

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 37420/13

DATE: 18 FEBRUARY 2015

In the matter between:

V[...] (PREVIOUSLY T[...]), K[...]

Applicant

and

T[...], G[...] F[...] C[...]

Respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. This matter was enrolled for hearing in the opposed motion court for the week of 9 February 2015 to 13 February 2015. The respondent set the matter down for hearing. The notice of set down was served on 29 October 2014.
2. The matter was allocated for hearing on 12 February 2015. The respondent had timeously filed heads of argument. No heads of argument on behalf of the applicant were filed. When the matter was called, senior counsel appeared on behalf of the applicant and handed up written heads of argument. The explanation for the late handing in of the heads of argument was that counsel accepted responsibility for not timeously filing such and requested that the applicant should not be penalised therefore.
3. A copy of the heads of argument was only handed to counsel for the respondent that morning. Counsel for respondent grudgingly accepted the applicant's heads of argument and in view of the fact that this application flows from a divorce matter; I indicated that I would hear the matter, as it would be expedient to do so.

4. Having heard argument, I reserved judgment to consider the numerous cases relied upon by counsel for applicant in his heads of argument and the various alternative arguments put forward on behalf of the applicant. This is my judgment.

5. It is necessary to give some background that led to the launch of this application.

6. The parties were married to one another for a relative short period and which ended in a decree of divorce that was granted during March 2014. On 28 January 2014, and prior to the granting of the decree of divorce, the parties entered into an agreement in respect of their patrimonial affairs and which was made an order of court on the granting of a decree of divorce. It was alleged that the respondent had not fully complied with one of the terms of that agreement. Hence this application.

7. The agreement entered into by the parties recorded the following in clauses 2.4 and 2.5 thereof:

“2.4 The parties have reached agreement with regard to property and other proprietary and ancillary consequences of the divorce in the event of the above Honourable Court issuing a decree of divorce.

2.5 The Plaintiff undertakes to seek an order in terms of 2.4 and which is compatible with the provisions of this agreement. ”

8. The nub of this application lies in the provisions of clause 4.1.2 of the agreement which reads as follows:

“Without admitting any obligation to do so, the Plaintiff shall effect payment of an amount of R 30 000.00 (thirty thousand Rand) in a cash lump sum, to be paid to the Defendant within 5 (five) business days following the granting of the decree of divorce. ”

9. It is common cause that the respondent only paid an amount of R 22 000.00 of the R 30 000.00 referred to in clause 4.1.2 of the agreement to the applicant.

10. The relief that the applicant seeks in the notice of motion reads as follows:

“1. Dat dit verklaar word dat die Respondent in minagting van ‘n Hofbevel is toegestaan deur die bovermelde Agbare Hof onder saaknommer 37420/2013 gemaak op 28 Maart 2014 (‘Die Hofbevel’) deurdat die Respondent versuim en/of weier om ‘n bedrag van R8 000.00 te betaal, welke aan die Applikant verskuldig is;

2. Dat die Respondent beveel word om ‘n periode van gevangenisstraf van 90 (negentig) dae uit te dien of sodanige ander periode as wat bovermelde Agbare Hof in sy diskresie, gepas mag vind onder die omstandighede.

3. *Dat die Respondent gelas word om die koste van die aansoek te betaal op 'n skaal soos tussen prokureur en kliënt.*

4. *Verdere in/of alternatiewe regshulp.*”

11. The applicant in her founding affidavit gives the following reasons for the relief sought in the notice of motion.

“4. *Die aard van die aansoek is 'n aansoek om minagting van 'n Hofbevel deur die Respondent. Die Hofbevel is gemaak op 28 Maart 2014 onder saaknommer 37420/2013.*

5. *Daar word veriang dat die Respondent gevangenisstraf moet toedien (sic) vir, die periode van 90 (negentig) dae, of sodanige korter period (sic) as wat die Agbare Hof as gepas mag vind. Gebasseer (sic) op die volgende omstandighede:*

5.1 ...”

She then sets out the grounds. These relate to the respondent’s alleged short payment of the R 8 000.00.

12. In *Protea Holdings Ltd v Wirwt et al* 1978(3) SA 865 (W) the court held at 868B:

*“It becomes necessary, therefore, and this provides a convenient stage, to deal briefly with the nature of contempt proceedings of this kind. The object of this type of proceeding, which is concerned with the wilful refusal or failure to comply with an order of Court, is the imposition of a penalty in order to vindicate the Court’s honour consequent upon the disregard of its order (Ferreira v Bezuidenhout 1970 (1) SA 551 (O) at 552) and to compel the performance thereof (Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 2nd ed at 583). Not all orders of Court will on their breach give rise to this sort of remedy. A distinction is drawn between orders ad pecuniam solvendum and orders ad factum praestandum.”*¹

13. The form of the penalty to be imposed may be that of imprisonment, a suspended sentence or the imposition of a fine.²

14. It is clear from the notice of motion and the founding affidavit, in particular with reference to the passage quoted above, that these proceedings are contempt proceedings for the committal of the respondent to a term of imprisonment.

15. Counsel for the applicant disavowed that the present application was proceedings for committal of the

respondent and submitted that prayers 1 and 2 of the notice of motion should be read disjunctively and hence that there was no connection between the two prayers. He further submitted that the application was merely one for contempt of court.

16. This submission is without merit. Prayers 1 and 2 of the notice of motion are to be read conjunctively. This clearly appears from the passage of the judgment in *Protea Holdings* referred to above.

17. It follows that the present proceedings are for the committal of the respondent for a period of imprisonment due to his alleged contempt of the court order of 28 March 2014.

18. The question arises whether the alleged contempt relates to a refusal to comply with an order *ad pecuniam solvendum* or an order *ad factum praestandum*.

19. The parties agreed on 28 January 2014 to resolve the issue with regard to property and other proprietary and ancillary consequences of the divorce in the event of that a decree of divorce is granted by this court. The parties indeed entered into a contractual arrangement in respect thereof. Accordingly, the respective obligations set out in clauses 4 and 5 of the agreement are of a contractual nature. Those clauses are couched in obligatory terms.

20. The only “undertaking” that appears in the said agreement appears in clause 2.5 (quoted above) of the said agreement. The respondent undertakes to make the agreement an order of court on the granting of a decree of divorce.

21. The obligation to pay an amount of R 30 000.00 on the granting of the decree of divorce is one *ad pecuniam solvendum*, the underlying nature of the obligation to make the aforesaid payment is one based on contract, not one of an undertaking *in facie curiae*.³

22. It follows that the applicant had launched inappropriate proceedings to enforce her rights under the said agreement. The order being one *ad pecuniam solvendum*, these proceedings for contempt and the committal of the respondent are inappropriate and not competent under the circumstances.

23. The applicant cannot succeed in the relief sought.

24. However, if the obligation upon the respondent to make payment of the R30 000.00 can by some forced construction be interpreted as “an undertaking *in facie curiae*”, and that these proceedings are competent, it must be determined whether the respective onuses have been discharged.

25. It is common cause that the order was made, that the respondent was aware of the order and that there had been non-compliance with the full obligation recorded above.

26. Counsel for applicant submitted that a wilful and intentional disregard to the court order of 28 March 2014 is to be inferred from the conduct of the respondent. The said conduct related to the respondent subtracting certain monies from the agreed amount of R 30 000.00 amounting to R 8 000.00.

27. The respondent alleges in his opposing affidavit that he had erroneously paid an amount of R 5 000.00 in respect of maintenance to the applicant for the month of February 2014, the parties having agreed on 28 January 2015 that compliance with the Rule 43 order that had been made would terminate on signing of the agreement. The respondent further alleged he made payment of an amount of R 3 000.00 in respect of the instalment of the motor vehicle of the applicant for which the applicant was obliged to make payment.

28. Prior to complying with the order to pay the amount of R 30 000.00, the respondent discovered the alleged “erroneous” payments and was under the belief that he was entitled to set off the said erroneous payments to the payment of the amount of R 30 000.00.

29. Whether his aforesaid belief is countenance in law is irrelevant when determining whether the respondent had wilful intent to disregard the order and was *male fide* in that regard. In *Fakie v CCII, supra*, the Supreme Court of Appeal held that the issue was whether the respondent had advanced evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *male fide*.⁴

30. Counsel for applicant submitted that an inference could be drawn from the respondent’s conduct in this regard. He submitted that it was reasonable to infer that prior to making the agreement an order of court, the respondent had already decided to deduct the amounts referred to above and that he had clear intent not to make payment of the full amount of R 30 000.00. No direct evidence or any suggestion in that regard was contained in the founding affidavit of the applicant. Counsel for applicant further submitted that the respondent’s conduct subsequent to the launch of this application in persisting with his conduct, is a further indication that he acted wilfully and *male fide*.

31. The inference that counsel for the applicant sought, cannot be drawn in the face of the direct evidence of the respondent in his opposing affidavit in regard to his contention of set off referred to above. Rightly or wrongly, it casts reasonable doubt as to whether the non-compliance was wilful and *male fide*. I find that the respondent has discharged his onus.

32. Counsel for the applicant attempted during argument to abandon the relief sought in prayer 2 of the notice of motion and sought an amendment thereof by the substitution of the following amendment.

“Die applikant se aanbod, met benadeling van regte, op 19 Junie 2014 word ‘n bevel van die hofgemaak en die respondent word gelas om R8000 aan die applikant te betaal binne 10 dae”

33. The aforesaid offer related to an offer to settle the matter: the applicant proposed that if the respondent paid the amount of R 8 000.00 to the applicant, the applicant would subsequently withdraw these proceedings.

34. In view of the finding that the respondent had discharged his onus, the proposed amendment to prayer 2 of the notice of motion requires no further consideration.

35. It follows that, in this respect, the applicant cannot succeed in the relief sought in the notice of motion, should the application be competent in the circumstances.

36. There remains the issue of costs. Both parties have sought cost orders against one another on a punitive scale. This matter has its origins in divorce proceedings. The court has an unfettered discretion in respect of costs. It would serve no purpose to order a punitive cost order either way.

37. The application for contempt and committal of the respondent cannot succeed.

38. I grant the following order:

(a) The application is dismissed.

(b) No order in respect of costs is made.

CJ VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

On behalf of Applicant: L J van Tonder SC

Instructed by: Van der Merwe Inc.

On behalf of Respondents: D J Badenhorst

Instructed by: Van der Westhuizen Attorneys

1 See also *Fakie NO v CCII Systems (Pty) Ltd* 2006(4) SA 326 (SCA) at 332B-B

2 *Protea Holdings, supra*, at 872; *Victoria Park Ratepayers • Association v Greyvenouw CC*[2004] 3 All SA 623 (E) at 642

3 See *Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969(1) SA 224 (T) at 227

