

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case No. : 800/2007

In matter between:

DIOKA REGINALD MABUYA

Applicant

And

SEGOMOTSO YVONNE MABUYA

Respondent

HEARD ON: 14/08/2014

DELIVERED ON: 18/08/2014

JUDGMENT BY: MOTLOUNG AJ

Introduction

[1] The applicant seeks an order for the setting aside of a warrant of execution and ancillary relief.

Facts briefly

[2] The applicant was divorced from the respondent on the 10 June 2008 and was ordered, amongst others, to pay the school

fees of the minor child Kekeletso (5 years old at the time) as per paragraph 1.3 of the Deed of Settlement that was made an order of court. The said clause read as follows as:

*“The plaintiff [applicant in this case] undertakes to pay maintenance to the defendant [respondent in this case] for the minor child Kekeletso at the rate of R2500.00 per month. **Plaintiff also undertakes responsibility for payment of the school fees and school uniforms of Kekeletso. Plaintiff [applicant] undertakes to keep Kokeletso as a member of his medical aid fund and Kokeletso will be entitled to all the benefits of the medical aid ...**”*
(my emphasis).

[3] The applicant subsequently paid the school fees of Kekeletso until the end of the year 2011 but stopped paying any school fees in the year 2012 after the minor child was moved at the beginning of 2012 by the respondent from Brandwag Primary School (Brandwag), a public school, to another school, Eduplus Independent School, a private school.

[4] When the divorce order was granted, the minor child was attending a private pre-school by the name of CBC. Subsequent to the divorce, the minor child was moved by both parties from CBC private school to another school which is not a private school, called Brandwag Primary School (hereafter referred to as "Brandwag"). The child attended the said school until the respondent removed it from Brandwag to a private school by the name of Eduplus in February 2012.

[5] There exists a dispute between the parties as to whether or not the the respondent moved the child from Brandwag to Eduplus with the knowledge or concurrence of the applicant. The applicant alleges that he neither knew nor consented to the move, and states that he only discovered in February 2012 when he went to make enquiry at Brandwag regarding the account for school fees that the child had been moved from the school in January 2012, whilst the respondent alleges that the parties were both called to Brandwag where they were advised to move the child to Eduplus. The applicant also alleges in his replying affidavit that he only discovered in November 2012 that the child had been moved to a private school.

[6] On the 27 March 2013 the applicant issued a writ of execution for arrear maintenance in the sum of R34 783.20, comprised as follows:

6.1. R1 100.00 for maintenance of the child,

6.2. R29 250.00 for school fees (January 2012 to February 2013),

6.3. R3 183.20 for medical costs, and

6.4. R1 250.00 for school clothing.

[7] Upon receipt of the said warrant (the applicant alleges in para 5.25 of the founding affidavit that he was served with the warrant in May 2013 whilst the respondent alleges that he was served with the warrant before he started effecting payments for school fees to Eduplus since March 2013, implying that the warrant was served on the respondent in March 2013), the applicant's attorney wrote a letter to the respondent's attorney in which the applicant's attitude and position in relation to the matter was stated.

In brief, the applicant's attorney stated that the applicant denied being indebted to the respondent. The applicant's defence was that the amounts claimed in the warrant were not yet due and payable as the respondent had failed to honour an agreement between the parties to the effect that the respondent would submit the relevant invoices (including for the school fees) to the applicant before he could be expected to pay them, in order to enable him to know the amounts to pay, where and to whom to pay them. Furthermore, so contended the applicant, the respondent had failed to consult with the applicant regarding the decision to move the child from one school to another, whereas she should have done so.

[8] After exchange of correspondence between the attorneys of the parties, the applicant offered and indeed paid the amount he deemed to be due and payable, after receiving the invoices from the respondent. Of all the invoices provided to him, he found them to be in order except for those regarding school fees. As regards the school fees, he took the view that he was prepared to pay them at the same rate of Brandwag, a public school, and that he was not liable for the excess difference between those of Brandwag and Eduplus.

On this premise, he then calculated his indebtedness to the respondent as totalling R14 883.20 and tendered to pay the said amount to the respondent upon service of this application on her (per his attorney's letter marked as annexure "F"). This left a balance of R19 900.00, being the difference between the Brandwag and Eduplus rates.

[9] The point of dispute as regards the school fees was phrased by the applicant's attorney (as per annexure "F" to the application), as follows:

"Ons is van mening dat ons klient in terme van die Akte van Dading verplig is om die redelike en billike skoolgelde te betaal. Die minderjarige kind is sonder ons klient se medewete of goedkeuring ingeskryf in 'n privaatskool en kas ons onmoontlik vir die verhoogde begrag skoolgelde aanspreeklik gehou word".

[9] In response to the applicant's tender (which included the point of dispute referred to above), the respondent's attorney stated (per annexure "G" to the application) the following:

“1. We suggest that your client attend to payment of the amount of R14 571.20 [subsequently corrected in the application to R14 883.20] and so also the costs of the Writ duly to be taxed or agreed upon.

2. Pertaining to the school fees, we hereby give your client a further fifteen (15) days after receipt hereof to file his application to set aside the Writ on the basis that then the only objection which he will canvass in his application would be pertaining to the school fees”.

[10] Therefore, the only remaining dispute as between the parties then was as regards the school fees.

[11] The applicant subsequently launched this application. Amongst others, he contended that:

11.1. The issue of the warrant was premature as it was issued before he was presented with the invoices relating to the amounts alleged to be owing, which invoices he received only after the warrant had been issued (see paras 20, 21 and 5.33 of the founding affidavit),

11.2. He believes that the Deed of Settlement (divorce order) only obliged him to pay public school fees, and this does not include private school fees (see paras 5.23, 5.32 and 22.4.4 of the founding affidavit, read with paras 21.1 and 29.2 of the replying affidavit), and the court order does not state that he should pay private school fees (see para 21.1 of the replying affidavit),

11.4. There is no need for the child to receive superior education (see paras 5.19, 5.20, 5.21, 5.22, 5.23 and 13 of the founding affidavit).

11.5. The respondent can only recover school fees from him by way of a writ only if she had made payment of such school fees on his behalf (see para 15.6 of the replying affidavit), and since the respondent does not say she effected such payment, she had legal standing to recover such fees from him (see paras 15.7 and 15.8 of the replying affidavit).

[12] It is common cause that the applicant has been paying an amount of R2 500.00 to Eduplus since March 2013, which is the same month in which the warrant was issued. I will revert to this point later in my judgment as regards when the warrant was

served on the respondent – was it “*during May 2013*” as alleged by the applicant (see para 5.25 of the founding affidavit) , or in March 2013 (as is to be inferred from the respondent’s allegation that the respondent has been paying Eduplus school fees “*since the warrant of execution has been served on the applicant*” at para 4.10 of the answering affidavit) or “*since April 2013*” as alleged by the applicant at para 18.1 of the replying affidavit? It is also common cause that the applicant subsequently paid the amount he tendered on the 13 August 2013 (after issuing the application on the 11 August 2013), but stopped paying the R2 500.00 monthly maintenance for the child. He alleges that the R2 500.00 that he pays monthly into the Eduplus account constitutes the maintenance amount of R2 500.00 and not the R2 300.00 Eduplus school fees, and that he has been paying the said amount to Eduplus *in lieu* of maintenance (as opposed to school fees) (see para 17.2, 17.3, 17.4, 18.1 and 19 of the replying affidavit). I will also revert to this dispute later in my judgment.

[13] In his replying affidavit, the applicant reiterated that he is prepared to pay the child’s “*reasonable school fees*” (see para 21.3) and also states that he “*does not know what reasonable school fees amount to*” (see para 22).

[14] The applicant was represented during argument by Mr Cilliers whilst the respondent was represented by Mr Reinders.

[15] It was contended by Mr Cilliers that this court is supposed to interpret the meaning of school fees and apply it to the facts of this case, and it would then be in a position to find that the warrant should not be allowed to stand as the reason or *causa* therefore would have fallen away – as it would mean that the respondent has been paid in full in accordance with the correct meaning of the court order referred to above (paragraph 1.3 of the court order) since the issue of the warrant.

[16] He also submitted that a jump of nearly five times the school of Brandwag, which is the rate of Eduplus, cannot be regarded as being reasonable.

[17] He also submitted that the applicant had been open and frank with the court by stating that he stopped paying maintenance to the respondent as he got angry with the respondent upon discovering that she had removed the child to an unknown destination (school) without consulting with him, and consequently decided to adopt a wait and see attitude, and that the court should take this factor into account in coming to its decision.

[18] On the other hand, Mr Reinders submitted that the court order is more than clear – it means school fees and the applicant committed himself to pay such fees. He further submitted that the conduct of the applicant was not *bona fide* as he did not only fail to pay the school fees, but he also failed to pay the full R2500 monthly maintenance to the respondent, as per the same court order, until the respondent issued the warrant against him.

[19] He further submitted that it was absurd for the applicant to contend that when he started to pay the monthly amount of R 2500 to Eduplus, after the warrant was issued against him by the respondent, this was after he had reached agreement with the respondent that he would pay the said R2500 monthly instalments to Eduplus *in lieu* of the R2500 monthly maintenance he was supposed to pay to the respondent. He questioned the feasibility of such an arrangement being workable if the applicant's version on this aspect was true, and then submitted that I should find that the said allegation (by the applicant) was untenable, and instead find that he was clearly paying the monthly school fees since after receiving the warrant, by making the said R2500 monthly payments to Eduplus.

[20] He further submitted that the applicant failed to take the court into his confidence by effectively stating under oath that he did not know to which school had the child been removed until November 2013, when on his own version he used to exercise his visitation rights when he would see the child in the sports attire of Eduplus and at some point his new wife personally transported the child to Eduplus for five consecutive days.

[21] It was conceded during argument upon a question by the court that the applicant failed to inform the court as to what his financial means are.

[22] Furthermore, whereas the applicant raised the points mentioned above under paras 11.1 to 11.5 in his papers, most of the said points were not seriously pursued by Mr Cilliers during argument, and his argument mainly revolved around the fact that a proper interpretation of the divorce order means that the applicant must only pay reasonable school fees.

[23] It is necessary, in my view, to briefly refer to some of the legal principles I consider relevant to this matter, which are trite, in considering this application. They are briefly as follows:

23.1. As a rule, an applicant who chooses to proceed by way of motion proceedings must make his case out in his founding papers.

23.2. An applicant who chooses to proceed by motion proceedings must disclose all material facts to the court, whether such facts tend to support his case or militate against it.

23.3. There rests a duty on both parents to support or maintain their children, and each parent must do so in accordance with his or her means.

[24] Coming back to the facts of this case, I am in full agreement with the legal proposition being made by Mr Cilliers to the effect that reference to school fees in the court order can only mean reasonable school fees. It is a basic cannon of construction that reasonableness, just like lawfulness, must as a rule be read into an agreement or statute when interpreting it. However, reasonable school fees does not necessarily equate the exclusion of a private school (as the fees of a private school may, depending on various factors, also be regarded as reasonable), and after all, reasonableness is a relative term which must obviously take into account, the respective means of the parties. I am not in agreement with the proposition being held forth by Mr Reinders that school fees means any amount of school fees payable.

[25] Furthermore, the applicant has failed to inform the court as to what his financial means are so that the court may be able to compare the reasonableness of the Eduplus school fees in relation to or compared to his financial means. Therefore, the applicant has failed to make his case on the papers before me, as reasonableness cannot be determined in isolation, without reference to the financial standing and means of the applicant.

[26] Nowhere in his papers does the applicant say or suggest that he cannot afford the school fees of a private school. He also denies that he ever required the respondent to contribute to the maintenance of the child.

[27] Furthermore, it became clear during argument by Mr Cilliers that the applicant is not opposed to the child being at Eduplus – all he is opposed to paying fees exceeding those of Brandwag. It is also worth noting that it has never been the applicant's case that he cannot afford the school fees being charged by Eduplus. His attitude is simply that Kokeletso does not need to attend a private school, and he has not provided any reason for this view.

[28] The court order does not state that the applicant must pay public or private school fees. Therefore, I find no reason why would the applicant contend so strongly that it can only mean public school fees. To the contrary, the fact that the child was attending a private school at the time of divorce militates against this interpretation. If the court order is silent on the kind of school, the fact that the child was attending a private school at the time of divorce, and thus at the time of concluding the Deed of Settlement, militates against such an interpretation. Therefore, if the intention of the parties at the time of concluding the agreement was to be established, I would have been inclined to find that the parties intended that the school fees that were applicable at the time of concluding the agreement, being the CBC private school fees, would be applicable.

[29] I am, however, of the view that it is not necessary to make a finding as to whether the court order means the school fees of a public or private school. It is unnecessary to do so. In my view, it is sufficient to find that all it means is reasonable school fees, and as stated above, reasonableness is always a relative term which must take into account the means of the parties.

In this case the applicant has failed to place those means before the court, and has thus failed to show the unreasonableness of the rates of Eduplus.

[30] The other “defences” initially raised by the applicant in his application were not seriously pursued during argument. I find that it was correct not to pursue them as there was no merit in them. I find it unnecessary in the light of my finding above that the applicant has failed to make his case out on his papers, by failing to indicate what his means are or that he cannot afford the fees of Eduplus, to deal with the other defences initially raised by the applicant.

[31] I am also in full agreement with Mr Reinders that the applicant was less than honest with the court in many respects. For an example, I find that he clearly lied regarding not knowing to which school the child had been removed. The evidence clearly shows that even on his own version he must have known that the child was moved to Eduplus when his new wife transported the child to the said school.

In accordance with the *Plascon-Evans* rule, I find that the applicant knew that the child was removed to Eduplus, or at the very least, he reconciled himself with that eventuality once he found out, and at the latest this was when his new wife transported the child to Eduplus. I also see no reason why the respondent would hide this fact from the respondent but sue him for the arrear fees in respect of the said school. The proposition by the applicant on this point is simply absurd.

[32] Furthermore, after the respondent filed her answering affidavit in which she disputed many facts that had been alleged by the applicant in his founding affidavit, the applicant conceded the factual mistakes he made in his founding affidavit, and agreed with the respondent on the said points. For an example, whereas he initially wanted the court to believe that the child was attending a public school when the divorce order was granted, he had to retract this allegation after the respondent pointed out in her answering affidavit that the child was attending CBC, which was a private school. In my view, the applicant had sought to lay a basis for his contention that he was supposed to pay public school fees by making this false statement.

[33] It is also clear to me that the applicant deliberately failed to mention in his founding affidavit that he started to pay the Eduplus fees after either receiving the warrant in March 2013 or knowing of its existence in March 2013, and he sought to keep this fact away from the court as he thought that it would prejudice his case. It is also absurd for him to allege that he paid the R2 500.00 monthly instalments to Eduplus on the basis that the respondent would extract the difference between the R2 300.00 monthly school fees from the school itself. In short, the applicant has failed to disclose all relevant facts in his founding papers and this is another basis on which his application should fail.

[34] In the premises, I find that the application must fail.

[35] There is no reason on the facts of this case as to why the ordinary rule of costs following the result must not apply.

[36] Consequently, I hereby make the following order:

The application is dismissed, with costs.

I. MOTLOUNG AJ

For applicant: AdvCilliers

Instructed by:

For Respondent: Adv

Instructed by: