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REPUBLIC OF SOUTH AFRICA

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

CASE NO: 41339/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

19 September 2022

In the matter between:

M [....], C [....] 1 J [....]

FIRST APPLICANT

D [....] 1, N [....]

SECOND APPLICANT

And

D [....] 2, L [....] A [....]

RESPONDENT

J U D G M E N T

MUDAU, J:

[1] The applicants seek an order holding the respondent in contempt of court, further that he be ordered to comply with the order of this court (per Labe J) dated 13 June 1997. They further seek an order as to costs on a punitive scale.

Point in limine: Non-joinder

[2] The respondent has raised two points in *limine*, the first is the non-joinder of C [...] 2, the first applicant and respondent's daughter, since she is an interested party with a direct and substantial interest in the subject matter of the litigation. C [...] 2 has however indicated that she does not want to be joined and has given the applicants leave to litigate on her behalf. Since a party with a vested interest cannot be forced to be joined, and now that C [...] 2 has waived her right to be joined, the point is of no consequence and stands to be dismissed.

[3] As his second point in *limine*, the respondent has raised an alleged dispute of fact based on the allegation that the property is now registered in his name. In argument however, the second point was correctly abandoned by counsel on behalf of the respondent, in that it went to the merits or otherwise of the application.

Background facts

[4] The facts are largely common cause. The first applicant and the respondent were previously a married couple. Two children (now adults) were born from that marriage, a son, the second applicant as well as a daughter, C [...] 2 who, as indicated above is not a party to these proceedings. After the divorce proceedings were instituted, they settled their disputes and signed a settlement agreement on 10 May 1997. On 13 June 1997 a decree of divorce incorporating the settlement agreement was granted. The service of the court order is not in dispute, with the respondent admitting that the settlement agreement was made an order of court by consent.

[5] Translated to English clause 4.2 of the settlement agreement, which is the basis of this application states:

'The parties acknowledge that the agreement pertaining to the purchase of the property known as Erf [...] situated in the township of B [...] (Erf/Stand [...]) is concluded in the name of the Plaintiff (Applicant) (and) the Defendant (Respondent) would continue to pay the outstanding amount due in terms of the agreement to the seller. After settling of the full purchase price the Defendant will transfer the property

into the name of a Trust that would be created by the Defendant, and wherein the minor children will be named beneficiaries. The Defendant will be liable for the costs of the creation of the Trust as well as transfer costs to transfer the property into the name of the Trust.'

[6] It is common cause that at the time of the divorce, the property was an undeveloped stand consisting of shares held in a Share Block Scheme, held through a Deed of Transfer (No. [...]). The applicants contend that it is clear from the settlement agreement that the intention of the parties was always that the property, once fully paid up of the debt that was still outstanding as at date of divorce, would be transferred to a Trust to be created by the respondent, with the then minor children being beneficiaries.

[7] It is common cause that the property is currently registered in the respondent's name contrary to the terms of the settlement agreement and court order.

[8] This application was served on 5 April 2019 with the respondent serving his answering affidavit on 29 July 2019, some four months thereafter. The applicants allege that the answering affidavit contained certain allegations that they were not aware of until that point. After concerted investigations were made regarding the allegations contained in the answering affidavit, and other factors that led to further delays, a replying affidavit, together with a substantive condonation application was only served and filed during September 2021. Given the delays experienced by both parties, they agreed, subject to the leave of the court, to abandon any claims to prejudice that either might have suffered as a result thereof. Condonation was accordingly granted.

[9] Also common cause is that the property scheme was changed from a Share Block Scheme to a full title during 2002. In this application, the respondent does not dispute that he was obligated to establish a Trust with the second applicant and his sibling, C [...] 2, as beneficiaries. On his version, as at the time of the divorce, the property was an undeveloped stand, consisting of shares held in a Share Block Scheme, known as Waltenroodt Oorde Shareblock Limited, on Erf [...] situated in B

[....] Township (General Plan LG No. [....] held by virtue of Deed of Transfer No. [....]). He contends that 'it was no longer possible to transfer the Shares of the Shareblock Scheme to a trust as prescribed in the settlement agreement'. The reason he gives for not doing so despite the property being fully paid up is that he did not have the funds to do so at the time.

Merits

[10] The respondent alleges that his inability to comply with the settlement agreement was discussed between him and the first applicant and the parties agreed that the respondent would not have to register a Trust but take transfer of the subject property into his name. This is disputed by the first applicant. The respondent also contends that the conveyancing attorneys would not have transferred the subject property in the respondent's name without the first applicant signing the necessary documents. But, this is not supported by any objective evidence. According to the respondent, he made improvements to the property '*by erecting a house and remains to have the children benefit from the subject property as per the true intention of the settlement agreement*'.

[11] The respondent also contends that he had no control over the township's subdivision resulting in the Share Block Scheme being converted to full title stands and as a result of the aforementioned, the transfer of the shares to a Trust was no longer possible. Thus, on his version, any alleged contempt cannot be found to be wilful or *mala fide*.

[12] It is trite that 'once the applicant has proved the order, service or notice, and non-compliance, the respondent 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'.¹ On the merits, the applicants submit that the respondent is guilty of the crime of contempt of court. The applicant draws on the decision in *Fakie* contending that the respondent has failed to present

¹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) (31 March 2006) para [42] (d).

any evidence whatsoever to avoid the conclusion that his non-compliance was wilful and *mala fide*. Based on all of the above, the applicants seek a punitive cost order.

[13] In the respondent's supplementary heads of argument filed on 26 July 2022 at the instance of this court addressing the question as to what prevented the respondent from transferring the full title property into the name of the children for their benefit, counsel conceded that 'there is nothing that precludes the transfer of a full title property into a trust'.

[14] However, the court order granted by consent did not refer to "shares" in the property but to "the property". The respondent attempted to raise the defence of "supervening impossibility" in alleging that it is not possible to transfer full title into a Trust, however, the respondent contradicts himself as he admitted that such a transfer is possible in the supplementary heads of argument. __Supervening impossibility of performance, that is, impossibility of performance, which is the consequence of, for example superior forces or unforeseen circumstances and which is not the result of fault on the side of a party to the contract, relieves both parties of their respective obligations.

[15] Evidently, as the applicants also contend, there was no prohibition on the respondent or any impossibility that prevented the transfer the property into a Trust. The transfer of the property is not impossible from a Share Block into a Trust especially since full title was obtained. The settlement agreement clearly stipulated that the property needed to be transferred to a Trust. The parties were well aware that there were shares but described same as the "property" in the settlement agreement. This might have been the opportune time to transfer full title into the names of the children. The respondent instead chose to transfer the property into his own name, and acquired the benefits thereof, instead of transferring same into a Trust.

[16] In my judgment, the respondent could and should have complied with the court order, by creating a Trust and transferred the property. The respondent made no attempt to approach the court at any point in time to raise the purported defence of "impossibility" and seek a variation or setting aside of the order. Therefore, the

respondent has not proffered any valid excuse why there was non-compliance with the court order. Any suggestion that he could not comply due to impossibility of performance on his own version accordingly, stands to rejected.

[17] It is trite, as counsel for the applicants also pointed out that, an owner can use his property, rent it out, use the fruits (usufruct), encumber, bequeath or disposes of his or her property. The property can further be ceded to a third party for a debt or mortgage bond that can be obtained over a property. This would limit the owner's real rights to the property. This would mean that the owner's ownership is limited until, by way of example, the debt has been settled. The relevant limitation over the property of an owner means that if the debts are extinguished or settled, then the property will and can revert back to the owner.

[18] The Constitutional Court in *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others*² quoted with approval the case *Pheko and Others v Ekurhuleni City*³ which stated:

‘Courts have the power to ensure that their decisions or orders are complied with by all and sundry, ... 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.’⁴

And at para 27:

‘Contempt of court proceedings exist to protect the rule of law and the authority of the judiciary. As the applicant correctly avers, “the authority of courts and obedience of their orders – the very foundation of a constitutional order founded on the rule of law – depends on public trust and respect for the courts”. Any disregard for this court’s order and the judicial process requires this court to intervene. As enunciated in Victoria Park Ratepayers’

² 2021 (5) SA 327 (CC) para 26.

³ 2015 (5) SA 600 (CC).

⁴ *The Judicial Commission of Inquiry into Allegations of State Capture* para 26.

Association, “contempt jurisdiction, whatever the situation may have been before 27 April 1994, now also involves the vindication of the Constitution’.

[19] In the instant case, the only reason why the transfer did not occur into the name of the Trust is due to the respondent allegedly not having the money to create a Trust, which is no excuse as the costs are minimal compared to construction costs. There were no legal impediments precluding him from acting in accordance with the court order. The argument proffered by the respondent is therefore without merit, but serves to indicate that he was wilful in not complying with the court order and also acted *mala fide*.

Order

[20] Consequently, I make the following order:

1. The respondent is declared to be in contempt of the order granted by this court on 13 June 1997, particularly clause 4.2. of the agreement of settlement therein (“the agreement”) insofar as the respondent has failed to create a Trust (“The Trust”) for the benefit of C [...] 2 D [...] 3 and the second applicant (“the intended beneficiaries”) and more specifically, has failed to see to the transfer of the property known as Erf [...] B [...] (“the Property”);
2. the respondent must, within 30 (thirty) days following the granting of the order herein, given effect to clause 4.2 of the agreement;
3. Should the respondent fail to comply with the aforesaid order after the lapse of the 30-day period, the Sheriff of the Court is directed to comply with the aforesaid order, by creating a Trust as well as transferring the property into the Trust, and to hold the respondent liable for the costs incurred; and
4. The respondent is liable for the costs of this application on the attorney and client scale.

MUDAU J
[Judge of the High Court]

APPEARANCES

For the Appellants: Adv. D Strydom

Instructed by: Ramsden Small Fernandes Attorneys

For the Respondent: Adv GL Kasselmann

Instructed by: Couzyn Hertzog & Horak Attorneys

Date of Hearing: 25 July 2022

Date of Judgment: 19 September 2022