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

Case No.:1334/2018

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

M[...] S[...]

APPLICANT

And

P[...] S[...]

RESPONDENT

CORAM: **NAIDOO J**

HEARD ON: **16 FEBRUARY 2023**

DELIVERED ON: **7 JULY 2023**

JUDGMENT

[1] This is an application for the respondent to be found in contempt of a court order and to be incarcerated, such incarceration to be suspended on certain conditions (the main application). The respondent opposed the main application and filed a counter-application, in essence, for the finalisation of the accrual of the estate, and other relief. The applicant opposed the counter-application. I mention that the respondent filed his Replying Affidavit in the counter application late, and accordingly applied for condonation for such late filing. The applicant's legal representative indicated that they do not take issue with the late filing of the Replying Affidavit and condonation for such late filing was granted. Adv R Van Der Merwe represented the applicant and Adv M Louw represented the respondent.

[2] The applicant sought an order, in essence, in the following terms:

2.1. The respondent be found to be in contempt of the Court Order issued by Judge AF Jordaan on the **16th day of October 2019**, under case number 1334;

2.2. Committing the respondent to imprisonment for a period of (90) NINETY days or such other period the Court may deem fit;

2.3. Suspending the aforesaid term of incarceration of the respondent for such a period as the Court may determine, on the condition that the Respondent comply with the order of Court (dated 16 October 2019);

2.4. Leave be granted to the applicant to approach the court on the same papers, duly amplified, for putting into operation of suspended imprisonment, should the respondent fail or neglect to comply with the court order;

2.5. Costs of the application.

[3] The parties who were previously married to each other out of community of property, with accrual, were divorced on 16 October 2019, and the Deed of Settlement they entered into, was made an order of court. In terms of the Deed of Settlement, the respondent was to pay maintenance to the applicant in the amount of

Eight Thousand Rand (R8 000) per month, which would lapse on the applicant's death, remarriage or if she entered into a cohabitation relationship. The maintenance was subject to review and/or cancellation after calculation of the accrual. Attorney Mr Pieter Joubert (Joubert) of the law firm Kramer Weihmann Joubert Incorporated (KWJ) was appointed as Receiver to determine the accrual of the marriage estate. Joubert's powers and duties were set out in the Deed of Settlement. The respondent currently resides in the Netherlands.

[4] The applicant alleges that the respondent, after having always paid the maintenance timeously and regularly, defaulted in such payment from June to October 2022, short-paying in June and failing to make any payments from July to October 2022. She launched this application on 2 November 2022, in which she claimed the relief I set out earlier. She further alleges that numerous letters were addressed the respondent's attorneys as well as to him personally, pointing out that he was in arrears with his maintenance payments, requesting payment and warning that a contempt application will be brought, should he fail to pay.

[5] The respondent's Answering Affidavit in the main application was also his Founding Affidavit in the counter application. In the latter application, he sought orders, which I summarise as follows:

5.1 The final calculation of the accrual between the parties, as calculated by KWJ, dated 15 December 2021, be lodged in the High Court, only if KWJ did not attend to same;

5.2 It be declared that there was no objection raised to the said accrual calculation, and that it is thus final and binding on the parties, but for the settlement contemplated in paragraph 3;

5.3 It be declared that the issue of the accrual in the respective estates of the applicant and respondent for the purposes of section 3(1) of the Matrimonial Property Act 88 of 1984, has been settled and the respondent has discharged his liability towards the applicant in respect thereof;

5.4 Alternatively to paragraph 5.3 above, and only if it be held that the respondent did not settle or compromise the accrual as contemplated in paragraph 5.3 above, that this court determine the balance owing to the applicant and make an order that it be payable within a reasonable time to be determined by the court;

5.5 The contents of paragraph 1.1 and 1.1.1 of the deed of settlement concluded between the parties on 15 October 2019, and made an order of this court on 16 October 2019, are cancelled and/or deleted;

5.6 Alternatively to paragraph 5.5, the maintenance obligations of the respondent arising out of paragraphs 1.1 and 1.1.1 of the deed of settlement concluded between the parties on 15 October 2019 and made an order of court on 16 October 2019, are suspended;

5.7 Alternatively to 5.5 and 5.6 above, the maintenance obligations of the respondent arising out of the deed of settlement mentioned above are temporarily suspended, pending the outcome of the proceedings referred to in 5.8 below;

5.8 The applicant be authorised to approach the Maintenance Court within 60 days of this order, in order to determine whether she has a maintenance requirement and the respondent's reciprocal obligation, if any;

5.9 The applicant to pay the costs of this application only in the event of her opposing same.

[6] The respondent alleges that the final calculation of the accrual was done by KWJ on 15 December 2021. Neither the applicant nor the respondent objected to the calculation, and in terms of clause 4.2 of the settlement agreement, if there was no objection to the calculation of the accrual, it shall be deemed to be confirmed between the parties. The respondent argues that in the absence of objection, he considered the accrual to have been finalised. The finalisation of the accrual triggered the operation of the review or suspension of maintenance, as well as the

respondent's "prompt and timeous" response by tendering payment of the amount of Six Hundred Thousand Rand. (R600 000.00). The respondent asserts that the calculation of the accrual therefore meant that he need not continue payment of maintenance. He argues that he paid maintenance to the applicant timeously and consistently since 2018, and acknowledges that he did not pay for the months of July to October 2022, only because he accepted that the accrual had been finalised and that he tendered settlement thereof by way of the payment of R600 000.00.

[7] The applicant's response in the Answering Affidavit to the counter application is, in essence, that the calculation of the accrual, upon which the respondent relies, was done by Mr Weihmann of KWJ and not by Joubert who was appointed as Receiver in terms of the court order dated 16 October 2019. She contends, therefore that the calculation of the accrual has not been finalised, as contended by the respondent. The applicant, in the course of the veritable mountain of correspondence that passed amongst the parties, their legal representatives and KWJ, indicated that she will accept the earlier calculation of R1 237 059.95, allegedly done by Joubert.

[8] The applicant set out in great detail the sequence of events and particularly the correspondence sent to the respondent and/or his legal representatives drawing to his attention that he is in arrears in respect of maintenance payments and warning that a contempt application would be brought against him, and persisted with the relief she sought in the main application.

[9] The acrimony between the parties in this matter is palpable and is abundantly evident from the voluminous papers. The distinct impression that one gains is that there is a lack of cooperation in this matter which has seriously hindered the finalisation of this matter. This is due in some measure to the attitude of the respective legal representatives to each other. The court had occasion during the oral hearing of this matter to raise this issue and remind the parties that collegiality, courtesy and professionalism are expected of legal practitioners in their interactions with each other and is necessary to protect the interest of their clients. It is regrettable and unfortunate that opportunism, legal posturing and the taking of technical points to gain advantage are a pervasive feature of this matter. I am in

agreement with Mr Louw's assertion that this matter should never have come to court. This is a classic example of a matter that ought to have been settled by discussions and communication between the parties. Not only would the matter have been finalised a few years ago, but the unnecessary escalation of legal costs would have been prevented. The latter ought to have been one of the primary objectives, as money is the centre of the dispute between the parties.

[10] Having said that, it is my view that it is unnecessary to deal with each and every issue raised by the parties (and there are many). There are two crisp issues for adjudication – whether the applicant has made out a case for an order that the respondent is in contempt of court and whether the orders sought by the respondent in the counter application are permissible. It is well established in our law that the requirements to prove civil contempt of court are:

- (a) the existence of the order;
- (b) the order must be served on or brought to the notice of the contemnor;
- (c) non-compliance with the order, and
- (d) the non-compliance must be wilful and *mala fide*.

[Fakie NO v CCII Systems (Pty) Ltd 2006(4) SA 326 (SCA); Matjhabeng Local Municipality v Eskom Holdings and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd (Matjhabeng) 2018(1) SA 1 (CC); also 2017(11) BCLR 1408 (CC)]

[11] The applicant bears the onus to prove, beyond reasonable doubt, the existence of the order, service of the order on or notification thereof to the respondent and non-compliance with the order. When that onus is discharged, the onus then shifts to the respondent to show that such non-compliance is not wilful or *mala fides*. In this matter, there is no dispute that the applicant has discharged the onus on her, which flows logically from the Deed of Settlement, signed by both parties, and which was made an order of court. It is also not in dispute that the

respondent did not pay maintenance for the period alleged by the applicant. In considering whether the respondent's non- payment of maintenance was wilful or *male fides* the circumstances pertinent thereto need to be examined.

[12] In her Founding Affidavit to the main application, the pertinent allegations by the applicant are that the accrual calculation was still pending and that she has not received any accrual due to her. She asserts that the respondent previously never failed to pay maintenance timeously, but failed to do so for the months of July to October 2022, while short-paying for June 2022. She also complained that he stopped paying for her medical aid cover. She did not mention at all that the respondent offered to settle the accrual and in fact paid her R600 000.00. She made no mention that he relied on an accrual calculation ostensibly finalised on 15 December 2021. She emphasises that he defaulted in maintenance payments and was hence in contempt of court. The payment of the R600 000.00 emerged from the letters she attached to the Founding Affidavit in support of her assertions that the respondent was notified of his default and that a contempt application would be brought against him. In my view, this is disingenuous, as the circumstances surrounding the payment of the R600 000.00 are very relevant to the issue of whether the respondent's non-payment of maintenance was wilful and *male fides*.

[13] The respondent asserts that there was a history of non-cooperation from the applicant, whose conduct delayed the finalisation of the accrual calculation and hence the compliance with the Deed of Settlement. He relocated to the Netherlands on 15 January 2021, and the accrual calculation he relies on was completed on 15 December 2021. What is evident is that the issue of the accrual calculation was ongoing from about 2020. It appears from the correspondence that inputs were being given in respect of the accrual calculation. The initial calculation sent under cover of a letter dated 2 December 2020 reflected that an amount of One Million Two Hundred and Thirty Seven Thousand Fifty Nine Rand and Ninety Five Cents (R1 237 059.95) was payable to the applicant (the first calculation). Thereafter a second calculation was sent to the parties on 25 May 2021, reflecting an amount of Six Hundred and Seventeen Thousand Fifty Nine Rand and Sixty Cents (R617 059.60) payable to the applicant (the second calculation), and the third calculation was sent on 15 December 2021 in the amount of Six Hundred and Nine Thousand Eight

Hundred and One Thousand and Three Cents (R609 801.03) payable to the applicant (the third calculation)

[14] As I indicated, the respondent relocated a month after the third calculation was sent. From the papers it seems that after receipt of the second calculation, there was little or no communication from Mr Weihmann from KWJ, who had undertaken the task of calculating the accrual, after Joubert left the employ of KWJ. The applicant in approximately July 2021, lodged a complaint with the Legal Practice Council (LPC), complaining of Mr Weihmann's inaction and failure to finalise the accrual. The third calculation was thereafter done by Mr Weihmann on 15 December 2021. The respondent alleges that he was unaware of the complaint to the LPC, as this was done without notification to or consent by him.

[15] The tender to pay the accrual amount reflected in the third calculation was done some time between 15 December 2021 and 9 February 2022. On the latter date, the respondent's attorney repeated the tender to Mr Weihmann, requesting details of his Trust banking account in order to deposit the money which he tendered to pay. It seems that after he received no cooperation from the applicant, the respondent made payment of R600 00.00 to the applicant, in August 2022. She rejected this offer of settlement of the accrual. He alleges that in view of his paying over the R600 000.00, he was under the impression that he did not have to pay maintenance. He is criticised for not approaching the court to confirm the accrual before paying an amount less than the accrual calculation, and for asserting that he thought the suspension of the maintenance was a matter to be settled between the parties. There was a long explanation about the applicant's attempts to return the R600 000, and the respondent's failure to furnish his details in terms of the Financial Information Centre Act (FICA) which prevented her from doing so. It ultimately turned out that there was no requirement to comply with FICA. I do not consider it necessary to deal with this aspect for the purposes of the present consideration.

[16] The inordinate delays in this matter prompted the respondent to attempt finalisation of the matter by making a settlement offer. He had paid maintenance up to the month before that. The applicant concedes that he paid timeously up to that point. It must also be borne in mind that he claims to have been unrepresented at the

stage that he made the payment. His attorney also repeatedly reminded the applicant's attorneys of this, but the latter persisted in forwarding correspondence to him, and demanding a response. In determining whether the respondent's non-compliance with the court order to pay maintenance was wilful and *mala fides*, I take cognisance of the conduct of the respondent. He made every effort to finalise this matter but appears not have had much cooperation from the applicant. The fact that he paid maintenance up to that stage and paid R600 000.00 to her to settle the matter, does not indicate to me that he wilfully and in bad faith intended to disobey the court order.

[17] The fact that the applicant failed to mention in her Founding papers that such an offer and payment were made, is telling. She alleged that she did not receive payment of the accrual amount, without explaining the relevant circumstances, for the benefit of the court and in order for the court to make a proper finding. In spite of the offer and the payment, she only thereafter (in September 2022) initiated communication with the respondent regarding his default, and threatening a contempt application. She alleges that he did not pay maintenance from July to October 2022, yet received payment of R600 000.00 in August 2022. It does not speak of a person who is desirous of resolving this matter, but rather of one attempting to extract as much financial benefit as she can from the respondent. It also appears to me that she exploited the respondent's financial position to her benefit. He stated in no uncertain terms that he could not afford the costs of an attorney in South Africa, hence he wished to settle the matter. I am constrained to find that the respondent's state of mind or his conduct are indicative of wilfulness. An incorrect interpretation or a possible lack of understanding of the correct legal position does not, in my view, translate to wilfulness or bad faith.

[18] I turn now to deal with the issues raised in respect of the compilation of the accrual calculation. The three calculations I mentioned earlier were all undertaken by Mr Weihmann of KWJ. Both parties appear to have made inputs as each calculation was presented to them, resulting in the final calculation drawn by Mr Weihmann on 15 December 2021. Both parties appear to have accepted Mr Weihmann's authority to do so, knowing that it was Joubert who was appointed as the Receiver by the court. Neither raised objections to Mr Weihmann's calculation dated 15 December.

This latter calculation followed the complaint lodged by the applicant against Mr Weihmann and was done before the decision of the LPC regarding Mr Weihmann's authority was made. It is noteworthy that the complaint was not against Mr Weihmann's lack of authority to undertake the calculation of the accrual but to his lack of response to the applicant's enquiries in respect of the calculation and his failure to expeditiously finalise the calculation. The complaint ends as follows: *"I am very concerned about the legal charges. Urgently need this case to be solved please!"*

[19] The applicant boldly asserts at para 15 of her Answering Affidavit to the counter application that she referred the matter to the LPC as a consequence of the fact that *"Mr JL Weihmann was not the appointed receiver and has no authority to make any determination regarding the accrual"*. This is not correct, as his lack of authority was not the basis of the complaint. The LPC appears to have made a ruling that it is Joubert who was required to finalise the accrual. A letter from Mr Weihmann attached to the papers, indicated that he would be handing the file in this matter to Joubert on 28 March 2022. No details are furnished with regard to how Mr Weihmann's authority came to be considered, but it would appear that the LPC, in the course of its investigation of the applicant's complaint of the delays on the part of Mr Weihmann, made this finding.

[20] The respondent alleges that he was not informed of the complaint to the LPC, lodged by the applicant. She does not dispute that she did not inform the respondent of the complaint to the LPC, nor is there anything in the papers to suggest that she informed him of the outcome thereof. Yet she suggests in her Answering Affidavit to the counter application, that *"notwithstanding the findings of the Legal Practice Council"*, the respondent persists in alleging that the accrual has been finalised. It is evident, in my view, that the respondent was not aware of the findings and decision of the LPC regarding Mr Weihmann's lack of authority, and in the absence of any response or objection from the applicant, assumed that the accrual calculation of 15 December 2021 was the final account. It appears that the LPC's decision was taken some time after February 2022, otherwise, it would make no sense for him to repeat the tender on 9 February 2022 to Mr Mr Weihmann, indicating that a tender of payment had already been made to the applicant but no response was received.

[21] The applicant's conduct in not responding to a tender made before February 2022 fortifies the respondent's assertion that she was non-cooperative and intended to delay the finalisation of the accrual as long as possible. There was no reason not to respond to the respondent's tender made prior to 9 February 2022. If she considered that the accrual calculation was not finalised in December 2021, one would have expected an immediate response to the earlier tender. I gain the distinct impression that this stance only arose after the LPC rendered its decision to her complaint, so that by the time the respondent made payment of the R600 000.00 in August 2022, she saw a way out of accepting the tender.

[22] It also fortifies my impression that she wished to gain maximum financial benefit from the accrual. An example of this is contained in two letters, both dated 2 September 2022, attached to her Answering Affidavit (RA 5 and RA 6), in which reference is made to two accrual calculations which were referred to as "A" and "B". I note that "A" and "B" were not attached. She indicated that she accepts "A" as final, while the respondent accepts "B" as final. RA5 was addressed to the respondent's attorney, while RA6 was addressed to Joubert. In the letter to Joubert, her attorney points out that there are two different accrual calculations, where "A" is accepted by the applicant, while "B" is accepted by the respondent. Joubert was then requested to approach the court for directions as it appears that there is a deadlock between the parties.

[23] In para 20 of her Answering Affidavit, the applicant, in referring to RA6, alleges that the respondent accepts the calculation done by Mr Weihmann, while she accepts the provisional calculation of the accrual, previously done by Joubert. This is once more an incorrect assertion, as RA6 makes no mention that the calculation she accepts is the provisional calculation done by Joubert. In fact, nowhere else in the papers is there an allegation that Joubert did a provisional calculation. The applicant failed to attach a copy of such a calculation to the papers. As I pointed out earlier, there were three calculations, all done by Mr Weihmann. In the first calculation, the amount of R 1237 059.95 was payable to the applicant, and the calculation which the respondent relies on is the third calculation in which the amount of R609 801.03 was payable to the applicant. The court can only assume that "A" referred to by the

applicant is in fact the accrual calculation sent on 2 December 2020. The correspondence annexed to the applicant's complaint to the LPC, and which was attached to her Answering/Replying Affidavit, reveals that the applicant's attorney sent a letter, dated 28 May 2021, to Mr Weihmann in which he made certain inputs regarding what appears to be the second calculation (which was sent to the parties on 25 May 2021), and requested amendments thereto. He did not in any way challenge Mr Weihmann's authority to do such calculations.

[24] The applicant previously opportunistically "accepted" a calculation reflecting an amount twice that of the third calculation relied upon by the respondent. Both calculations were undertaken by Mr Weihmann. This flies in the face of the stance adopted in September 2022 that Mr Weihmann lacks authority to have done the calculation, hence the accrual calculations done by him are not valid. In the interim, the applicant demands that maintenance payments should continue. It is worth noting that the applicant and respondent were represented by seasoned attorneys during the divorce proceedings as well as during the period that the accrual calculations were being attended to by Mr Weihmann. It begs the question why neither attorney raised the issue of the latter's lack of authority to undertake the accrual calculation in terms of the law.

[25] The parties conducted themselves for almost three years as though Mr Weihmann was authorised to act, and even indicated that they accept the calculations done by him, albeit two different calculations done at different times. The authority of a Receiver is a matter of law, and litigating parties usually rely on their legal representatives for guidance in this regard. The applicant's stance changed seemingly after the LPC alerted her to the fact that Mr Weihmann did not have authority to act, and directed Joubert to undertake the finalisation of the accrual. This lack of proper guidance and advice from the attorneys has caused much prejudice to the parties, particularly the respondent. For that matter, Mr Weihmann, himself a seasoned attorney, seemed oblivious to the legal requirements for him to act as Receiver in this matter

[26] It is so that Joubert was appointed by the court to attend to the finalisation of the accrual, and that, in the event that he failed or was unable to fulfil his mandate to

finalise the accrual, application would have to be made to court for him to be replaced by another Receiver. Even if the parties agree that a person, other than the court appointed Receiver, should do the calculation, the court order would have to be amended to include such other person as the Receiver. Therefore, the parties should have approached the court to substitute Mr Weihmann for Joubert. The final calculation of the accrual would also have to be approved by the court. Although both parties appeared to accept the calculations of Mr Weihmann, neither party followed the proper course of approaching this court for the appointment of Mr Weihmann as the Receiver in place of Joubert, rendering the accrual calculations by Mr Weihmann of no force or effect.

[27] The position of the parties is that the applicant is currently living rent-free in a house owned by a Trust. She is a businesswoman who earns an income from that business. The respondent appears to have stopped paying maintenance from July 2022. No evidence was placed before this court to indicate what the current financial position of the applicant is. The respondent paid an amount of R600 000.00 to the applicant in settlement of the accrual as determined in terms of the calculation done by Mr Weihmann in December 2021, and after much wrangling over that money, it eventually found its way into the Trust banking account of Peyper Attorneys, where Joubert is currently employed. The respondent persists in his argument that both parties accepted Mr Weihmann's authority to finalise the calculation of the accrual and as neither party objected thereto, the calculation of the accrual was finalised in December 2021. This argument is not good in law.

[28] The court, in adjudicating this matter, is obliged to apply the law in a way that will be fair to both parties and serve the interests of justice. I have set out the acrimonious nature of the relationship between the parties, which has clearly prevented them from finalising this matter. It is an untenable situation that almost four years after the final order of divorce was granted, the parties have not brought finality to this matter. In my view, the legal representatives of the parties must bear some responsibility for this, as they have not diligently advised the parties of the legal requirements relevant to this matter and failed to comply with such legal requirements. The conduct of the appointed Receiver, Joubert, is deeply worrisome. He has not discharged his duties as an officer of this court, and even after the file

was handed to him, in March 2022, following the decision of the LPC, he appears to have done nothing to finalise the calculation of the accrual, for the eleven months since the file was handed to him, prior to the hearing of this matter. There appear to be no outstanding documents or information required for him to have finalised the calculation. If there were, he had ample time to request same from the parties to enable him to comply with his duties in terms of the court order.

[29] He deposed to a confirmatory affidavit in support of the applicant's case, making the bald assertion that the accrual has not yet been finalised. He has made no attempt to explain why:

(a) he has not complied with the court order of 16 October 2019,

(b) Mr Weihmann undertook the calculation of the accrual,

(c) he had not approached the court for direction as to how he should take the matter forward, in view of the impasse between the parties and

(d) he appears not to have finalised the calculation of the accrual in the eleven months prior to the hearing of this matter.

[30] In my view, Joubert's conduct is unacceptable and warrants investigation. He has failed to conduct himself according to the standard required of an officer of this court and he has also failed to act in the interests of the parties in this matter, causing them undue prejudice. I intend to refer his conduct to the Legal Practice Council for further investigation. The applicant and respondent have also fallen short in their behaviour towards each other, causing the untenable situation they find themselves in. Not only have they delayed the finalisation of the matter, but have unnecessarily escalated the costs in this matter, by their obstinate and recalcitrant conduct. It does not lie in their mouths to complain about legal costs, nor to seek the payment of such costs from the opposing party.

[31] Consequently the following orders are made:

31.1 The application to declare the respondent to be in contempt of court is dismissed;

31.2 The counter application is dismissed, save for the following:

31.2.1 The maintenance obligations of the respondent arising in paragraphs 1.1 and 1.1.1 of the Deed of Settlement made an order of court on 16 October 2019, are suspended pending the outcome of proceedings referred to in 31.2.2;

31.2.2 The applicant is authorised to approach the Maintenance Court within 60 days from the date of this order in order for that court to determine whether the applicant is in need of maintenance and whether the respondent has any reciprocal obligations in relation thereto;

31.3 Each party is to pay his/her own costs;

31.4 The Receiver, Pieter Joubert, is directed to take all necessary steps to finalise the calculation of the accrual in this matter, within sixty (60) days from the date of this order;

31.5 The Registrar of this Division is directed to bring this judgment to the attention of the Legal Practice Council, Free State, for investigation into the conduct of Pieter Joubert in failing to attend to and finalise the calculation of the accrual since 16 October 2019, in compliance with the court order of that date.

S NAIDOO, J

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