitute an inappropriately raised afterthought.

[29] The applicant, relying heavily on the judgments of ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another***⁹ and ***Soffiantini v Mould***,¹⁰ urged me to take a robust view and reject the interpretation of the Court order as asserted by the respondent.

[30] In rebuttal of the applicant's argument, as aforesaid, counsel for the respondent argued that on an objective and purposeful interpretation of the allegations made in the first contempt application, the context of the facts and surrounding circumstances, that then existed, illustrate that whether or not the diagnostic test on the vehicle had been timeously attended upon was as a fact to the respondent unknown at that stage. If the respondent was aware of such fact he would have raised the defence which it raises in respect of the present application.

CONCLUSION

[31] The relief that the applicant seeks is final in effect. Moreover, it is of a serious nature given the possible incarceration of the respondent that civil contempt of proceedings can possibly attract.

[32] To my mind, there appears to be factual disputes which are material and relevant as to the manner in which the 25 May order falls to be objectively interpreted which are incapable of being adjudicated upon the papers.

[33] This difficulty is further exacerbated by the fact that material documents produced by the Kundendienst Trust, which documents feature heavily in the respective cases of both the applicant and the respondent insofar as the question of the interpretation of the 25 May order is concerned, constitute inadmissible evidence. The applicant, alive to this issue, explains that one Mr Botha of said trust refuses to depose to a confirmatory affidavit on the basis that he does not wish to become embroiled in the parties acrimonious dispute. The applicant requests that such facts be admitted into evidence.

[34] It is trite that:

[34.1] Inadmissible evidence is by its very nature irrelevant and irrelevant evidence need not be responded to nor does it justify any negative inference if irrelevant evidence is not responded to;¹¹

[34.2] The weight placed on evidence contained in affidavits therefore depends on the evidence, the weight to be placed on what is in the affidavits depends on its relevance and admissibility;¹² and

[34.3] Inadmissible evidence has no probative value.¹³

[35] Although it is so that neither of the parties moved for a referral of the aspect of interpretation of the 25 May 2022 to oral evidence a Court may, in the exercise of its discretion, make such referral.

[36] In ***Du Plessis en 'n Ander v Tzerefos 1979 (4) SA 819 (O) at 838 A - B*** the following is stated:

“Nie een van die party het op enige stadium aansoek gedoen dat die aangeleentheid vir mondelinge getuienis verwys moet word nie of dat een van die deponente aan kruisverhoor onderwerp moes word nie. ‘n Hof kan egter ook mero motu ‘n bevel van sodanige strekking maak: Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) te 1165; Oertel NO v Pieterse and Others 1954 (3) SA 364 (O) te 368.”

[37] Taking all of the facts relevant to the issue of interpretation of the 25 May order into account in my view, and in the exercise of my judicial discretion, the aspect of the interpretation of the 25 May order falls to be referred to oral evidence.

[38] Insofar as the costs of the application are concerned, the same ought to stand over for later adjudication.

ACCORDINGLY, THE FOLLOWING ORDER IS GRANTED:

1. The matter is referred for the hearing of oral evidence, at a date and at a time to be arranged with the Registrar, on the issue of the interpretation of paragraphs 4, 4.1 and 4.2 of the settlement agreement made an order of Court on 25 May 2022;
2. Unless the Court otherwise directs, in relation only to the issue referred to oral evidence:
 - 2.1 The parties are entitled to call any witness who deposed to any affidavit in these application proceedings;
 - 2.2 The parties are obliged to make available for cross-examination such witnesses who deposed to affidavits in these proceedings to the extent that such party persists in seeking to place any reliance on that person's evidence in the affidavits;

- 2.3 The parties are entitled to call any further witnesses who were not deponents to affidavits in these application proceedings:
 - 2.3.1 Provided that such party has at least 30 court days before the date of the hearing of oral evidence served on the other party a statement of the evidence in chief to be given by such person;
 - 2.3.2 Subject to the Court, at the hearing of the oral evidence, permitting such further witnesses to be called notwithstanding that no such statement has been served in respect of his or her evidence;
 - 2.4 The parties may subpoena any witness to give evidence at the hearing or to furnish documents whether such person has consented to furnish a statement or not in relation to the issue referred to oral evidence;
 - 2.5 A party who has served a witness statement in terms of sub-paragraph 2.3.1 above or has subpoenaed a witness shall not oblige such party to call the witness concerned;
 - 2.6 Uniform Rule 35 will apply to the discovery of affidavits.
3. The remaining issue in the application, being the issue of the respondent's civil contempt of the 25 May 2022 order, stands over for determination on the affidavits filed by the parties to date by the Court referred to in paragraph 1 above.
 4. The costs of this application stand over for adjudication.

S. TSANGARAKIS, AJ

On behalf of the Applicant: Adv J.C. Coetzer

Instructed by: Honey Attorneys
Bloemfontein

On behalf of the Respondent: Adv M.C.M. Pieterse

Instructed by: Horn & Van Rensburg
Attorneys
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- ¹ **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA).
Pheko v Ekurhuleni City 2015 (5) SA 600 (CC).
Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others 2021 (5) SA 327 (CC).
- ² **Fakie NO v CCII Systems (Pty) Ltd** *supra* at para [9].
- ³ 2012 (4) SA 593 (SCA) paragraphs [18] and [19].
- ⁴ 2021 (6) SA 1 (CC) paragraphs [64] to [68].
- ⁵ 2022 (5) SA 373 (SCA).
- ⁶ 1977 (4) SA 298 (A) at 307A to 308A.
- ⁷ 2012 (4) SA 593 (SCA).
- ⁸ 2014 (2) SA 494 (SCA) paragraph [12].
- ⁹ 2008 (3) SA 371 (SCA) at paragraphs [12] and [13]
- ¹⁰ 1956 (4) SA 150 (ED) at 154G to H.
- ¹¹ **Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa** 1999 (2) SA 279 (T) at 336 F – F; **Supreme Court of Appeal, confirming Swissborough judgment, in a matter of National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA).
- ¹² **Goldfields Ltd and Others v Motley Rice LLC** 2015 (4) SA 299 (GJ) at par. [128]
- ¹³ **Giesecke and Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security** 2002 (2) SA 137 (SCA) at par [30]