

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO:8262/2008

In the matter between:

VINOTHA RAMIAH

Applicant

and

NEETHIPRAKASHUM RAMIAH

Respondent

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JUDGMENT

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Delivered : 6 November 2012

M PILLEMER, AJ:

[1] The Applicant seeks an order against her estranged husband holding him in contempt of court and committing him to periodical imprisonment for contempt of court. She alleges that the Respondent deliberately refused to comply with a court order made in her favour in terms of Rule 43 of the Uniform Rules of Court for maintenance and other relief pending the finalisation of their pending divorce action.

[2] An applicant in proceedings for civil contempt has to prove the order; service or notice; non-compliance; and wilfulness and *mala fides* beyond reasonable doubt. But, 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.

*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

[3] The Respondent admits the Rule 43 Order, which was granted on 17 December 2008, that it was served and that he has not complied with it since at least February 2010. He denies however that he is guilty of contempt of court because he contends that the court order had lapsed by February 2010 or, if it had not, that he genuinely believed it had lapsed and therefore had no intention to deliberately disregard an order of court.

[4] This defence is that described in *Gold v Gold* 1975 (4) SA 237 (D) at 239F, namely that Respondent did not act in willful disobedience of the order of court but in the *bona fide* belief that it had ceased to operate. In the *Gold* case Howard J (as he then was) after describing the nature of the defence added “as appears from

cases such as *Consolidated Fish Distributors (Pty.) Ltd. v Zive and Others*, 1968 (2) SA 517 (C) at pp. 523 - 4; *Haddow v Haddow*, 1974 (2) SA 181 (R) at p. 183; *Noel Lancaster Sands (Edms.) Bpk. v Theron en Andere*, 1974 (3) SA 688 (T) at p. 691, that is a complete answer to the case" which the respondent in Gold was called upon to meet. He too had failed to pay a maintenance order because he believed *bona fide* that it had fallen away.

[5] The reason the Respondent contends the order is not binding and had lapsed is that after the pleadings closed in the divorce action that he had launched and in which the Applicant had counterclaimed, the parties had become reconciled and had resumed a normal marriage relationship for almost a year thereafter. The pleadings were complete in December 2008. The rule 43 Order was made on 17 December 2008. The parties did not proceed with the action: instead, in March 2009, they chose to reconcile. Respondent moved back into the matrimonial home and the parties then lived together for almost a year as husband and wife resuming their marriage relationship with each other.

[6] The Respondent has testified in his answering affidavit that he *bona fide* believed that with the reconciliation the rule 43 Order fell away and ceased to be of any force or effect. He testified further that he was advised that the reconciliation may well have

extinguished the respective causes of action in the pending divorce action.

[7] He had good grounds for believing that the action fell away. He after all had abandoned his action and by her conduct the Applicant demonstrated that she had done likewise with regard to her counterclaim. There is no evidence that the reconciliation was conditional or an attempt "without prejudice" to the pending actions if it failed. The parties in March 2010 were faced with a choice as to whether they should reconcile or continue to litigate. These two courses of action were inconsistent with each other. Seeking a divorce on the grounds of irreconcilable breakdown is inconsistent with a reconciliation and the restoration of the marriage relationship and so, once the parties elected to reconcile, they made a decision to do something that was inconsistent with the action proceeding. Faced with two mutually destructive options electing to exercise the one results in law in the inference that the other is abandoned in accordance with the doctrine of election which has been described thus "where a man has two courses open to him, and he unequivocally takes one, he cannot afterwards turn back and take the other. Where there has been no unequivocal act, then whether an election has taken place or not is a question of fact" per Bristowe J in the often quoted extract from *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761. No attempt was made by the

Applicant in her replying affidavit to contradict the evidence that the reconciliation had been genuine or to suggest that her commitment to it was equivocal or that she had expressed any reservations whatsoever.

[8] In the context of a judicial separation that was part of our law before the Divorce Act came into effect it was explained in *Barnard v Barnard* 1926 WLD 137 that “the general principle of law is, of course, undoubted, that an existing deed or a judicial decree of separation is a bar to an action for restitution. But it is contended by Mr. Juta, for the plaintiff, that this is so only on condition that the parties have not thereafter composed their differences and come together again; that, once having come together again, the existing deed or separation order not only becomes inoperative for the period that parties do come and live together, but that it lapses and ceases to have any effect so soon as parties by their conduct have agreed that the order should no longer be of force as between them. And the point to be determined in the present case is whether such an order is to be deemed to be still in existence and a bar to proceedings for restitution of conjugal rights, merely because it has not been formally set aside by judicial process, where the parties thereto became reconciled and actually lived together, after the order was made.”

After a comprehensive discussion of the authorities on the topic the court then came to the following conclusion:

"The conclusion to which I have come, on this volume of authority, is that undoubtedly the weight of opinion expressed by the Judges of the Courts of South Africa is to the effect that, although the existence of a deed of separation, whether underhand or judicial, between husband and wife, operates as a bar to a subsequent action at the instance of either spouse for restitution of conjugal rights, yet where the parties themselves have elected to treat the agreement or decree as a nullity the Court will look upon it as having lapsed, and as having become inoperative; and if, thereafter, either party deserts the other, the party deserted is entitled to institute action for restitution of conjugal rights without going through the formality of first setting aside the decree or the agreement, as the case may be."

[9] The premise behind an order for maintenance *pendente lite* is that the parties are no longer in a normal marriage relationship and it is necessary therefore for the court to regulate issues such as maintenance pending the divorce. That premise falls away once the parties reconcile and resume a normal marriage relationship. It seems to me that much like the order for judicial separation, a rule 43 Order similarly lapses once the parties by their conduct have

agreed that the order should no longer be of force as between them when they resume their normal marriage relationship and, if it breaks down again so that there is a need to regulate the position again, then it is necessary for a fresh application to be made under Rule 43. The Order does not simply revive and is not latent lying in limbo during the reconciliation. This is on the assumption of course that the reconciliation is genuine and not conditional and that they have not agreed that if it fails the order will be revived.

[10] The marriage relationship broke down again eleven months later in February 2010 when the Applicant had an extra marital affair and the Respondent moved out of the matrimonial home. To my mind this constitutes an entirely new cause of action that arose when the marriage relationship broke down in February 2010 and if either of the parties wished to sue for divorce after February 2010 that party could only show an irretrievable breakdown that occurred in or after February 2010, because for almost a year prior to that they had been living as husband and wife in a normal marriage relationship. February 2010 is well over a year after the pleadings in the divorce action had closed in December 2008. The cause of action in the pending action could not be sustained because the evidence would show that the marriage relationship had not irretrievably broken down at that time.

[11] The Respondent did not resume making the payments in terms of the rule 43 order of December 2008 when the parties separated in February 2010 because, he says, he believed the December 2008 court order had fallen away. The Applicant, who was living as husband and wife with another man at the matrimonial home, did not complain about the failure of the Respondent to comply with the Rule 43 Order from the time of the second separation in February 2010 until twenty months later in November 2011. In November 2011 she made a demand and then launched the present application for contempt of court in March 2012 seeking the imprisonment of the Respondent. The only time the order was mentioned by her before November 2011 was in a letter from her attorney who stated in one paragraph in a long without prejudice letter that the Applicant "has advised that she will have the house sold to defray the bond expense and [Respondent's] share of the liabilities in terms of the Rule 43", without specifying what these were and without demanding compliance with the Order.

[12] About a month after launching the present contempt proceedings the Applicant brought proceedings in terms of rule 43 (6) for a variation of the 2008 Order. One of the issues before the court in those proceedings was whether or not the 2008 Order had lapsed. I was informed from the bar that Jeffrey AJ, who heard the application in August 2012, found that the Order had not fallen



away and made an order under Rule 43(6) that varied the original order. I was also informed that an *ex tempore* judgment was delivered. I have been able to access the digital recording of the judgment and have listened to the record of it being delivered. In the judgment the issue of whether or not the Rule 43 Order had lapsed is mentioned as one of the issues to be decided. The court records that counsel did not provide authority for the proposition that the Order had lapsed and states that he too had been unable to find any. The learned judge stated that in his view the court order was merely “put on hold” during the reconciliation but the reconciliation did not “do away with it altogether”. He rejected the contrary proposition as “having no merit whatsoever”, but unfortunately gave no reasons as to why he came to this conclusion. Accordingly what was held was that the effect of the reconciliation was to suspend the operation of the 2008 Order during the reconciliation and that it revived thereafter when the parties separated again in February 2010.

[13] Although for the reasons set out above I take a different view, as between the parties the issue has been decided. The Rule 43 Order has been varied and the Respondent is clearly bound by that order, which he is complying with. In my view an eleven month reconciliation is a clear election by both spouses to abandon the their respective claims and counterclaims for divorce. The

Respondent was the plaintiff in the action and he says that is what he thought occurred when the parties reconciled. He obviously had an intention to abandon the proceedings and acted upon that intention. I cannot see how the Applicant could be said to have done otherwise in relation to her counterclaim when she agreed to the reconciliation particularly since it endured for as long as it did and broke down on a basis different from the original cause of action in the summons. If the action was *de facto* abandoned and the respective causes of action were lost, then a rule 43 Order that was to operate pending the outcome of the action surely fell away. Even if the divorce action remained pending, the premise underlying the 2008 Order had fallen away which in turn caused the order to fall away as between the parties. However even if I am wrong on this (and as between the parties the issue has been resolved on the basis other than the one I consider correct), it is certainly to my mind a legitimate belief for the Respondent to have held and, that being so, there is no reason to disbelieve him when he testifies that he held such belief and, if that is the case, he was not in willful default of the order of court.

[14] Mr Chetty, who appeared for the Applicant, accepted that on the evidence on the papers the Respondent was initially *bona fide* in his belief that the Order had lapsed, but contended that once it was clear that the Applicant regarded the Order as extant then he

contended the Respondent should have regarded himself as being bound by it and his remedy was to seek a variation of the rule 43 order and not to simply flout it. He relied upon the judgment of Jeffrey AJ that the order remained in force. This is of little help to the Applicant because it was common cause that the Respondent is complying with the Order made by Jeffrey AJ. Mr Chetty also contended that the Respondent must have appreciated that he was bound from the time the without prejudice letter was sent to his attorneys in August 2011. The action had not been formally withdrawn and thus, Mr Chetty submitted, it cannot be said that the rule 43 Order, which operated pending the action, had fallen away. He contended that the Respondent could not have genuinely believed that he did not have to comply with the order, but could not point to any evidence that would support this submission other than the reference to the order in the without prejudice October 2011 letter in the extract quoted above. I do not agree with this approach. If Respondent genuinely believed the action had fallen away and with it the rule 43 order then he was not in contempt of the court order in failing to comply with it. There was no demand from February 2010 until November 2011 for him to comply with the order and he had no reason to doubt his view. I am satisfied that the evidence established that even if the Order did survive then the Respondent *bona fide* believed, and with good reason, that it

did not and therefore was not in contempt of the court in treating the order as if it had fallen away.

[15] Having regard to the history set out above it must have been plain to the applicant that she could not discharge the onus of proving *mala fides* beyond all reasonable doubt. It was unconscionable to my mind for the Applicant to seek to have the Respondent imprisoned by way of these proceedings when what she ought to have done was approach the court under rule 43, explaining the background, providing evidence of the changes since the order was granted more than three years earlier and either seeking a fresh order or, as she did, a variation of the original order if it had not lapsed. I consider these proceedings to be a costly abuse of the process of court.

[16] I am satisfied that the Respondent is not guilty of contempt in failing to comply with the order that he *bona fide* believed had fallen away and so in the result the application must therefore fail. Both parties agreed that costs should follow the result, which for the reasons set out in paragraph 15 above I would have awarded to the Respondent anyway.

[15] The application is dismissed with costs.

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M PILLEMER, AJ

Counsel for the Applicant : K J Chetty

Applicant's Attorneys: Pravda and Knowles

Counsel for the Respondent: E S Law

Respondent's Attorneys: Shaukat Karim & Co.

Date of hearing : 1 November 2012

Date of Judgment : 6 November 2012