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**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

**CASE NUMBER:15561/13
DATE: 8 NOVEMBER 2013
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES**

In the matter between:

LIESEL CARA BURGER **APPLICANT**

And

ABRAHAM GERHARDUES BURGER **RESPONDENT**

JUDGMENT

TLHAPI J

[1] The applicant seeks an order that the respondent be declared to be in contempt of certain orders of court and that he be incarcerated for a period of six months. The orders are the following:

1. An order by Tolmay on 30 July 2010 in case number 38093/20 and which is annexed to the papers as annexure "LB1";
2. An order by Botha J on 23 August 2010 in case number 10019/2010 which is annexed to the papers as annexure "LB2"; and
3. An order by Van der Merwe DJP on 31 July 2012 in case number 76827/2009 and which is annexed to the papers as annexure "LB3"

Contempt proceedings were launched with regard to the order under case 10019/2010. The application was postponed to a further date. The applicant averred that for a while the respondent complied with the orders of Sapire J of 21 May 2010 and as contained in annexure "LB4" and also for a while paid maintenance. This order is not the subject of this application.

[2] This application was opposed. Furthermore in a counter application the respondent sought to have the above mentioned orders varied in the following respect:

1. That the primary residence vest with the respondent; or
2. Maintenance be reduced to R2000.00 per month per child including medical aid and school fees;
3. That applicant/respondent be responsible to pay board and lodging when the minor children stay with either party; or
4. Each party contribute 50% each towards school fees, school and extracurricular activities, school clothing, medical expenses, food and housing;

[3] Tolmay J ordered respondent to pay applicant's costs of the application before her. The Bill of Costs was taxed to the tune of R23 057.05. The applicant averred that respondent failed to comply.

[4] Botha J ordered respondent to pay maintenance to the applicant in the amount of R8000.00 commencing 5 September 2010 and that subsequent payment be made on or before the 5th of every succeeding month. The respondent was also ordered to contribute towards the costs of the applicant in the amount of R2500.00, payable in instalments of R500.00, commencing 5 September 2010. The applicant averred that the respondent made payments towards maintenance in the amount of R32 706.33 as outlined in the founding affidavit and failed to make any contribution towards costs. Consequently at the launch of this matter he was in arrears in the amount of R145 793.67.

[5] Van der Merwe DJP incorporated the deed of settlement entered into by the parties into his order granting a decree of divorce. The order entailed the following:

That the respondent:

1. contribute an amount of R4000.00 in respect of each of the minor children J... and E... until they became self-supporting and, payment was to commence on 1 August 2012;
2. contribute all school fees up to tertiary level;
3. contribute 50% of school books, clothing, tours, excursions and extracurricular activities;
4. register the minor children as beneficiaries on his medical aid and to pay for additional medical needs not covered by the medical aid and, to reimburse the applicant within 30days of her producing proof of payment for such extras paid for by her;
5. deliver to the applicant within seven days of the divorce being granted a medical aid card for the minor children;
6. pay the outstanding fees of Kevin and Ms Fourie in the amount of

R1 796.10 by the end of August 2012;

The applicant averred that the outstanding maintenance between 1 August 2012 to 1 March 2013 stood at R64 000.00. She had failed to pay her share of the minor children's school fees due to none payment of maintenance. The respondent had also failed to pay his share of the fees which amounted to R19 995.00. The respondent had failed to provide her with a medical aid card as ordered. Several letters were addressed to the respondent's attorney regarding the arrears. At one stage he attempted to vary the maintenance ordered in the Rule 43 order. He abandoned the application.

[6] The respondent admitted having failed to comply 100% with the orders of Court, not because he was refusing or neglecting to do so but because he could not afford to pay. The answering affidavit is replete with matters not relevant to the application. I shall try to extract but a few of the several reasons advanced for not paying maintenance:

1. *"I have not read one statement in the applicant's founding affidavit that she or the minor children are in want or need due to my alleged failure to pay maintenance. The general slant of her affidavit is the respondent is a chartered accountant and he can therefore pay alternatively he must go to prison because I am entitled to his money" (para 3.1)*
2. *"Having to pay "100% of maintenance as per court order and unnecessary legal fees caused by the applicantimpacting negatively on my credit record with damaging consequences on my career and future income" (para 7.11)*
3. *"distress caused at my workplace by applicant and maintenance I had to pay....my employees resigned and so did my clients dwindle" (para 1.13)*
4. *"I therefore deny that I refused to comply with the said court order, save that I dismally failed to pay applicant's legal fees as ordered due to my miserable financial situation, which was and still is out of my control" (para 8.10)*
5. *"I am depicted as a financial powerhouse who simply refuses to pay*

maintenance. This, while the applicant is fully aware of my dire financial situation. ”

[7] The respondent denied that he had failed to hand over the medical aid card for the minor children or that he was responsible for paying the psychologist Ms Fourie. However, having reconciled his payments against the outstanding amounts alleged by the applicant he admitted that on his own calculations he was in arrears in respect of maintenance:

1. in the amount of R106 047.67 in respect of the order of 23 August 2010;
2. in the amount of R72 000.00 in respect of the order of 31 July 2010;

The school fees of the minor children still remained outstanding.

[8] In ***GFv SH 2011 (3) SA 25 (NG)*** at 34H-J Kollapen AJ cited with approval the matter of ***Fakie NO v CC11 (Systems (Pty) Ltd (4) SA 326 (SCA)*** at para 9, on the test to be applied in order to determine wilful or mala fide non compliance where the following was stated:

“The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide’. 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 the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)”

Kollapen J stated: *“the consequences of a committal for contempt impact on the freedom and liberty of the individual; at the same time orders of court create serious obligations and should not be lightly disregarded. At the end of the day the court, in considering an application for committal, must indeed be satisfied that there is no reasonable doubt that the party whose committal is being sought acted mala fide or wilfully. ”*

[9] As I see it, the respondent found an opportunity in his answering affidavit to deal

with all the complaints he had against the applicant which were not relevant to the determination whether his failure to comply with the said orders was not wilful deal with all the complaints he had against the applicant which were not relevant to the determination whether his failure to comply with the said orders was not wilful and ***mala fide***.

[10] Mr Kruger for the applicant argued that the respondent was in a position to make payment as ordered and that this could be deduced from the following:

1. The respondent was a chartered accountant and gainfully employed during certain periods. . The respondent concurred with the applicant that he had spent about R300 000 in legal fees up to 2012. He accounted for an amount of R173 483.80 and suggested that he had misplaced his other receipts.

I took into account the figures in 'annexure G10' of the respondent's papers and note that he paid more than a R100 000.00 in legal fees between August 2010 and July 2011. It is clear that the respondent had income to pay his legal fees over and above his other expenses. In my view he has failed to give a satisfactory explanation why he could not pay the applicant's costs of R23 057.05 and contribution towards costs of R2 500.00 during the above period, especially where in respect of the latter amount he had to pay in instalments of R500.00 per month.

2. The maintenance payable in respect of the Rule 43, the divorce order and contribution towards costs were payable directly to the applicant. Although the respondent was responsible for paying the minor children's medical aid, such contributions were not payable direct to the applicant except for the extras not covered by medical aid.

The respondent should not have included his medical aid contributions in his calculations of arrear maintenance. He was ordered to keep the minor children on his medical aid and to provide the applicant with a medical aid card. He admitted making payments to the applicant, the last being on 21 December 2011 for R2000.00 and that he was 23 months in arrears.

Therefore the arrears in respect Botha J's order were $23 \times 8000 = 184000 - 32706.33$ (maintenance paid) = 151 293.67 (arrears).

3. The respondents ABSA account reflected that during September and November

2012 substantial payments of R 37 701.19 and R37 660.73 respectively were deposited into the account. No maintenance was paid to the applicant. The respondent was again placed in a position to pay maintenance when during March 2013 he landed a three month contract paying R500.00 per hour limited to a maximum of 130 hour per month, he again failed to contribute towards maintenance as was ordered.

The payment to Ms Fourie formed part of the Divorce order. If respondent had a problem with it, he had the right to approach the court to rescind the order and he failed to do so was to appear and his attorneys should have informed him. It is inconceivable that he could have been under the mistaken belief that he was still married to her up to March 2013, that is, when he alleged he became aware for the first time of the order of 31 July 2012. The respondent has always been aware of his right to approach the Maintenance Court to have the amounts reduced. He failed to follow through with his application for a variation. That avenue is still open to him, however until such time that the order of Van der Merwe J is varied, the respondent is responsible for paying maintenance as ordered and of complying with all the other orders pertaining to medical aid, school fees and his 50% contribution towards other needs of his minor children.

[12] In my view, the respondent acted ***mala fide*** and wilfully in not complying with the orders because he first wished to settle other issues with the applicant as appears in his answering affidavit. He failed to make out a proper case in his counter application. The fact that he now seeks to have the maintenance reduced to R2000.00 per month per child is indicative of his ability to afford maintenance even at this reduced rate together with the ability to cater for his responsibilities towards his new family. If he can afford the reduced rate an attempt at least should have been made to contribute that amount as contended by the applicant. Furthermore, he failed to play open cards on how he could suddenly afford a reduced amount.

[13] In the circumstances I make the following order:

1. The respondent is declared to be in contempt of the orders of this court handed down on the, 30 July 2010, 23 August 2010 and 31 July 2012;
2. The Respondent is sentenced to four months imprisonment, wholly suspended for a period of three years, on condition that he pays the following:

- 2.1 The fees due to Ms Fourie in the amount of R1796.00 on or before 30 November 2013;
- 2.2 His 50% share towards the minor children's school fees which is in arrears as at the handing down of this order. The arrears should be paid on or before the 30 November 2013 to the applicant;
- 2.3 applicants costs in the amount of R23 057.05 and R2 500.00 on or before the 31 December 2013;
- 2.4 An amount of R5000.00 per month commencing 1 February 2014 and thereafter on or before the 7th day of each succeeding month until such time that the arrear maintenance calculated at R151 293. 67 has been fully paid.
- 2.5 Each party to pay his/her own costs of this application.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON

30 SEPTEMBER 2013

JUDGMENT RESERVED ON

03 OCTOBER 2013

ATTORNEYS FOR THE APPLICANT

LUBBE INGELYF

ATTORNEYS FOR THE RESPONDENT

IN PERSON

