

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

Case no: 193/2018

In the matter between:

A[...] D[...]

Applicant

and

R[...] D[...]

Respondent

REASONS FOR JUDGMENT

Zilwa AJ

[1] This matter came before me as an urgent application in which the Applicant sought the following orders:

- 1.1 declaring the Respondent guilty of contempt of the Order of Acting Justice Zietsman granted on 2 March 2021
- 1.2 declaring the Respondent guilty of contempt of the Order granted by Acting Justice Naidu granted on 12 October 2021;
- 1.3 that a period of imprisonment be imposed on the Respondent with such period of imprisonment to be suspended on conditions deemed appropriate by the Court;

- 1.4 that a fine be imposed upon the Respondent as deemed appropriate by the Court; and
- 1.5 that the Respondent be ordered to pay costs of the application on an attorney and client scale.

[2] The application was opposed by the Respondent and she further brought an urgent counter application where he sought, *inter alia*, the appointment of a parenting co-ordinator, a variation of the Order of 2 March 2021 and the appointment of a therapist to the minor children.

[3] Sequel to the granting of the order, the Respondent sought reasons of the order on 6 December 2023 but was only brought to my attention on 31 January 2024. The file was delivered to me on 12 February 2024.

Factual Background

[4] The Respondent initiated an action for divorce where there was also an issue of the minor children that needed to be determined. The parties concluded a deed of settlement which was ultimately made an order of court by Acting Justice Zietsman on 2 March 2021. This is one of the orders which the Applicant contends that the Respondent is in contempt of.

Naidu AJ's order

[5] When the Respondent failed to comply with the order of 2 March 2021, the Applicant launched a contempt of court application which was heard by Acting Justice Naidu wherein, *inter alia*, the Respondent was ordered to comply with the divorce order in all material respects.

[6] In reaction to the application brought, the Respondent brought a counter-application for variation and such application was postponed *sine die*.

[7] The application for contempt which served before me was a second one and it was opposed by the Respondent. What the parties are fighting about is the issue of access to the minor children. On one hand the Respondent believes that the Applicant's supervised access by the latter's mother is no longer suitable as it was at the time of conclusion of the divorce settlement. On the other hand, the Applicant believes that the supervision by his mother is still suitable. He further believes that the supervision is not even necessary and he is basing his view on the clinical psychologist report compiled by Professor Stroud. The report opined that the Applicant is psychologically fit to have unsupervised contact with the minor children. As a result thereof, the Applicant launched a variation application for her contact to be unsupervised and that application is still pending.

Legal Framework

[8] It is trite that the object of contempt proceedings is to obtain imposition of a penalty in order to vindicate the Court's honour consequent upon a disregard of its order as well as to compel performance in accordance with the Order.¹

[9] It is further trite that settlement agreements that have been made orders of court in divorce actions are Orders of court like any other order. In *PL v YL*², Van Zyl ADJP, as he was then, writing for the Full Bench had the following to say:

'The parties may, however, choose to agree to ask the court to give judgment on the issues raised by the action in accordance with the terms of their settlement agreement. One of the advantages of this arrangement is that the court retains jurisdiction over the matter in the sense that it has the inherent power or authority to ensure compliance with its own orders. This enables the parties, in the event of a failure by any one of them to honour the terms of the order, to return directly to the court that made the order, and to seek the enforcement thereof without the necessity of commencing a new action.'

[10] For as long as the order of 2 March 2021 has not been set aside nor varied, the Respondent has no other option but to fully comply even if she may feel it is wrong or incorrect in some respects. In a similar case that involved children, the

¹ See : *East London Local Transitional Council v MEC For Health, Eastern Cape* 2001 (3) SA 1133 (Ck) at 1140J – 1141 A; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 325 (SCA) at 333A-B; *Replication Technology Group v Gallo Africa* 2009 (5) SA 531 (GSJ) at 549C-D; *Lan v OR Tambo International Airport Department of Home Affairs Immigration Admissions* 2011 (3) SA 641 (GNP) at 653C – 655I

² 2013 (6) SA 28 (ECG) at para 10; Also see : *Eke v Parsons* 2016 (3) SA 37 (CC); *Moraitis Investments (Pty) Ltd & Others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at para 10

Constitutional Court had an occasion to assert the legal position in a matter of *SS v VVS*³ where Kollapen AJ, as he was then, had the following to say:

[23] All court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all. Those interests include the protection of the rights of children and the collective ability of our nation to "free the potential of each person" [8] including its children, which ring quite powerfully true in this context.

[24] Thus, when courts act as the upper guardian of each child they do so not only to comply with the form that the Constitution enjoins us to be loyal to, [9] but with the very spirit that is encapsulated in the provisions of section 28(2) of the Constitution that "a child's best interests are of paramount importance in every matter concerning the child".

[25] This is precisely such a matter. The Order was about ensuring the best means of protecting and enhancing the interests of the minor child, and the scope and the breadth of the provisions of the settlement agreement appear to compellingly underscore that objective. The High Court, when it granted the decree of divorce, must then have been satisfied that the interests of the minor child were well catered for.

³ 2018 JDR 0275 (CC)

[26] When those interests are imperilled or when the obligation undertaken by either parent to the child is not diligently complied with, then courts are enjoined to interfere in a manner that best protects those interests. In Bannatyne, this Court dealt with the significance of maintenance obligations and the duty of courts to ensure compliance therewith.'

[11] In *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae*⁴, Mokgoro J at para 27 had the following to say:

'If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.'

Conclusion

[12] It is my view that the Respondent's actions have proven herself not to be prepared to respect this Court's orders considering that there was a previous application for contempt which compelled her to comply with all the terms of the order issued on 2 March 2021. Notwithstanding the compulsion through the order of Naidu AJ, she continues to disobey both orders. I am satisfied that her actions are contemptuous and this Court was left with no option but to issue a coercive order on 28 November 2023.

⁴ 2003 (2) SA 363 (CC)

[13] I was satisfied that all the elements for contempt as enunciated in *Fakie (supra)* were met and therefore the Applicant ought to succeed in his application.

[14] The counter application that was launched on urgent basis was a clear attempt to circumvent compliance with the previous court orders issued and I did not find any sufficient grounds for urgency and that is the reason why I ruled that it should be struck off from the roll with costs. Even if I am wrong in my conclusion in this regard, there is another reason why the counter application could not be entertained. Assuming that the Respondent had a strong case in her counter application, she would be able to get substantial redress in due course but compliance with the orders already issued could not be postponed pending appointments of people the Respondent believes would be able to supervise the Applicant's contact with his children.

[15] There was also a defence of *lis pendens* raised by the Applicant which was conceded by Ms Ellis, on behalf of the Respondent. It was common cause between the parties that there is a pending application for variation which was postponed *sine die* in March 2021. The said application was between the same parties and on the same subject matter and therefore it meets all the requirements of *lis pendens*. For this reason I would not have entertained the application in any event even if I was satisfied that it was sufficiently urgent.

[16] Resultantly, I reiterate the order granted:

- 14.1 That the Applicant's non-compliance with the Rules relating to forms, service and time periods is hereby condoned and the matter is allowed

to be heard as one of urgency in terms of Rule 6(12) of the Uniform rules.

14.2 That the Respondent is found to be guilty of contempt of this Court's order issued by Mr Acting Justice Zietsman on 2 March 2021 under case number 193/2018.

14.3 That the Respondent is found to be guilty of contempt of this Court's order issued by Mr Acting Justice Naidu on 12 October 2021 under case number 193/2018.

14.4 That the Respondent be committed to prison for a period of 30 days, which committal is suspended for a period of one year on condition that she complies with the orders granted by this Honourable Court on 2 March 2021 and 12 October 2021 within 3 days from the date of this order.

14.5 That the Respondent be and is hereby ordered to pay costs of the application on a party and party scale.

14.6 That the counter-application be and is hereby stuck off from the roll of urgent matters, with costs.

14.7 That in accordance with Rule 49(1)(c) of the Uniform Rules, the reasons for this order will be furnished to either party on application.

H ZILWA
ACTING JUDGE OF THE HIGH COURT

Date of hearing : 28 November 2023
Date of order : 28 November 2023
Date of reasons requested : 06 December 2023
Date of reasons of judgment : 20 February 2024

Appearances:

For Applicant: Mr KD Williams
Instructed by: Badenhuizen Inc., Walmer, Gqeberha

For Respondents: Ms L Ellis
Instructed by: Kaplan Blumberg Attorneys, Gqeberha