

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. YES

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JC UYS SC

15 OCTOBER 2024

CASE NO:2023-124378

In the matter between:

M[...] **A[...]** **M[...]**

Applicant

And

M[...] **E[...]** **M[...]**

Respondent

JUDGMENT

UYS AJ

[1] Applicant seeks an order declaring the Respondent to be in contempt of paragraph 2 of an order by this court (granted on 20 May 2022 under case number 2021/18161) as well as *inter alia* a declaratory order to the effect that Respondent is

in breach of the settlement agreement entered into between the Applicant and Respondent in their earlier divorce proceedings.

[2] A decree of divorce was granted under paragraph 1 of the aforesaid 20 May 2022 order and a settlement agreement concluded between the parties was made an order of court under paragraph 2 thereof.

¹

[3] In addition to the aforesaid relief, the Applicant seeks that, in respect of the transfer of one-half share of Remaining Extent of Erf 7[...], B[...] (*“the Bryanston property”*), Respondent be directed to :

[3.1] sign any and all documents required in terms of the relevant legislation to pass transfer thereof to Applicant;

[3.2] make payment of the transfer costs occasioned by transfer of such one-half share; and

[3.3] settle all outstanding costs in respect of the property payable to the relevant service providers, alternatively effect payment thereof to the conveyancers,

all of the above within a period of 30 days of granting of such order sought.²

[4] Applicant furthermore also seeks that a fine, deemed appropriate by the court, be imposed on the Respondent and/or that the Respondent be committed to a period of imprisonment suspended on conditions deemed appropriate and ultimately also for Respondent to be ordered to pay the costs of the application on the attorney and own client scale.³

[5] The essence of the relevant history and facts herein are to a large degree common cause between the parties.

¹ Order by Mahalelo J dated 20 May 2022 under case number 2021/18161, CaseLines page 010-4

² paragraph 4 with sub-paragraphs thereto of Applicant's notice of motion, CaseLines pages 01-2 to 01-5

³ Applicant's notice of motion, paragraphs 5, 6 and 7, CaseLines pages 01-2 to 01-5. In the draft order provided by Applicant, the issue pertaining to an appropriate order consequent upon a finding of the Respondent to be in contempt of court is sought to effectively be postponed and for enrolment at a later date in the event of Respondent failing to adhere to relief compelling Respondent to remedy its failures.

[5.1] Applicant and Respondent were married in community of property on 29 November 2000 with their marriage dissolved through order of court on 20 May 2022 under case number 2021/18161.⁴

[5.2] The decree of divorce so granted resulted from an action for divorce instituted by the Respondent against the Applicant and consequent upon an agreement entered into between Respondent and Applicant in settlement of the said divorce action.⁵

[5.3] At the time of Applicant's and Respondent's divorce and the settlement agreement so entered into, they were the co-owners⁶ of *inter alia* three immovable properties, to wit:

[5.3.1] the Bryanston property, situate at 5[...] O[...] Street, B[...];

[5.3.2] a property situated at 1[...] S[...] A[...] Drive, E[...] G[...] Estate, V[...], Gauteng⁷; and

[5.3.3] a sectional title unit described as Unit 2[...], R[...] O[...] Estate, M[...], Gauteng⁸.

[5.4] It is aspects pertaining to transfer of and payments to be made in respect of the Bryanston property and the provisions contained in the settlement agreement pertaining to that property, that forms the essential subject matter of this application.

[5.5] The crux of the dispute between Applicant and Respondent revolves around certain of the provisions contained in the settlement agreement⁹ and specifically the provisions under clause 9 relating to the Bryanston property¹⁰, read with clause 15 need particular consideration. Clause 9.1 provides as follows:

"9.1 With regards to the immovable property known as 5[...] O[...] Street, B[...], South Africa (hereinafter referred to as 'the first property'):

⁴ See footnote 1 above

⁵ CaseLines pages 01-22 to 01-46

⁶ resulting from their marriage in community of property on 29 November 2000

⁷ herein referred to as the "*Golf Estate property*"

⁸ herein referred to as the "*Morningside property*"

⁹ CaseLines pages 01-22 to 01-46; such settlement agreement made an order of court by Mahalelo J on 20 May 2022 as aforesaid

¹⁰ defined in the settlement agreement as "*the first property*"

9.1.1 *The parties are the registered and beneficial co-owners of the immovable property in equal and undivided shares;*

9.1.2 *It is agreed that the First property is to become the Defendant's sole and exclusive asset;*

9.1.3 *The Plaintiff agrees that the First property will be transferred into the Defendant's name in terms of a section 45bis(1)(a) endorsement or any other acceptable means of transfer;*

9.1.4 *Both the Plaintiff and the Defendant shall sign and do all things necessary to complete the registration process;*

9.1.5 *The transfer contemplated herein shall be on a voetstoots basis and no warranties, representations or the like concerning the state of the immovable property have been made by or on behalf of the Defendant;*

9.1.6 *The Plaintiff shall bear all and any costs of transfer herein contemplated;*

9.1.7 *The Plaintiff shall use the proceeds of the third property (Morningside) sale to pay for the transfer costs;*

9.1.8 *The Plaintiff shall receive no value for the property;*

9.1.9 *The Plaintiff undertakes to pay rates and taxes, water costs, and the monthly alarm/security fees until registration of transfer of the first property takes place. From the date of the transfer, then it shall be the sole responsibility of the Defendant.*¹¹

(own emphasis)

[5.6] Clause 15 of the settlement agreement provides : *"All outstanding debts in either party's name on date of signature hereof that would have been shared equally between the parties, as declared during the Discovery process, shall be settled by Plaintiff."*

[5.7] It was at Respondent's (then as Plaintiff) instruction and request that the court made the settlement agreement an order of court.¹²

¹¹ The reference to "*Plaintiff*" in the aforesaid quoted clauses was a reference to Respondent herein with the reference to "*Defendant*" in the aforesaid clauses having been a reference to Applicant herein

¹² It also had been expressly agreed upon between the Applicant and Respondent under clause 19 of the said settlement agreement that the agreement was to be made an order of court, CaseLines page

[5.8] It also stands admitted by Respondent that Respondent was “... well aware that the Honourable Court had made the settlement agreement an order of court”.¹³ The allegation that it is “... uncontroverted that the Respondent is aware of the order and his obligations which arise from the said order” similarly stands admitted.¹⁴

[5.9] The reason for Respondent’s non-compliance is alleged by Respondent as follows: “... the Applicant and I signed the addendum agreement with First National Bank which, in hindsight, affected my ability to perform in terms of the settlement agreement because my performance was conditional upon me receiving the proceeds of the sale of the Morningside property”.¹⁵

[5.10] The Respondent continued and alleged that the said aforesaid condition: “... could not be fulfilled due to the fact that the property from whose proceeds it was envisaged I would pay the transfer fees, has been realised and all its proceeds have been paid to First National Bank per the addendum agreement.”¹⁶

[5.11] The addendum referenced in paragraph [5.10] above was an addendum entered into during or about 2023 to an earlier agreement between Applicant, Respondent and RMB Private Bank, a division of FirstRand Bank Limited, pertaining to essentially security over also the Bryanston property, with it agreed between Applicant, Respondent and RMB Private Bank that the third property would be realised from the original deed on condition that RMB Bank was in receipt of R874 000,00 and the proceeds from the sale of the Morningside property with same to be utilised to permanently reduce the outstanding balance in respect of the mortgage bond loan.¹⁷

01-44 to 01-45. The express allegation in this regard made by Applicant in Applicant’s founding affidavit stands admitted (Applicant’s founding affidavit, paragraph 24, CaseLines 01-13; Respondent’s answering affidavit, paragraph 59, CaseLines 09-18).

¹³ Applicant’s founding affidavit, paragraph 26, CaseLines page 01-13. Respondent’s answering affidavit, paragraph 59, CaseLines 09-18.

¹⁴ Founding affidavit, paragraph 26, CaseLines page 01-13; answering affidavit, paragraphs 59-61, CaseLines pages 09-18.

¹⁵ Answering affidavit, paragraph 60, CaseLines page 09-18

¹⁶ Answering affidavit, paragraph 61, CaseLines pages 09-18 to 09-19

¹⁷ Founding affidavit, paragraphs 27, 28 and 29, the content thereof admitted by Respondent at paragraph 62 of Respondent’s answering affidavit, CaseLines page 09-19. The undated deed of amendment in respect of the “RMB structured loan” appears at CaseLines page 01-55 seemingly bearing both Applicant’s and Respondent’s signatures at CaseLines 01-56

[6] Applicant's allegation that Respondent has failed to comply with the relevant provisions of the settlement agreement¹⁸ is met with a bald denial by Respondent.¹⁹ Respondent's purported referencing to the existence of factual disputes²⁰ is clearly misplaced and without merit.

[6.1] The bald denial by Respondent does not serve to establish the existence of factual disputes.²¹

[6.2] It follows from the content of Respondent's affidavit *per se* that there had not been compliance with the settlement agreement and thus with paragraph 2 of the order granted by Mahalelo J on 20 May 2022. Respondent on its own version did not comply with the settlement agreement as Respondent purportedly held the view that:

[6.2.1] clause 9.1.7 created two conditions precedent, to wit the first that the Morningside property had to be sold before Respondent's obligation to pay transfer costs would arise and the second that the proceeds from the sale of the Morningside property had to be in Respondent's possession to enable him to fulfil his obligation pertaining to payment of the transfer costs in respect of the Bryanston property;²² and

[6.2.2] through signing of the addendum pertaining to the agreement between RMB, Applicant and the Respondent, Respondent forfeited the proceeds from the sale of the Morningside property as a result of which Respondent alleges that his "... *obligations to pay transfer costs* [in respect of the Bryanston property] *were extinguished by the addendum agreement.*"²³

¹⁸ Founding affidavit, paragraph 32, CaseLines 01-15

¹⁹ Answering affidavit, paragraph 64, page 09-19

²⁰ See answering affidavit, paragraphs 50 and 51, CaseLines pages 09-16 to 17

²¹ See *Wightman t/a JW Construction v Headfour and Another* 2008 (3) SA 371 (SCA) at paragraph [13]

²² Respondent's answering affidavit, paragraph 43, CaseLines 09-15

²³ Answering affidavit, paragraph 47, CaseLines page 09-16

[6.3] Given the aforesaid, the denial by Respondent that Respondent had failed to comply with the relevant provisions of the settlement agreement, is clearly without substance.

[7] The defences raised by Respondent as to why the court order which incorporated the settlement agreement had not been complied with by him were, his aforesaid reliance on an alleged condition precedent allegedly contained within clause 9.1.7 of the agreement and the obligation on Respondent to have paid the transfer costs allegedly having been extinguished through the addendum agreement and pertaining to the relief relevant to contempt sought, that Respondent “... *genuinely believed that I was entitled to act in the manner in which I did owing to a mistaken but bona fide belief that I was entitled to do so.*”²⁴

[8] The proper and correct interpretation of the settlement agreement must be effected mindful of the relevant state of the law pertaining thereto which had been aptly summarised in the often quoted decision by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁵ where it was *inter alia* held that:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.” (own emphasis)

²⁴ Answering affidavit, paragraph 66, CaseLines page 09-20

²⁵ 2012 (4) SA 593 (SCA) at paragraph [18]

[9] On a normal grammatical interpretation in accordance with the principles clearly summarised in *Endumeni*²⁶, clause 9.1.7 of the settlement agreement cannot be held to contain two conditions precedent as alleged by the Defendant. The provisions of clauses 9.1.1 up to 9.1.6 and 9.1.8 and 9.1.9 of the settlement agreement militate against such interpretation.

[10] To find that the conclusion of the so-called RMB addendum²⁷ between RMB Private Bank, Applicant and Respondent had the effect of exonerating or excusing Respondent from the obligation to effect payment for the transfer of the Bryanston property as provided for in the settlement agreement and/or from the obligation in respect of other payments, are simply devoid of any logic and cannot be said to flow from the normal grammatical interpretation of the respective clauses in accordance with the aforesaid recognised principles of interpretation.

[11] Such aforesaid interpretation would not only be non-sensible, but would furthermore fail to take account of the context in which the provisions appear and would also undermine the clear purpose of the document so concluded between the parties at the insistence of the Respondent, clearly with full knowledge of all relevant facts when it was so concluded.

[12] Clause 9.1.6 of the settlement agreement in no uncertain or ambiguous terms provided that the Plaintiff (Respondent) “... *shall bear all and any costs of the transfer herein contemplated*”.

[13] Mindful of the fact that Applicant and Respondent were married in community of property, it follows that the inclusion of clause 9.1.7 also has to be read mindful of the provisions under clause 9.3 thereof pertaining to such Morningside property and where under clause 9.3.6 provision was made that the nett proceeds of the third property “... *will be for the sole benefit of the Plaintiff, save as specified otherwise in this agreement*”. (own emphasis)

²⁶ See footnote 25 above

²⁷ CaseLines 01-55

[14] The conclusion of the addendum to the earlier agreement entered into between RMB Private Bank, Applicant and Respondent pertaining to the proceeds of the sale of the Morningside property, did not and could not have had any effect on the obligations on Respondent arising from the settlement agreement entered into.

[15] The provisions under clause 9 of the settlement agreement further have to be read with the provisions contained under clause 15 of the settlement agreement so entered into and made an order by Mahalelo J on 20 May 2022, such clause providing that *“All outstanding debts in either party’s name on date of signature hereof that would have been shared equally between the parties, as declared during the Discovery process, shall be settled by the Plaintiff.”* (own emphasis)

[16] On a proper interpretation of the relevant clauses of the settlement agreement forming the subject matter of the current application, it can thus also not be said that Respondent has been discharged from his obligation to perform in terms of the relevant clause of the agreement pertaining to the transfer of the property and costs incidental thereto, specifically also the payment of the transfer costs²⁸ simply resulting from no proceeds of the Morningside property being available from which Plaintiff would have been entitled to pay the transfer costs in respect of the Bryanston property.

[17] Furthermore, the sale of the Morningside property and the proceeds not being available to Respondent can by no stretch of the imagination have rendered Applicant’s current application moot and academic as sought to be argued on behalf of the Respondent.²⁹

²⁸ thus clauses 9.1.2 to 9.1.6 of the agreement

²⁹ Respondent’s supplementary heads of argument, paragraph 12 read with paragraphs 22 to 27 thereof, CaseLines pages 12-21 and 12-25 to 12-26

[18] In the result, it is held that Respondent is currently in breach of clauses 9.1.2, 9.1.3, 9.1.4, 9.1.6, 9.1.9 and 15 of the settlement agreement and an order will (again) be granted against Respondent in this regard.³⁰

[19] The question now arises whether Respondent's breach of the agreement and thus non-compliance with the earlier order of court is of such a nature to hold Respondent to be in contempt, this pursuant to paragraph 2 of the order granted by Mahalelo J on 20 May 2022 as aforesaid.

[20] The current scenario is a typical example of an instance where a party, in this instance the Respondent, had been ordered to do something (*ad factum praestandum*) and where there has been non-compliance, which could entitle a party (the Applicant) to bring an application not only for the Respondent to be held in contempt of court, but also for a sanction to be imposed and an order of compliance.³¹

[21] The applicable principles and relevant onus pertaining to contempt of court were aptly summarised in *Fakie NO v CCII Systems (Pty) Limited*³² where the Supreme Court of Appeal held as follows:

“(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

³⁰ This thus in addition to the order granted by Mahalelo J through which the settlement agreement was made an order of court consequent upon dismissal of Respondent's purported but meritless defences stipulated above

³¹ Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th edition) at page 1099

³² 2006 (4) SA 326 (SCA) at paragraph [42]

- (d) *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.*
- (e) *A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”*
- (own emphasis)

[22] With regard to the above quoted portion from the *Fakie* judgment³³, the court in *Readam v BSB International*³⁴ elaborated and held upon the authority of the *Fakie* judgment:

“... A wilful and mala fide defiance must be established beyond a reasonable doubt. No onus of proof rests on a person accused of contempt, but a burden to adduce evidence from which an inference of absence of wilfulness or mala fides can be deduced does rest on such a person, once proof is adduced of the existence of an order, service on the person, and non-compliance.”³⁵

(own emphasis)

[23] The court in *Readam*³⁶ continued and stated that:

“The word ‘wilful’ is a dangerous one. It is a pejorative term. It embraces more than just the notion of ‘intentionally’ but also the mantle of rebuke; ie the intention is unsavoury. In this sense the usual mantra which requires both ‘wilful’ conduct and ‘mala fide’ conduct seems to be tautologous. A negligent failure to perform can never be wilful. A mala fide failure is always wilful.”³⁷

[24] The test whether disobedience of a civil order constitutes contempt is thus whether the breach was committed deliberately and *mala fide* with it also held that:

³³ See footnote 29 above

³⁴ 2017 (5) SA 183 (GJ)

³⁵ at paragraph [9]

³⁶ *supra*

³⁷ at paragraph [10]

“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 objective unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).”³⁸

(own emphasis)

[25] As already stated above, on Respondent’s papers, the only defences raised are firstly that clause 9.1.7 purportedly created two conditions precedent, the latter seemingly by necessary inference not having materialised, to wit that the proceeds of the Morningside property sale actually had to be in Respondent’s possession to fulfil his obligation of the payment of the transfer costs and secondly that Respondent’s obligations to effect payment of the transfer costs had been extinguished by the addendum agreement concluded between RMB Private Bank, Applicant and Respondent pertaining to the Morningside property. I have already found both the aforesaid purported defences to be without any merit.

[26] The only allegation that remains is the mere *ipse dixit* of Respondent that:
“... As a person I generally believed that I was entitled to act in the manner in which I did owing to a mistaken but bona fide belief that I was entitled to do so.”³⁹

[27] With the order by Mahalelo J of 20 May 2022, notice thereof and non-compliance therewith already found proven, it follows that Respondent bears an evidential burden in relation to wilfulness and *mala fides* Respondent, thus he had to establish a reasonable doubt whether non-compliance by him with the order was wilful and *mala fide*.⁴⁰

[28] Both the two purported defences raised by Respondent on its papers (already found to be without merit) and Respondent’s refusal to have complied with

³⁸ *Fakie NO v CCII Systems (Pty) Limited supra* at paragraph [9]

³⁹ Respondent’s answering affidavit, paragraph 66; CaseLines page 09-20

⁴⁰ *Fakie NO v CCII Systems (Pty) Limited supra* at paragraph [42]

the order by Mahalelo J were objectively unreasonable and thus evidenced a lack of good faith, with the only ground raised on the papers of it having been *bona fide*, being the mere unsubstantiated and unfounded *ipse dixit* of the Respondent as quoted above.⁴¹

[29] Respondent has thus failed to meet the threshold of his evidentiary burden to establish reasonable doubt on whether his non-compliance was wilful and *mala fide*.

[30] With regard to the issue of costs and mindful of the conduct of Respondent herein, to wit his failure to have adhered to the order of Mahalelo J which incidentally as aforesaid was an order sought by Respondent (then as Plaintiff) in his own divorce action, I deem it appropriate to grant a punitive costs order herein.

[31] In the result I make the following order:

1. Mr M[...] E[...] M[...] (*“Respondent”*) is found to be in contempt of the court order granted on 20 May 2022 by Mahalelo J under case number 2021/18161 through which the settlement agreement entered into between M[...] A[...] M[...] (*“Applicant”*) and Respondent dated 23 March 2022 and 6 April 2022 respectively, was made an order of court, this specifically in respect of clauses 9.1.2, 9.1.3, 9.1.4, 9.1.6, 9.1.8, 9.1.9 and 15 thereof.
2. The Respondent is ordered to, within 30 (thirty) days of the granting of this order:
 - 2.1 do all things necessary to effect transfer of his half-share of the Remaining Extent of Erf 7[...], B[...] situated at 5[...] O[...] Street, B[...], South Africa (*“the Bryanston property”*) to the Applicant;
 - 2.2 sign any and all documents required in respect of the transfer referred to in paragraph 2.1 above in terms of Section 45bis of the Deeds Registries Act or any other applicable legislation to pass transfer to Applicant of his half-share of the Bryanston property;
 - 2.3 make payment of the transfer costs and any other costs incidental thereto to the conveyancers instructed or to be instructed by

⁴¹ See footnote 39 above

Applicant to attend to such transfer of Respondent's half-share in the Bryanston property to the Applicant;

2.4 settle all outstanding costs in respect of the Bryanston property payable to the respective relevant service providers as provided for under clause 9.1.9 of the settlement agreement; and

2.5 settle all outstanding debts in respect of the Bryanston property as provided for under clause 15 of the settlement agreement.

3. The relief sought under paragraphs 5 and 6 of Applicant's notice of motion is postponed *sine die* and in the event of Respondent failing to comply with any aspect of this order, the Applicant will be entitled to again set the matter down, with supplemented papers to the extent necessary, for determination of the relief sought under prayers 5 and 6 of Applicant's current notice of motion.

4. Respondent is ordered to pay the costs of this application on a scale as between attorney and client.

J C UYS SC

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 14 August 2024

Judgment: 15 October 2024

Appearances

For Applicant: Adv S Shongwe

On instructions: T M Mahapa Inc Attorneys

For Respondent: Adv T K Mokhethi

On instructions: Xuba & Associates Attorneys