

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

**CASE NO: A5050/2020
COURT A QUO CASE NO: 36343/2014
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
16 August 2022**

In the matter between:

N [....] 1 T [....]

Appellant

and

N [....] 2 S [....] 1 D [....]

Respondent

JUDGMENT

Mdalana-Mayisela J (Wepener J and Mahomed AJ concurring)

1. This appeal came before us as a result of leave being granted by the Supreme Court of Appeal to this court. The appellant who was cited as respondent in the court a quo, is appealing against the whole judgment and order made by Modiba J, delivered on 25 March 2020, sitting as court of first instance in Gauteng Local Division, Johannesburg (“contempt of court order”).

2. First, I deal with the condonation application filed by the appellant. The appellant has filed a substantive application for condonation for the late filing of his

application for a date for the hearing of this appeal in terms of Rule 49(6)(b) and 49(7)(a)(ii) of the Uniform Rules of Court, and reinstatement of the appeal which, in terms of Rule 49(6)(a), had lapsed. Further, he sought a condonation for the late filing of copies of the record of the proceedings.

3. This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and prospects of success (*Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) at 477A-B*).

4. We considered the explanation given by the appellant for the delay, the reasons given by the respondent in opposing this application, the nature and importance of the relief sought, the respondent's interest in the finality of her judgment, the convenience of the court, the avoidance of unnecessary delay in the administration of justice, and our view on the merits of the appeal. We also considered any prejudice to be suffered by the respondent if the condonation was granted, and found none. We concluded that it would be in the interests of justice to grant the condonation, and it was granted.

5. The respondent in this appeal, is the ex-wife of appellant. The parties were married to each other in community of property on 4 July 2003. Two minor children were born from their matrimonial union, a boy born on 6 April 2012 and a girl born on 9 June 2014. Their marriage was dissolved by a decree of divorce incorporating the settlement agreement, granted by this court on 29 June 2015 at the respondent's instance ("court order").

6. On or about 12 September 2017, the respondent ("applicant in court a quo") launched an application before this court, for orders declaring the appellant to be in contempt of court order, and compelling him to make good his contemptuous

conduct, failing which he ought to be committed to prison for 90 days or such other period the court might deem appropriate. The application was opposed by the appellant who also mounted a counter application, seeking an order staying the contempt application, alternatively, suspending the settlement agreement, further alternatively, portions of it, pending the determination of an action he instituted to have the settlement agreement declared void *ab initio*. The respondent opposed the counter application.

7. On 25 March 2020, Modiba J, granted the application in favour of the respondent in terms whereof she ordered that:

“1. The respondent is declared to be in contempt of the court order handed down by the above Honourable Court on 29 June 2015, under case number 2014/36343 (“the order”), a copy of which is annexed “DN1”;

2. The Respondent is ordered, within 21 days for date of this order, to make payment to Applicant of the following amounts:

2.1 Outstanding spousal maintenance: R267 000.00;

2.2 Immovable property expenses: R313 717.71, comprising:

2.2.1 Transfer costs: R44 041.35

2.2.2 Sharonlea – rates and municipal charges: R104 207.33

2.2.3 York Place – rates and municipal charges: R15 133.35

2.2.4 Enfield – rates and municipal charges: R7 223.56

2.2.5 York place: levies: R69 491.20

2.2.6 Enfield levies: R34 108.07

2.2.7 Immovable property maintenance costs: R39 512.85

2.3 Children’s expenses: R101 570.00, comprising:

2.3.1 Maintenance: R15 000.00

2.3.2 School fees:

2.3.2.1 M [...] : R38 170.00

2.3.2.2 S [...] 2: R34 380.00

2.3.3 Extra murals: R14 020.00

2.4 Payment of the proceeds of the Alexander Forbes pension policy in the amount of R553 095.32 into an interest bearing bank account/s for the benefit for the children in equal shares;

2.5 Respondent shall replace Applicant's Mercedes Benz C200 BE Avantgarde [...] motor vehicle with an upgraded motor vehicle to be registered in the name of the Applicant. The Respondent is ordered to pay the purchase price and all maintenance costs in respect of the said replacement motor vehicle.

3. Failing compliance with paragraph 2 above, the Respondent shall be committed for imprisonment for a period of 90 days.

8. The Respondent is ordered to pay the Applicant's costs of this application on the scale of attorney and client."

9. The court a quo did not make a formal order regarding the counter application of the appellant, but in the body of the judgment the counter application was found to be abortive.

10. I deal briefly with the background facts. Having regard to the founding affidavit and the answering affidavit, taking into account also the replying affidavit, the common cause facts are as follows. On 29 June 2015 this court granted a decree of divorce incorporating a settlement agreement concluded by the appellant and respondent. The appellant was in court on that day and did not oppose the action. In terms of the settlement agreement, the appellant agreed to pay to the applicant, spousal maintenance in the sum of R20 000.00 per month until her death, or re-marriage, whichever occurs first. The respondent would retain ownership of a C200 Mercedes Benz ("Mercedes") motor vehicle. The appellant would remain responsible for all the maintenance and finance costs of the Mercedes. The Mercedes could only be sold with the respondent's consent, whereupon the appellant would replace it with an upgraded motor vehicle. All the three matrimonial estate properties would be registered in the respondent's name. The respondent would pay the transfer costs and would continue paying rates and taxes, electricity and maintenance costs for these properties. The appellant would deposit the rental received from the two rental properties in an interest bearing account for the benefit of the minor children. In

addition to being responsible for the minor children's education expenses including school fees, school tours, levies, extra lessons, school uniform, textbooks, stationary and extra mural costs, the appellant would maintain them on his medical aid, pay medical expenses not covered by medical aid, their holiday costs and as well as pay to the respondent an amount of R2 500.00 per month towards the maintenance of each child. The parties would donate their respective benefits from the respondent's pension fund to the minor children, to be kept in an interest bearing account for their benefit.

11. It is common cause that the appellant has breached the terms of the settlement agreement mentioned in paragraph 7 above. In addition, he has exited his pension fund and utilized the proceeds in the sum of R553 095.32 to purchase a vacant land solely registered in his name.

12. The grounds of appeal in the appellant's notice of appeal are as follows. First, that the court a quo erred in not considering the points *in limine* raised by the appellant in his answering affidavit and not finding that any one or more of them were valid. Second, in determining whether the appellant was in wilful default of the court order, the court a quo erred in not applying the legal principles and test for doing so set out in *Fakie N.O v Systems (PTY) Ltd 2006 (4) SA 326*. Third, the court a quo erred in finding that he was in wilful default and had acted mala fide. Fourth, the court a quo erred in finding that the respondent made out a case for condonation for the late filing of the replying affidavit.

13. I now deal with the merits of the grounds of appeal. For the appellant to be found to be in contempt of court order, the respondent must prove the requisites of contempt (the order; service or notice; non-compliance, and wilfulness and mala fides) beyond reasonable doubt. But once the respondent has proved the order, service or notice, and no-compliance, the appellant bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt (*Fakie NO v CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006)*).

14. In this matter the material facts are common cause. The court order was granted against the appellant in his presence on 29 June 2015; the appellant was served with the court order or had knowledge of it; and the appellant failed to comply with the court order.

15. The question therefore is whether the respondent proved beyond reasonable doubt that the appellant's failure to comply with the court order was wilful and mala fide. The respondent has established the requisite elements of the contempt of the court order, and therefore wilfulness and mala fides are presumed, and the appellant bears an evidentiary burden to establish a reasonable doubt.

16. The appellant has not been complying with the court order from the day it was granted (29 June 2015). First, he submits that he could not comply with the court due to his inability to pay. In support of this allegation, he attached three unsubstantiated self-created schedules to his answering affidavit. He failed to attach the salary slips and bank statements to his answering affidavit. The respondent obtained copies of his bank statements and salary slips invoking Rule 35 (12) procedure, which disproved his allegation of inability to pay. The appellant alleges inability to pay, whereas he exited his pension fund and bought a vacant land for R553 095.32 with the proceeds, whilst having knowledge of the existence of the court order. Furthermore, his financial obligations towards the respondent and minor children are in terms of the settlement agreement that he signed and he did not challenge it in court when the court order was made.

17. Second, he submits that it was his belief that, as he will be successful in an action brought under case number 2016/9045, in which he seeks to set aside the settlement agreement, alternatively portions thereof, he was not obliged to comply with the divorce court order. His belief had no legal basis. A court order, whether correctly or incorrectly granted, has to be obeyed unless it is properly set aside (*Culverwell v Beira 1992 (4) SA (W) at 494 A-C*).

18. I find that appellant failed to discharge the evidentiary burden to establish a reasonable doubt that his non-compliance with the court order was wilful and mala

fide. The court a quo correctly applied the principle in *Fakie NO* case, and found him to be in contempt of the court order.

19. Courts have the power to ensure that their decisions or orders are complied with by all, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. Contempt of court proceedings exist to protect the rule of law and authority of the Judiciary. The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution demands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions, risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced (*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* (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021).

20. The fourth ground of appeal is that the court erred in granting condonation for the late filing of a replying affidavit incorporating respondent's answering affidavit to the appellant's counter application. This ground alone, does not warrant the interference by this court. The condonation application is an interlocutory application. Rule 27 of the Uniform Rules of Court gives a discretion to the court to condone non-compliance with the rules where good cause has been shown and the other party would not suffer prejudice. It is settled law that, in considering an application for condonation, the court has a discretion, to be exercised judicially upon a consideration of all facts; and that in essence it is a question of fairness to both parties (*United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E-G). The appellant elected not to file papers opposing the condonation application. His counsel opposed the condonation application from the bar without any facts supporting it. The court a quo found that the condonation application made in the

replying affidavit sufficed, good cause has been shown and no prejudice would be suffered by the appellant if the non-compliance with the rules would be condoned. It was in the interests of justice that the replying affidavit be taken into account and that the matter be finalised and unnecessary additional costs be avoided. The court a quo allowed the late filing of the replying affidavit, in order to decide the merits of the dispute between the parties unfettered by technicalities (*Pangbourne Properties Ltd v Pulse Moving CC and Another 2013 (3) SA 140 (GSJ)*). The court a quo exercised its discretion judicially in favour of the respondent. I find no reason to interfere with the discretion of the court a quo.

21. The appellant states that the court a quo erred in not considering his objection to the late filing of the replying affidavit and granting him postponement to file a further affidavit. He states that he had requested a postponement in his answering affidavit and heads of argument. First, heads of argument are not a pleading. After receiving a replying affidavit, he should have sought leave of the court to file a further affidavit opposing a condonation application and file such affidavit before the hearing date. Second, it could not be correct that he requested a postponement in his answering affidavit to file a further affidavit opposing condonation of the late filing of the replying affidavit, because it was prepared and filed after he filed his answering affidavit. The court a quo correctly refused the postponement.

22. I find that none of the grounds of appeal have any merit. They are centred on criticising the court a quo's reasons for refusing to grant the counter application. The issue was whether the respondent, who was the applicant in the court a quo has made out a case for contempt of court, and the order compelling the appellant to make good his contemptuous conduct. The counter application was entirely dependent on whether the main claim succeeded or not. Once the main claim succeeded it followed that the counter application could not succeed. The court a quo correctly found that the appellant failed to prove his counter application and that there was no basis to stay the contempt of court proceedings for the pending action. Having canvassed the common cause facts and the authorities attendant to these facts, it follows that this appeal cannot succeed. It fails both on common cause facts and the law applicable to the issues at hand.

23. Turning to costs, the court a quo ordered the appellant to pay costs of the application on the scale of attorney and client. The court a quo found that the respondent has been in and out of court since the parties' divorce was granted to compel the appellant to comply with a settlement agreement to which he is a party, and this warranted a punitive cost order against the appellant. The punitive costs order was justified in the court a quo because, if it was not for the appellant's reprehensible and malicious conduct, the respondent would not have been required to approach the court. I am of the view that the court a quo cannot be faltered on this finding.

24. The appellant brought the urgent application served on 28 April 2021, for suspension of the operation and execution of the court order, setting aside any warrants issued pursuant to the court order, and interdicting his arrest. The urgent court reserved the costs of the urgent application. The appellant seeks the order that the respondent pay the urgent application costs.

25. The respondent is opposing this request on the basis that the necessity of the urgent application to stay the writ of committal, three months after the lapsing of his appeal, was self-created by appellant's conduct and his attorneys' negligence, in failing to timeously prosecute appellant's appeal. In my view the respondent was entitled to execute the court order, the appellant was seeking indulgence from the urgent court as a result of his delay, and therefore he should pay the costs.

26. I am satisfied that the court a quo did not err, and its judgement cannot be assailed.

27. In the premises, I propose the following order:

1. The appeal is dismissed with costs.

M.M.P. Mdalana-Mayisela
Judge of the High Court

Gauteng Division

I agree and it is so ordered

W.L. Wepener
Judge of the High Court
Gauteng Division

I agree

S. Mahomed
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: August 2022

Appearances:

On behalf of the Appellant: Adv M Basslian SC

Instructed by: Saders Attorneys

On behalf of the Respondent: Adv W Davel

Instructed by: Sian Richardson Attorneys