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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 39676/16

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

DATE: 22 November 2023

In the matter between:

N[....] P[....]

APPLICANT

And

J[....] L[....] P[....]

RESPONDENT

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 22 November 2023.*

Summary: *Application-contempt of court - and variation of court order (Rule 42(1)-Uniform Rules of Court. Clause 3.1.5-divorce settlement. Not in the best interests of the child. Applications -contempt and variation dismissed. Costs on party and party scale.*

JUDGMENT

NTLAMA-MAKHANYA AJ

Introduction

1 This application is comprised of two parts. **PART A** deals with an application for contempt of court against the Respondent regarding his lack of compliance with the court order granted by this court on 14 October 2016 under case number 39676/2016. The order incorporated the terms of their divorce settlement agreement that they entered on 16 August 2016. **PART B** deals with an application for the variation of the said court order as it falls short of promoting the best interests of the minor children (J[....]s born 28 September 2010 and M[....] born 28 June 2012) born out of their marriage relationship.

[2] The applicant prays for:

[2.1] the Respondent to be found in contempt of the order granted by this court on 14 October 2016.

[2.2] the committal of the Respondent in prison for a period of 30 (thirty) days for his failure to comply with the court order.

[2.3] the above period in (ii) to be suspended for a year if the Respondent complies by paying all arrear maintenance and contributions towards the minor children's extra-mural activities.

[2.4] Applicant to re-approach this court for further relief if the Respondent fails to comply.

[2.5] Variation of the 14 October 2016 court order granted by this court.

[3] The application is opposed by the Respondent:

[3.1] denying the willful refusal to comply with his maintenance obligations of the minor children as per the court order.

[3.2] rebutting the applicant's contention that he refused to pay for the extra-mural activities of the children as he was faced with financial difficulties.

[3.3] expressing that clause 3.1.5 of the settlement agreement, which was incorporated into the court order, the applicant will be solely responsible if the written consent is not obtained for the children's extra-mural activities.

[3.4] acknowledging the arrear maintenance of R61 906.26 which was the consequent result of the decline in profit between the years 2017-2020 at the time he was the sole member of the RSA Sport, a close corporation that traded as a sports clothing manufacturer and supplier.

[3.5] however, despite the financial difficulties, he continued to make contributions to the tune of R51 514.34.

[3.6] he got employed in October 2020 and continued with maintenance obligations.

[3.7] he made written representations to the Senior Prosecutor on being charged with the failure to pay maintenance in terms of section 31(1) of the Maintenance Act 1998 and the Prosecutor declined to prosecute, instead the matter was converted into an enquiry in terms of section 41 of the Maintenance Act.

[3.8] at no stage, did he show any *mala fides* on his part as he continued to fulfill his obligations, despite the financial stress he found himself in at the time.

[4] The contentious issue that is borne by this application is the underlying cause regarding the protection of the 'best interest of the child' as envisaged in section 28(2) of the Constitution of the Republic of South Africa, 1996 (Constitution). In getting to the gist of this application, this court must deal first with the '**stone-walled**' obstacles which in this instance, is the determination of the merits of the contempt of court order allegations and the variation of the said order in giving meaning to the substance of the 'best interest of the child principle'. However, this court will be constrained in establishing the essence of this principle without the background facts that prompted this application.

Background facts

[5] The parties were married on 05 December 2009 and two minor children: J[....] and M[....] were born out of the relationship. The marriage did not survive its intended lifespan and the applicant instituted a divorce which was granted on 14 October 2016. The decree of divorce incorporated the deed of settlement (agreement) that they agreed upon on 16 August 2016. The terms of the agreement were for the Respondent:

[5.1] to pay maintenance for R3500 per month towards each of the minor children as determined by the deed of settlement.

[5.2] the above amount to escalate yearly at a rate equal to the consumer price index.

[5.3] for the minor children's school fees, aftercare fees and any reasonable school related expenses occasioned by their attendance of a government school, upon which both parties have agreed.

[5.4] pay all minor children's reasonable medical expenses not covered by medical aid.

[5.5] applicant to obtain the respondent's written consent should a need arise for any additional scholastic expenses before they are incurred.

[5.6] ***The minor's extra mural activities are limited to three for each of them and for the applicant to obtain the respondent's consent for the participation of the minor children in such extra-mural activities. Should the applicant fail to obtain the respondent's consent, the applicant shall be solely responsible for any costs associated with such activities, (my emphasis and clause 3.1.5 of the agreement and subject of contention in this application).***

[6] The applicant is staying with minor children in Pretoria and the Respondent has since moved to Polokwane after getting employment at Marula Platinum. She is overburdened with the responsibilities relating to the upbringing of the children and as a sole decision-maker on the activities of the children. The children participate in water polo, cricket academy and maths classes as extra mural activities and are obsessed in

participating in any other type of sport that cost money. The children never participated in more than three activities per term as anticipated in the Court order. The applicant adduced evidence of the chronology of messages sent to the Respondent requesting his consent for the children's participation in extra mural activities and has blatantly refused to cooperate and give the needed consent for the development of the children. Particularly, undertaking his share of co-responsibility in the children's upbringing.

[7] At the risk of repetition, the Respondent refutes the allegations placed before this court by the applicant. As captured in paragraph 3 above, the Respondent denies the allegations that he refuses to adhere to the court order and provide the necessary support and consent to the children's extra-mural activities. Of main concern to him is not to overburden the children with such activities. Also, he has since demonstrated his commitment to pay the arrear amount of R61 906.26 and continued to make contributions to the tune of R51 514.34 notwithstanding his financial challenges. However, since regaining employment, he is still committed to continue with his obligations.

Analysis

PART A: Contempt of court application

[8] This court observed as is evident from the papers and during argument that the parties are in a hostile relationship as also drawn from the history of the litigation of this matter. This case took 7 years following the court order and in between the parties frequented the court in dealing with factors regarding the order before being brought by the applicant seeking an order for contempt against the Respondent. The applicant alleged that the Respondent has deliberately disregarded compliance with the court order granted by this court on 14 October 2016. It was her assertion that the Respondent is intentionally refusing to give consent for the children's extra-mural activities and other additional medical costs in defiance of the court order.

[9] However, the crux of this application touches not only on the alleged failure to comply with the order but on the substance of the role of this court in the exercise of its discretion for granting of just and equitable remedies as envisaged in section 172(1)(b) of the Constitution. In this instance, contempt of a court order is the intentional and unlawful disobeying of a court order which strikes deeply on the integrity not just of this court but of the judiciary in its entirety. As expressed by Morgan AJ in **E.N.M v L.T.M [2023] ZANWHC 34** that in ‘a case concerning contempt of court proceedings and a blatant disregard of a court order is a challenge to the foundational values of the rule of law (section 1) and supremacy (section 2) of the Constitution amongst others’, (**para 20**). It is no doubt that the intersection of the rule of law and supremacy of the Constitution are the ‘engine rooms’ for the functioning of the courts and its orders fall within this framework and no one is not to adhere to the granted orders. It is on this basis that Morgan AJ quoted with approval Kriegler J in **S v Mamabolo 2001 (5) BCLR 449 (CC) para 16** and held that ‘the judiciary is a crucial constitutional strut, which supports and reinforces the rule of law. Courts function to achieve justice through their court orders. They do not command the army, the police, and the public purse. They must rely on moral authority and trust, founded on the legitimacy of their court orders’ (**para 25**). Therefore, the applicant must prove the essential elements of contempt and demonstrate that the order was granted; served and the respondent failed to adhere to the order, (Morgan AJ **para 23**). These elements were also not disputed by the Respondent as they constitute the importance of adhering to the orders. Compliance with court orders is the bedrock of the new dispensation in ensuring the upholding of the integrity of the judiciary.

[10] I am also in agreement with Mantame J in **FS v ZB [2023] ZAWCHC 152** on his caution of the courts in that they need to ‘be careful and prudent not to be strung along by litigants who are unwilling to reach finality to their actions as is the case with counsels to guard against becoming involved in party’s marital battles thus neglecting their role as advocates, attorneys and or legal practitioners and for the courts not to be abused in ensuring the fair the dispensation of justice’ (**para 20**). As stated, I am persuaded by the caution in that Mokgoro J in **Bannatyne v Bannatyne 2003 (2) BCLR**

111 (CC) concretised it and held that '*systemic failures to enforce maintenance orders have a negative impact on the rule of law of law ... [and] if court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law, (para 27)*'. The essence of **FS and Bannatyne** judgments is for the courts not to be emotionally and personally dragged into the dispute but to remain independent as envisaged in section 165 of the Constitution in considering the facts and applicable principles in the matter at hand. This brings me to the gist of the legal argument and the question raised in this case. Has the Respondent deliberately undermined the order and authority of this Court? Has the respondent willfully withheld his consent for the payment of the children's extra mural activities and related additional costs?

[11] In this matter, the applicant placed great emphasis on the willful disobedience of the Respondent for not complying with the court order. The applicant, in papers and argument, stated that the Respondent frustrated every attempt to assist her and in turn, in ensuring compliance with the court order. The applicant's argument, supplemented by e-mail correspondences between them was her emphasis on their disagreement regarding his consent on the payment of the additional costs for the extra-mural activities of the children and not the main maintenance payment. The applicant, in her Supplementary Affidavit shows the Respondent's disingenuous attitude towards compliance with the court order. In this affidavit, the other child injured his foot, and the applicant was left to pay the Doctor's bill whilst the Respondent flatly refused to pay and not considering the expense as necessary. The Respondent's attitude towards the payment of the Doctor's costs as unnecessary indicates his recalcitrant conduct not to pay for additional expenses incurred by the applicant. Her resort to this court as the last attempt to enforce compliance is to show the Respondent's *mala fide* conduct by his refusal of complying with the order, and for him to be directed to comply with the order.

[12] On the other hand, the Respondent, in his answering affidavit relies heavily on clause 3.1.5 of the divorce settlement that was incorporated into the decree of divorce

as an order of court. The said clause states that the '*applicant must consult him for any additional expenses regarding the minor children failing which, she will be solely responsible for them*'. The Respondent, despite his denial that the orthodontic procedure constituted a 'necessary medical procedure', he made an offer to contribute 50% towards such an expense although it was never discussed with him or informed about it and eventually, as applicant alleged, he did not honour this offer. The Respondent further highlights that at the time the decree of divorce was granted, he was in a good financial position and was not only willing but able to pay the maintenance as ordered by the court. It was three years (2019) after the order was granted that he started suffering financial loss. Following the closure of RSA Sports due to the impact of the COVID-19 pandemic, he only secured a temporary contract at Marula Platinum from October 2020 until 30 September 2021. Between November 2019 until December 2020, he also managed to pay R51 514.34 towards the maintenance of the minor children. Further, he never denied his owing of the arrear maintenance which he made arrangements for its payment to the extent of applying for a personal loan despite his financial difficulties at the time he was not employed.

[13]The Respondent further placed before this court that on two occasions (2017 and 2019), he applied for the variation of the court order with Pretoria Magistrates Court without success and criminal charges were brought against him in 2019 by the applicant, the Senior Prosecutor considered the matter not as a criminal issue and referred it as an enquiry to be considered by the Maintenance Court, shows the bias and prejudice he has suffered under the hands of the applicant.

[14]I must state that the centrality of the matter in this case is not the contempt of the order of this court itself but the indirect protection of the rights of minor children through the yardstick of the contempt of a court order. The significance of the purpose of this case is overshadowed by the fundamental differences regarding the parties relationship and preferences on what is best for the minor children. This is evident from the applicant's replying affidavit in that she states that the '*respondent is remunerated at R100 000 per month and does not have a spouse or other children to maintain and his*

purchasing of a new Ford Everest is indicative of fulfilling his own interests and not the children'. This is not the substance of the legal framework in support of this court on its role in giving meaning to the advancement of the 'best interest of the child principle' alongside the endorsement of parental responsibility in the enforcement of this principle. This is the 'peeping eye' on what the applicant deems not suitable for the Respondent and not the essence of the right regarding the interests of the minor children.

[15] This court exercises caution as forewarned in regulating 'unholy' personal relationship between parents. Its focus is on the paramount importance of the best interests of the child as envisaged in section 28(2) of the Constitution. As argued by the applicant's counsel, these interests are reinforced by the adoption of the Children's Act 38 of 2005 which captures the high standards of responsibility for the translation into reality of the 'best interest principle' as envisaged in section 7(1) of the said Act. As is the case with section 9 that is linked to section 7(1) envisages that the application of all matters concerning the care, protection and well-being of a child, the standard of the child's best interests is of paramount importance and parties need not renege from this fundamental principle. The implications of the principle developed by Yacoob J in the ***Grootboom v President of the Republic of South Africa 2000 (11) BCLR 1169 (CC)*** judgment is of direct relevance in this case. In that case, the Court held that the '*primary caregivers of the children are the parents, and the state becomes a secondary caregiver as envisaged in section 28(1)*', (**paras 77-78**). In the context of this case there is a link between the provisions of sub-sections 1 and 2 in section 28 in that the fulfilment of parental responsibility as primary caregivers is interdependent with the achievement of the best the interest of the child principle.

[16] The best interest of the child principle captures the content of parental responsibility which entails equal contributions towards the well-being of the child without fail. The relationship that exists between the best interests and parental responsibility is central to the development of the child. The United Nations Convention on the Rights of the Child which was adopted on 20 November 1989 concretises the importance of the development of the child. The gist of this Convention endorses the '*family environment*

as a site for the natural growth and well-being of its members, particularly children that should be afforded the necessary protection and assistance so that they fully assume its responsibilities within the community’, (preamble). This is an endorsement of the family as a global player in the protection of the rights of children. In the present case, global status seeks to domesticate the universal principles of parental responsibility at local level which in turn gives substance to the significance of the best interest of the child principle.

[17]I must revert and draw attention to the impact of the non-compliance with the court order on the rights of the children. I need not repeat that a court order is a binding outcome following the holistic determination of the facts presented before the court regarding the dispute. Court orders do not constitute the ‘love and hate’ relationship between the parties but give substance to the authority of the courts in protecting children’s rights that would in turn promote public confidence without which confidence on the courts would wane down. I have noted the foundations of the integrity of the judiciary above and without the supplement of public confidence, an effective judicial system will always be viewed through the lens of a ‘compromised judiciary’ that will ultimately sink the values of democracy and the rule of law into a ‘hollow ring’. The parents as primary caregivers should strive towards the advancement of the protection of the best interests of their children. It is not their personalities that should overshadow the constitutional protection of children’s rights.

[18]This court acknowledges the burden of single parenting on women as presented in this case whilst the father of the children appears to be disregarding his co-parenting role. Goldstone J in ***President of the Republic of South Africa v Hugo 1997 (6) BCLR 708 (CC)*** situated the challenges faced by women and touched on complexities regarding single child-parenting that has negative consequences, particularly on women’s lives. As Goldstone J stated:

although no statistical or survey evidence was produced to establish that mothers are primarily responsible for the care of small children in our society, I see no

*reason to doubt the assertion that mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers. There will, doubtless, be instances where fathers bear more responsibilities than mothers for the care of children, ... however, although it may generally be true that mothers bear an unequal share of the burden of child rearing in our society as compared to the burden borne by fathers, ... it is a burdensome one ... requiring time, money and emotional energy [and] for women without skills or financial resources, its challenges are particularly acute. **The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship.** The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment, (my emphasis, **para 37**).*

[19] Given the acute challenges faced by women, this court, as the upper guardian of minor children, finds it distasteful the deliberate non-compliance with its own orders, more especially, on matters that involve children. Compliance with its orders is of direct importance to the upholding of the fundamental rights of minor children. The children's rights cannot be caught in a 'crossfire' between parents and may have negative consequences not only for the children but the parents themselves. As is the case with the integrity of the court that cannot be left at the mercy of people defying its orders whilst the core content of its role in upholding the rule of law is left questionable.

[20] However, this court is also not a 'slaughterhouse' that would view the Respondent as a recalcitrant parent that is unwilling to comply with the court order. This court acknowledges that compelling the Respondent to comply with the order might not have the desired results, particularly with the relationship with the children as it has the potential to create more hostility as evidenced by this case. A forceful order, and a threat of imprisonment would be an ineffective exercise and cause more damage for the achievement of the goals that the applicant also wishes to achieve. The applicant does not necessarily wish to see the Respondent being imprisoned if the court is amenable to her prayer and grants the contempt of court order as she prays for a 1-year suspension

if he complies. Although the applicant dismisses the Respondent's non-consideration of the orthodontic expense as a necessary medical expense, she acknowledged the offer for the payment of 50% towards such an expense although not paid by the Respondent who alleged that he was not consulted. Therefore, the sending of the Responding to jail will cut ties and eliminate any future reforms for the relationship with the children. It is evident that the applicant still values the relationship that the Respondent should have with the children. The engagement in this protracted litigation intensifies and strains the relations with children as the applicant during argument, indicated that the children have since withdrawn from other sports (rugby) which is a direct consequence of the way in which the parties have conducted themselves in handling this matter. Enforcing non-compliance will not vindicate the integrity and authority of this court whilst on the other hand it will cause more damage for the unintended consequence.

[21] This court finds no willful disregard in the Respondent's non-compliance with its order. The applicant placed before this court as appears in the Heads of Arguments that the Respondent could only be absolved of liability if he proves a misunderstanding and inability to comply with the court order, (**para 28**). I must state that the Respondent's emphasis on compliance with clause 3.1.5 of the order is not a confusion or mistake on his part regarding the genuine belief he has on the importance of complying with the said clause which was not a 'mere gentlemen's agreement' but an order of court. This is my considered view that the Respondent genuinely believed that his reliance on clause 3.1.5 did not constitute contempt and of course the avoidance of his primary responsibility. As captured by the Supreme Court of Appeal in **Fakie v CCII Systems Pty Ltd 2006 (4) SA 326 (SCA)**, Cameron JA contextualised the standard of proof in establishing the elements of contempt and held:

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 infraction. Even a refusal to comply that is objectively unreasonable may be bona fide ... that the refusal to obey should be both willful and mala fide, and that unreasonable non-compliance, provided it is

bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute, or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent, (paras 9-10, all footnotes omitted).

[22] Drawing from Cameron J in **Fakie**, this court will not walk on a 'tight thread' to establish willful disobedience when traces of genuine belief which was grounded on clause 3.1.5 is found credible. This brings me to PART B of this application.

PART B: Variation of the court order

[23] Another segment of this application that was tabled before this court was the variation of the 14 October 2016 court order granted by Maluleke J under the same case number. The applicant prays for the variation of this order in that:

[23.1] the applicant need not be obliged to get the Respondent's consent for the participation of minor children in extra-mural activities.

[23.2] the Respondent to be liable for the payment of the three extra-mural activities per child per term without the applicant having to obtain the Respondent's consent for the same.

[23.3] the Respondent to pay for extra-mural activities of the minor children as they are involved in cricket academy, water polo and extra maths classes.

[23.4] the court order does not serve the best interests of minor children.

[24] The contentious issue in this application is clause 3.1.5 of the settlement agreement which was incorporated into the court order as noted in paragraph 3 above and it is worth that I repeat it in full as it reads as follows:

The Respondent shall be liable for the minor children's school fees, after school fees and any school reasonable related expenses occasioned by attendance of a government school upon which the parties have agreed. Should any additional scholastic expenses need to be incurred, the applicant will obtain the Respondent's written consent before such expenses are incurred. The minor's extra-mural activities shall be limited to no more than three activities per child and the applicant shall obtain the Respondent's written consent for the minor child to participate in such extra mural activities. Should the applicant fail to obtain written consent for the children's participation in such extra mural activities the applicant shall be solely responsible for any costs occasioned by such participation.

[25] Since this clause was incorporated into the court order, gave meaning to the true intention of the parties in the settlement of their divorce. The standing principle is that the granted court order remains final except on rare occasions that it may be altered or corrected due to certain circumstances, (***Colyn v Tiger Food Industries Ltd [2003] ZASCA 36, para 4***). As is the case in this application, I am not going to shy away from this principle on the finality of the judgment unless taken on review or appeal. The courts are also cautioned to sparingly use their discretion to revise, alter or supplement their judgments in that the principle of finality in litigation should generally be maintained rather than eroded. On the other hand, as put by the Namibian High Court in ***SK v SK [2017] NAHCMD 344*** which held that:

an agreement, made an order of court, which ordinarily does not create any rights but rather determines the amount of liability of the parents, is no bar to a subsequent variation, provided there is good cause. The contemplations of the parties to the agreement, as embodied therein, should not be ignored, but due weight must be given to what the interests of the child demands, (para 36).

[26] The comparative lessons drawn from the above judgment in Namibia, touch on the centrality of the question raised in this matter whether the finality of the order take precedent over the best interests of the minor children as argued by the applicant?

[27] The foundation of this application is grounded in terms of Rule 42(1) of the Uniform Rules of the Court that determines the circumstances upon which the order may be varied. This Rule provides that an order may be varied in circumstances where:

- (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
- (c) an order or judgment granted as the result of a mistake common to the parties.*

[28] It is evident that courts have a restricted discretion in varying their orders. On closer analysis of the papers and the argument made, the applicant sought the variation of the court order on the ground that there were compelling reasons for such an undertaking because the order compromised the best interests of the minor children as envisaged in section 28(2) of the Constitution. She averred that the dependence on getting the Respondent's consent for the payment of the children's extra-mural activities did not accord with the promotion of the rights of the children. Having considered this argument, this court did not take lightly the constitutional imperatives of the 'best interests of the child' principle and carefully examined the prejudice already suffered and its implications for the future should it interfere and vary the court order.

[29] In this regard, this order is traceable from two months of the agreement before it was made an order of court. It is now 7 years after it was made an order of court that the applicant is seeking relief from this court due to what appears to be the Respondent's lack of commitment to comply with it.

[30] I must state that, the parties, on entering into the agreement in anticipation of the finality of their divorce, this court was not presented with any evidence that could have shown that either party was pressured or misled into signing it. Both parties had a meeting of the minds towards what would best work out for their children after the

divorce. This agreement, despite the challenges that led to the divorce, was not signed as a 'smoke pipe peace' for a clean break from each other. The gist of the agreement was based on an 'informed consent' that is based on 'clear and unambiguous terms that enabled the parties with a plan to execute it' when it was incorporated into the court order, (**AVW v SVW [2022] ZAWCHC 74 para 8**). As endorsed by De Wet AJ in **AVW** judgment, the agreement was, as is the case in this matter, *'a package deal' for both parties and no reasons provided that could have doubted its legitimacy and the court could have provided a further opportunity to be addressed regarding the concern it might have had before it could have granted the order ... [and the] agreement was not capable of meaningful separation that could have destroyed the consensual bases on which the agreement as a whole was founded [and the court] cannot and will not make an order that amounts to it unilaterally altering the terms of the agreement as it may not draft a replacement agreement for the parties'*, (**para 22**). Therefore, it has not been shown that there was an error of judgment in the drafting of the agreement that needs a variation by this court. In deciding matters that involve minor children, as fore warned, the courts walk on a 'tight rope' to determine the reasonableness of the agreement that is prayed for its incorporation into its order.

[31] There is also no evidence to suggest that the Judge committed a mistake in granting the order that suited the parties. The granting of the order is indicative of the purpose of the Judge in giving substance to the foundational purpose of the agreement in the application of law without any impartiality. Varying the order that gave true meaning to the intention of the parties will not give substance to the overall scheme of judicial adjudication.

[32] Let me reiterate the question raised above whether the centrality of the non-variation of the court order does not compromise and or take precedent over the best interests of the child principle? The court, as the custodian of the rights of minor children, is placed in a unique position to ensure adherence not only to its orders but to the prescripts of the supremacy of the Constitution as envisaged in section 2. It is public knowledge that generally, children are the most vulnerable members of society, and the

court need not only vindicate its integrity but strive towards the fulfilment of human rights of children. This case is a reminder of the shaming of the parents that appear to be absent from their children's upbringing, which in this instance, the insinuation that the Respondent's quest for the need to comply with the 3.1.5 clause of the agreement is founded on 'absenteeism' from child-rearing. This clause is the 'package deal' of the court order and cannot be challenged independently from the main order of the court. As stated above, the challenge and varying of the order would mean the review of the order itself and not its sub-clauses.

[33] The direct concern in this matter is the Respondent's co-parental role in carrying the additional costs regarding the children's extra-mural activities and not the maintenance amount itself of R3500 which was granted by the court. Such additional costs are linked to the requirements of section 18(2) of the Children's Act for the Respondent not only to undertake an 'arms-length' approach towards his duty of care, contact and contribution towards the maintenance of children. Bloem J in **MB v NB [2018] ZAECHC 74** gave substance to this role and held that '*parents should not mechanically sacrifice the best interest of the child on the altar of their [personal differences]*', **para 8**. In my view, the Respondent's persistence for co-compliance with the clause 3.1.5 order is not indicative of his recalcitrant attitude towards fulfilling not just his common law obligations but his constitutional duties. He did acknowledge that he has been approached by the applicant about the additional costs including the medical costs of the younger minor son, and showed his commitment to fulfil his duties but such must also be in line with the requisites of the court order as stipulated in clause 3.1.5. It is not the attitude of the Respondent not to pay the needed additional costs but as read in the papers and during argument, a plea for a constructive meeting of the minds on matters concerning the payment of additional expenses. This cannot be viewed as a refusal to pay for the children's additional costs and in turn flout the constitutional imperatives of the Republic as envisaged in section 28(2) of the Constitution.

[34] The court also considered the fact that the Respondent has since left the Gauteng Province (Pretoria) for Limpopo and the applicant is now overburdened by being the

sole parent in decision-making regarding the needs and the support to be provided to their minor children. In *Hugo* above, the Constitutional Court painted a sore picture of the impact of sole rearing of children on women. In this case, the disagreement on the way in which additional costs are to be fulfilled are not the sufficient reasons for the varying of the order and link it to section 28(2) obligations. The applicant's own admission indicates that activities such as rugby are not yearly activities but quarterly sports. The applicant's counsel made an emphasis on the lack of the Respondent's commitment to pay even for the extra maths classes. The Respondent has also shown commitment to the educational needs as he wishes that they not be overloaded and focus on their schoolwork. The disagreement on decision-making regarding which priority activities should the children do does not amount to the compromise of the section 28(2) obligations. It is my considered view that this application has not shown a real change in the circumstances of the applicant where the court order could be varied by this court. The constitutional rights of the children and not the decision-making process regarding the execution of 3.1.5 clause were explicitly considered by the court. There is also no reason to believe that as prescribed by section 6(1)(a) of the Divorce Act 70 of 1979 that the court in granting order was not satisfied that the welfare of minor children would not be fulfilled or be affected under the circumstances by the parent's divorce. Therefore, I find no substance in the applicant's contention that the Respondent is failing to carry out his fair share of the deal. I have forewarned myself from lessons learnt from other cases not to be involved in the personalities of the parties in this dispute. This case is a classic example of the clash of personalities and not the in-depth consideration of the rights approach of the minor children themselves. The latter rights were used as an indirect catalyst to deal with personal differences.

[35] I repeat, the maintenance and the payment of additional expenses was dealt with in terms of the agreement where the parties without undue influence agreed on the way in which they would honour their obligations in respect of their minor children. In this case, the parties cannot infuse their 'personal warfare' into the 'lawfare' against each other, particularly the applicant, without satisfying the grounds as provided for by Rule 42. This court has not been put into confidence that there was a common mistake between; or

ambiguity with the settlement itself and or the Judge was misdirected in granting the order as envisaged in Rule 42. The incorporation of clause 3.1.5 into the order of court was made with an understanding that it will not change. Therefore, the variation of the 14 October 2016 order cannot be undertaken solely through the backdoor of the courtroom without the mutual consent as they showed an understanding when they initially agreed upon it. The 'disagreement to agree' approach on the way in which the clause may be executed is not rationally connected to the grounds in Rule 42.

[36]As stated, having found no reasonable grounds for granting the contempt of order application, I am not convinced that the applicant has made a substantive case for the variation of the court order including an argument for the best interest of the child principle. I have also stated throughout this judgment, with lessons learnt that courts should be cautious and not put the 'cart before the horse' and make a non-existing case for the litigants. It is on this basis that this court is threading carefully and not to interfere with the 14 October 2016 order to avoid any after-effects that would negate its integrity by making new contracts for the parties instead of holding them to their original intentions into which they independently and deliberated upon. I find the Respondent not a defiant parent that is not willing to take his co-parental responsibility with the applicant. The quest for minimal participation in decision-making in the upbringing of their children is distinct from the blatant refusal as argued by the applicant's counsel. This court does acknowledge that children's right to development is key at this stage of their growth considering their ages that require close involvement by both parents. That should not be frustrated by personal differences to an extent of involving the courts where the matter could have been harmoniously solved.

[37]In the result, this court makes the following order:

[37.1] The application for contempt court is dismissed.

[37.2] The application for the variation of the 14 October 2016 court order is dismissed.

[37.3] The costs of this application are ordered on a party and party scale.

**N NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date Heard: 30 October 2023

Date Delivered: 22 November 2023

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