

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

CASE NO. 3933/2011

In the matter between:

LEE-MARYN RAUTENBACH

APPLICANT

and

PAGEL RAUTENBACH

RESPONDENT

CORAM: NAIDOO, AJ

JUDGMENT BY: NAIDOO, AJ

HEARD ON: 1 DECEMBER 2011

DELIVERED ON: 8 DECEMBER 2011

NAIDOO AJ

- [1] The applicant, who was previously married to the respondent, seeks, in the main, an order for contempt of court against the respondent, arising out of his alleged non-compliance with the divorce order dissolving their marriage, in terms of which a Deed of Settlement was made an order of court on 30 June 2011. More specifically, the order (loosely translated) that the

applicant seeks is as follows:

1. That the respondent is found guilty of contempt of court and is sentenced to imprisonment for a period of thirty (30) days, alternatively, in the event that the respondent pays to the applicant the arrear amount of R38 000.00, he should be sentenced to thirty (30) days' imprisonment from the date of this order, which sentence is suspended for a period of three years on condition that he is not found guilty of contempt of an order of this Honourable Court or of any other court in the Republic of South Africa, as a result of his failure to comply with such an order;

2. That the respondent be ordered to pay the costs of this application on an attorney and client scale.

3. Further and/or alternative relief.

The applicant was represented by Ms H Murray and the respondent was represented by Mr WJ Groenewald.

[2] The Deed of Settlement provided, inter alia, that the

respondent would be obliged to:

- 2.1 pay maintenance of R1 500.00 per month per child in respect of the four minor children born of the marriage;
- 2.2 hand over to the applicant a Honda FRV motor vehicle;
- 2.3 pay an amount of R75 000.00 to the applicant as a cash settlement, which amount was payable in monthly instalments of R3000,00 per month from the date of divorce;
- 2.4 pay arrear maintenance to the applicant amounting to R94 600.00 in instalments of R5000.00 per month, commencing on 1 April 2011, and thereafter on or before the first day of each succeeding month until the final amount is paid; and
- 2.5 make a contribution to the applicant's legal costs in the amount of R10 000.00, payable from the date of divorce.

[3] The applicant, in her Founding Affidavit which she signed on 11 August 2011, alleges that the respondent has failed to honour any of the terms of the Deed of Settlement, despite demand being addressed to the respondent's attorney.

[4] The respondent, however, paints a different picture in his Opposing Affidavit. He states that early in July 2011, when he learned that the divorce had been finalised, he handed the motor vehicle to the applicant, on the understanding that, and in accordance with the Deed of Settlement, she would continue with the payments towards the vehicle. On 28 July 2011, he paid the applicant an amount of R14 000.00, being R3 000,00 in respect of the cash settlement, R5 000,00 in respect of arrear maintenance and R6 000.00 in respect of maintenance for the children. He sets out in detail what his financial position has been, and also admits that he has not paid the amount in respect of his contribution to the applicant's legal costs and other amounts, totalling R30 000.00. The respondent acknowledges his indebtedness in terms of the Deed of Settlement and asserts that he has made every effort to pay the amounts required of him, but his dire financial situation has prevented him from fully complying with his obligations.

[5] The respondent alleges that, around the time he signed

the Deed of Settlement, he was promised an increase in his salary by his employer but it seems that did not materialise, plunging him into the financial crisis that he finds himself in. An affidavit by a member of his employer was filed confirming that the promised increase could not be given due to “unforeseen circumstances”

- [6] The applicant admits in her Replying Affidavit that she received the motor vehicle from the respondent in July 2011, that he made payment of an amount of R14 000.00 at the end of July 2011 and, in addition, that he made further payments of R14 000.00 each month in August 2011, September 2011 and October 2011. She also admits that she refunded to the respondent the payments in respect of the motor vehicle which were deducted from his bank account after the divorce. It is noteworthy that these admissions are in stark contrast to the allegations in the applicant’s Founding Affidavit, where she states that the respondent did not hand the motor vehicle to her and that he made no payments at all in terms of the Deed of Settlement. It is also noted

that in spite of these allegations in the Founding Affidavit, the applicant, in her Replying Affidavit, denies alleging that the respondent did not hand the vehicle to her.

[7] In her Replying Affidavit, the applicant alleges that the respondent is working for his brother. Ms Murray suggested during her address that the respondent's family controlled his salary and were thus able to manipulate his salary advice, (presumably) to enable him to avoid meeting his financial obligations in terms of the Deed of Settlement. The applicant also alleges that since the divorce the respondent purchased two luxury vehicles for himself and his girlfriend.

[8] This court must now decide whether the respondent is guilty of contempt of court. Contempt of court has been defined as *“the deliberate, intentional disobedience of an order granted by a court of competent jurisdiction”* [Consolidated Fish Distributors (Pty) Ltd v Zive 1968(2) SA 517 (C)]

Both Counsel referred me to the case of **Fakie NO v CCII Systems (Pty) Ltd 2006(4) SA 326 (SCA)**, where

the court summarised the position regarding contempt of court. One of the requirements enunciated by the court **(See Erasmus “Superior Court Practice” B1-58G)** is that the applicant, in particular, bears the onus to prove, beyond reasonable doubt, the requisites of contempt (the order; service or notice; non-compliance; and wilfulness *and mala fides*). Once the applicant has proved these requisites the respondent bears an evidential burden in relation to wilfulness and *mala fides*. In other words, he must provide evidence that raises a reasonable doubt as to whether his non-compliance with the court order is wilful and *mala fides*. Should the respondent fail to do so, contempt will have been established beyond reasonable doubt. Where the respondent has genuinely tried to comply with the court order and has failed to do so through no fault of his own, or has been unable (not unwilling) to do so, proceedings for committal will fail. Poverty or financial insufficiency may well be regarded as factors rendering a respondent unable to comply with the court order.

[9]. The applicant in this matter, by her admission in her

Replying Affidavit, was in possession of the motor vehicle as claimed by the respondent. She took possession of it approximately one month prior to her deposing to the Founding Affidavit herein. At the time she signed the Founding Affidavit, she was also in receipt of the payment of R14 000.00, which the respondent made to her on 28 July 2011. The applicant, however, failed to mention this, and in fact specifically alleged that the respondent had failed to comply at all with the order of court.

- [10] To my mind, it appears as though the respondent has made the best efforts to honour the court order referred to in paragraph [1]. It is true that he has not honoured the order fully, and he freely admits that he is still in arrear in an amount of R30 000.00. While the court remains concerned that the amounts outstanding relate, in part, to the maintenance of the minor children, the issue that this court must adjudicate is that of contempt of court. The explanations tendered by the respondent and the evidence he has advanced in support thereof are, in my view, sufficient to discharge the evidential

burden on him relating to wilfulness and *mala fides*. The applicant has not played open cards with the court for the reasons I have outlined in paragraph [9] above. In addition, she raised, in Reply, that the respondent works for his brother and that he purchased two luxury vehicle since the divorce. These are factors which significantly bear on the respondent's non-payment of the amounts due in terms of the court order and would have been within the knowledge of the applicant at the time she launched this application. These factors, if true, would have assisted the applicant to establish wilfulness and/or *mala fides* on the part of the respondent.

- [11] The applicant's failure to do so in her Founding papers is telling and adds cogency to the respondent's allegation that she expressed the intent to "ruin him". It does not assist the applicant to have raised these issues in Reply as it is trite that an applicant in motion proceedings must stand or fall by his/her Founding papers. The applicant, in my view, has failed to make out a case for the relief she seeks.

[12] I, accordingly, make the following order:

The Application is dismissed with costs.

NAIDOO, AJ

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