

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

CASE NO: 2022-17297

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVIEWED: YES/NO

25 July 2025

In the matter between:

B[...]-Y[...]: T[...]

Applicant

And

B[...]-Y[...]: A[...]-A[...]

Respondent

JUDGMENT

Raubenheimer AJ:

Introduction

[1] The applicant brought a contempt of court application against the respondent for non-compliance with a court order granted on 5 August 2022 in terms of which the respondent had to within 5 days:

1.1 *Pay the following sums to the applicant:*

- 1.1.1 *R 65,470.00, R 89,734.83 and R7, 000.00;*
- 1.2 *Provide the applicant with a petrol card.*
- 1.3 *Bring the balance of the applicant's Discovery Bank credit card to R10 000.00 and maintain that balance monthly;*
- 1.4 *Pay the minor children's school fees in the sum of R31,647.00 directly to their school;*
- 1.5 *Transfer 50% of the shares held by him in Auction Inc. 2010/024815/07 to the applicant and provide the applicant with a share certificate demonstrating such share transfer.*

[2] The respondent opposed the application and brought a counter application for the following relief:

- 2.1 *The enforcement of and compliance with the divorce order and terms of the settlement agreement is declared to have been conditional upon the granting of a Get by the Beth Din and the enforcement of and compliance with the divorce order and terms of the settlement agreement is suspended, pending the granting of a Get by the Beth Din.*
- 2.2 *Clause 12.1 of the settlement agreement is void ab initio, alternatively impossible to perform and set aside.*
- 2.3 *The Respondent's maintenance obligation to the Applicant as set out in clause 7 of the settlement agreement is discharged.*
- 2.4 *Clause 2.1.1.1, 2.1.1.2, 2.1.1.12, and 2.5 of the settlement agreement is varied as follows:*
 - 2.4.1 *"2.1.1.1 "Every alternate Tuesday for supper, whereby the Defendant will collect the minor children from the Plaintiff's residence (if supper is going to be at the Defendant's residence) and return the minor children to the Plaintiff's residence by 9pm. The day for supper will be agreed upon at least 24 (twenty- four) hours in advance."*
 - 2.4.2 *2.1.1.2 "Every alternate Thursday, the Plaintiff will drop the minor children at the Defendant's residence after school whereby the minor children will sleep overnight at the Defendant's residence and be dropped off at school on Friday morning (the following day) by the Defendant. Every alternate Saturday, the Plaintiff will drop the minor children at the Defendant's*

residence at 9am. The minor children will sleep overnight at the Defendant's residence and be returned, by the Defendant to the Plaintiffs residence by 9am on Sunday (the following day)."

2.4.3 2.1.1.12 *"Public holidays shall be alternated between the parties."*

2.4.4 2.5 *"A portion of the long, short and mid-term holidays will be spent with the Defendant whereby the minor children will go on holiday at least once per year with the Defendant. The Plaintiff shall not unreasonably withhold permission."*

Factual Background

[3] The parties were married in 2012 and two children were born of the marriage on 23 July 2015 and 8 November 2018 respectively.

[4] The marriage was dissolved on 5 August 2022 on an unopposed basis and the settlement agreement concluded between the parties on 20 April 2022 was incorporated in the decree of divorce.

[5] The decree of divorce was served on the respondent on 4 November 2022, 11 May 2023 and 4 July 2023. Service was effected via e-mail.

[6] The respondent was informed by the applicant's attorney on 23 September 2022, 15 January 2023 and 3 May 2023 that he was in breach of the decree of divorce incorporating the settlement agreement and that should the breach not be remedied, contempt of court proceedings would be instituted against him.

[7] The respondent did not remedy the breach and the applicant launched the contempt proceedings on 1 December 2023.

[8] The respondent launched the counterapplication on 24 January 2024.

Submissions by the applicant

[9] The settlement agreement provided that the respondent shall pay to the applicant an amount of R23,500.00 per month towards maintenance for the children, which amount shall escalate annually in accordance with the Consumer Price index. The respondent shall pay all of the expenses of the children as well as any shortfalls in respect of medical and associated expenses not covered by the Medical Aid Scheme.

[10] The respondent must pay R20,000.00 per month to the applicant as spousal maintenance, provide the applicant with a credit card and maintain a positive balance on the card of R10,000.00, pay for one tank of fuel for the applicant's vehicle and transfer 50% of his shares in a company to the applicant. All payments had to commence on 1 May 2022.

[11] Should the applicant earn a salary of R20,000.00 or higher per month for a consistent period of 6 months or more the spousal maintenance will reduce with R5,000.00 per R10,000.00 earned above R20,000.00.

[12] In respect of child and spousal maintenance the respondent was R65, 470.00 in arrears when the applicant launched the application.

[13] The respondent made not payments towards the medical expenses, school and related expenses, recreational and related expenses. The outstanding amount in this regard is R89, 734.83.

[14] The school fees of the children is in arrears in the amount of R31, 647.00 due to non-payment by the respondent.

[15] The credit card balance is not maintained by the respondent at the agreed amount of R10, 000.00 and has gone as low as R0, 00.00 on occasion.

[16] The tank fuel has also not been provided and has unilaterally been replaced with payment of an amount of R1, 000.00, which was not paid every month. The total

amount outstanding in this regard amounts to R7, 000.00.

[17] The transfer of the shares, which had to be effected upon signing of the settlement agreement namely, 20 April 2022 has not been effected by the respondent.

[18] The respondent has since September 2022 not only been alerted on at least three occasions of his non-compliance but warned that contempt proceedings will be instituted against him. These notifications and warnings were to no avail and has he taken no steps to remedy his non-compliance.

Submissions by the respondent

[19] The respondent avers that as both parties are members of the Jewish faith the final decree of divorce had to be formalised within the Jewish community by obtaining a Get. He furthermore contends that the obtaining of a Get constituted an implied term of the settlement agreement that the applicant would agree to the issuing of a Get which would be issued on the granting of the divorce and that the enforcement of the terms of the settlement agreement would be conditional upon the obtaining of the Get and that pending the obtaining of the Get the operation of the settlement agreement is suspended. He is therefore consequently not in contempt.

[20] His counter application contains an application for the suspension of the enforcement of the divorce order until the applicant agrees to a Get and one has been granted. The counter application has a further purpose namely to prevent the applicant of approaching the court with frivolous enforcement applications where she herself is in breach of the settlement agreement and in contempt of the divorce order.

[21] The respondent avers that the provision in the settlement agreement dealing with the transfer of the shares cannot be implemented as it is impossible to implement due to the shareholders agreement providing as follows in clause 5.2:

“The Shareholders each covenant with each other that no shares in the

company belonging to a shareholder shall be sold without the consent of the other shareholders of the company, who will be given the right of first refusal to purchase those shares for fair market value.”

[22] According to the respondent the company has the right to first refusal of his shares and him entering into the settlement agreement amounts to a contravention of the shareholders agreement and consequently the provision of the settlement agreement entitling the applicant to the transfer of 50% of the respondent's shareholding is void ab initio.

[23] In order to rectify this impossibility the respondent made an offer to pay the applicant an amount of R100,000.00, representing the approximate value of the shares at the time of the divorce, in full and final settlement of her claim to 50% of his shares in the company. The offer was rejected by the applicant.

[24] The amount of the offer was not based on a proper formal valuation of the share value of the company but according to the respondent represents a reasonable offer.

[25] According to the respondent the contact with the children is unnecessarily restrictive and not in the best interests of the children. He wants the contact provisions of the settlement agreement varied to the effect that he will have more contact with the children.

[26] The maintenance payable to the applicant is according to the respondent not feasible due to the fact that at the time of the divorce she was working as a makeup artist and is a highly qualified person with two honours degrees. As such she is capable to secure employment and generate an income.

[27] In explaining his non-compliance with his maintenance obligations, the respondent contends that his financial fortunes have changed materially as a result of which he is no longer able to afford the current maintenance payments and that he is consequently not in wilful contempt of the settlement agreement. He has

attempted to engage with the applicant with the possible reduction of his maintenance obligations, but to no avail.

Discussion

The alleged implied term

[28] The defence that the settlement agreement is conditional is premised on the proposition that the obtaining of Get is an implied term of the settlement agreement.

[29] An implied term has been defined as:

“an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties” and also used to denote an unexpressed provision of the contract which derives from the common intention by the parties. The latter category is more accurately referred to as tacit terms.¹

[30] Implied terms are generally regarded as terms imported by law, without reference to any actual intention of the parties. The origin of such terms could be the common law, custom, trade usage or statute.² The intention of the parties in respect of implied terms is only really relevant to the question of whether the parties have exercised their privilege of excluding an implied term that would otherwise apply.³

[31] In the second place, "implied term" is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if

¹ Alfred McAlphine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (AD).

² Alfred McAlphine (n1 above).

³ Christie & Bradfield Christie's The Law of Contract in South Africa (6ed)

the question, or the situation requiring the term, had been drawn to their attention.⁴

[32] The respondent contends for the insertion of a term on the basis of the common intention of the parties.

[33] It is not the function of Courts to make contracts for parties nor should a court supplement an agreement between parties merely because it would be reasonable to do so.⁵ Courts consequently do not readily import a tacit term.

[34] The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term.⁶

[35] Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term

[36] In order to imply a tacit term a Court would have to be persuaded that an implication of necessity arises to the effect that the parties intended to contract on the basis of the suggested term.⁷

[37] A Court should not imply a term in a contract unless, based on the language of the contract and the surrounding circumstances it can be inferred that the implied term must be necessary to give effect to the clear intention of the parties as found in the expressed terms of the contract.⁸

Not only is it necessary that both parties must have intended the tacit term to be implied the term must reflect the clear intention of the parties.⁹

⁴ Van der Merwe v Viljoen 1953 (1) SA 60 (AD)

⁵ Mullin (Pty) Ltd v Benade Ltd 1952 (1) SA 211 (AD), SA Mutual Aid Society v Cape Town Chamber of Commerce 1962 (1) SA 598 (A) 615D

⁶ Mullin & SA Mutual Aid Society (n5 above).

⁷ Mullin & SA Mutual Aid Society (n5 above)

⁸ Rapp and Maister v Aronovsky 1943 (WLD) 43

⁹ Rapp (n4 above)

[38] It is not sufficient that the term sought to be implied would make it more convenient for either or both of the contracting parties to execute the contract or if it might have been included if the parties had thought of including it.¹⁰

[39] A term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalysts in the process of legal development.¹¹

[40] A term can only be implied if it is necessary in the business sense to give efficacy to the contract. It must be a term of which it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: what would happen in such a case? they would both have replied: of course such and such will happen: we did not trouble to say that because it is so clear.¹² The court must be satisfied that both parties necessarily would have agreed upon such a term, had it been suggested at the time. It is not necessary to show that the parties actually directed their minds to the question: provided that their common intention was such that a reference to the possible situation would have evoked from them a prompt and unanimous assertion of the term.¹³ Thus, the test is objective, and not subjective. Both the surrounding circumstances and the subsequent conduct of the parties may be relevant in indicating the existence of a tacit term.¹⁴

[41] When deciding whether a term is to be implied into a contract the terms of the contract is crucial.¹⁵

¹⁰ Rapp (n4 above)

¹¹ South African Forestry Company Limited v York Timbers Ltd 2005 (3) SA 323 (SCA) at 339 E-J.

¹² Reigate v Union Manufacturing Co (Ramsbottom) 1918 1 KB 592

¹³ Techni-Pak Sales (Pty) Ltd v Hall 1968 (3) SA 231 (W) at 236-7.

¹⁴ Christie & Bradfield (n3 above).

¹⁵ Hiti South Africa (Pty) Ltd v Vodacom Services Provider Company (Pty) Ltd and Another (20829/02) [2006] ZAGPHC 8 September 2006.

[42] An imputed tacit term is only read into the contract if both parties overlooked or failed to anticipate the event in question; it is based on their assumed intent in respect of a situation they had not bargained for.¹⁶

[43] The test used to determine whether a term is to be implied is whether it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would have both replied: 'Of course, so-and-so. We did not trouble to say that; it is too clear. This is often referred to as the "bystander test."¹⁷

[44] In assessing the whether the term sought to be implied the court has to consider the language of the contracts. There is no indication in the contract that that the parties intended the term to be implied.

[45] The divorce proceeded on an unopposed basis and the settlement agreement was concluded before the summons was issued approximately three months after the settlement agreement was concluded. No mention was made in either the Particulars of Claim or the settlement agreement of the requirement to obtain a Get.

[46] After the decree of divorce was granted the respondent did not raise the existence of the implied term. This despite the fact that he had become involved in a relationship well knowing that he would not be able to get married without a Get.

[47] The issue of the obtaining of a Get was only raised after the applicant issued the Contempt of Court application.

The respondent submits no evidence that he approached the applicant to obtain her agreement to the issuing of a Get.

[48] According to the respondent he was involved in numerous meetings and correspondences with the applicant in respect of his alleged inability to afford his

¹⁶ Wilkens v Voges 1994 (3) SA 130 (AD).

¹⁷ Riegate (n12 above).

financial obligations in terms of the settlement agreement. At no stage did he raise the issue of the implied term.

[49] The conduct of the parties is not indicative of the existence of the implied term. The respondent did not raise the existence of an implied term when alerted to his non-compliance with the court order.

[50] The application of the respondent for the importation of an implied term stands to be rejected. The applicant's application for an order that the divorce order incorporating the settlement agreement to be conditional upon the obtaining of a Get and the operation of the settlement agreement to be suspended until a Get has been obtained is dismissed.

The application for the setting aside of the transfer of shares clause

[51] The basis for this relief is impossibility of performance and the consequent *ab initio* voidness

[52] The common law position in respect of impossibility of performance is that if performance in terms of a contract is impossible due to unforeseen events, which was not caused by the parties, the parties are excused from performing in terms of the contract. The impossibility must however be absolute or objective and not relative or subjective. It is furthermore required that the parties must not have had reasonable foresight of the event causing impossibility at the time the contract was concluded.¹⁸

[53] Mere personal incapability to perform does not amount to impossibility.¹⁹ If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract.²⁰

¹⁸ Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd 2000 (4) SA 191 (W) 198 B-E.

¹⁹ Scoin Trading (Pty) Ltd v Bernstein NO 2011 (2) SA 118 (SCA) para 22.

²⁰ Frye's (Pty) Ltd v Ries 1957 3 SA 575 (A)

[54] In order to determine whether performance will be excused it is necessary to consider the following factors: the nature of the contract, the relationship of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant. The rule will not be available to a defendant if the impossibility is self-created and will likewise not be available to a defendant if the impossibility is due to his or her fault.’²¹

[55] No evidence was submitted to the effect that the applicant was aware or should have been aware of the existence of the provisions of the shareholders agreement.

[56] The agreement between the parties is a settlement agreement on the basis of which the divorce proceedings between the parties proceeded on an unopposed basis more than two months after the conclusion of the settlement agreement. The parties were not in a commercial relationship at the time when the agreement was concluded. The purpose of the settlement agreement was the dissolution of a marriage relationship and to provide amongst other for the patrimonial consequences of the dissolution. The impossibility contended for by the respondent is based on him being unaware of the provisions of the shareholders agreement at the time of conclusion of the settlement agreement. The respondent furthermore did not follow the procedure prescribed in the Shareholders Agreement by offering the shares he was obliged to transfer to the applicant to the other shareholders and but merely stated that it would be a contravention of the agreement.

[57] The defence of impossibility of performance in respect of his refusal to transfer the shares in terms of the settlement agreement does not amount to objective impossibility. The impossibility is furthermore ascribable to his own fault and should the respondent have had reasonable foresight of the provisions of the shareholders agreement at the time he concluded the settlement agreement.

[58] The defence of impossibility of performance of the transfer of the shares is consequently dismissed.

²¹ Mv Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal [2008] ZASCA 27; 2008 (4) SA 111 (SCA).

The application for the amendment of the contact regime

[59] This matter has on a previous occasion been referred to the family advocate who indicated that there would be no objection to the amendment of the contact regime provided that an independent social worker be appointed and a report on the feasibility of an amendment as well as the nature and content of the proposed amendment be submitted to the Family Advocate and such amendment be approved by the Family Advocate.

[60] No such independent social worker has yet been appointed and no such report has been submitted to the Family Advocate.

[61] The court is consequently not in a position to exercise its discretion in respect of the application to amend the contact regime. The application is consequently dismissed.

The application for a reduction of maintenance

[62] The applicant applied for a reduction of his maintenance obligations in respect of both children and the applicant. This application is brought on the basis that the respondent has been experiencing a change in circumstances which had a negative effect on his financial fortunes.

[63] The respondent is in arrears with the mentioned obligations and is therefore precluded from bringing an application for a reduction of his maintenance obligations until the outstanding debt in this regard has been reduced in full.²²

[64] The application for a reduction of the maintenance obligations is consequently dismissed.

The contempt of court application by the applicant

²² SS v VVS 2018 (6) BCLR 671 (CC).

[65] For this application to be successful the applicant must show that an order was granted against the respondent who had knowledge of the order and had failed to comply with the order.²³

[66] Once the existence and knowledge of a court order have been proven a presumption of wilfulness and *mala fides* is activated resulting in the respondent being saddled with a burden to establish a reasonable doubt.²⁴

[67] It is not required of the respondent to disprove wilfulness and *mala fides* on a balance of probabilities. He is merely required to present evidence that establishes reasonable doubt as to whether his non-compliance with the court order was wilful and *mala fide*.²⁵

[68] The conduct of the respondent had to be of such nature that it violated the dignity, repute and authority of the court in an intentional and deliberate manner. Mere non-compliance with a Court order is insufficient to establish contempt.¹

[69] The respondent did not approach a maintenance court for a reduction when his financial fortunes changed. He did not approach the High Court for an amendment to the Settlement Agreement. He furthermore did not cure his contempt after being notified thereof on numerous occasions. He only brought an application for a reduction in a counter application. His conduct towards the applicant in respect of the non-payment of the maintenance payable to her was blatantly disrespectful when he alleged that she should obtain a job “just like other women” whilst she was employed.

[70] The applicant did not make a full disclosure of his financial situation in his answering affidavit.

²³ Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma and others 21 (5) SA 327 (CC).

²⁴ Pheko v Ekurhuleni City [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC).

²⁵ Fakie N.O v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 SCA.

[71] The conduct of the respondent is a clear indication of wilful disregard of the court order and liable to punished.

[72] The respondent should however be afforded an opportunity to cure his contempt.

Conclusion

[73] For the reasons set out above I make the following order:

73.1 The respondent is in contempt of the order granted on 5 August 2022 ('the order')

73.2 The respondent is to be committed to imprisonment for a period of 30 days;

73.3 The committal to imprisonment shall be suspended on the following conditions:

73.3.1 That the respondent fully comply with the order within 30 days of the date of this order by effecting payment of all arrears amounts;

73.3.2 That the respondent within 30 days of the date of this order comply with the undertaking in the settlement agreement to transfer 50% of his shareholding in Auction Inc. with registration number 2010/024815/07 by offering the shares to the other shareholders at a value determined by an independent Chartered Accountant appointed by the Chairperson of the South African Institute of Chartered Accountants. If the shares are purchased by the other shareholders the respondent shall pay the purchase price to the applicant. If the other shareholders does not purchase the shares the respondent shall pay an amount equal to the valued amount to the applicant.

73.3.3 That the respondent shall continue to comply fully with the order.

73.4 The Counter Application is dismissed.

73.5 Each party to pay their own costs

E Raubenheimer
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

**GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **25 July 2025**

COUNSEL FOR THE PLAINTIFFS:	Adv B Manning
INSTRUCTED BY:	Blumenthal Attorneys
COUNSEL FOR THE RESPONDENT:	Adv Z Teperson
INSTRUCTED BY:	Clifford Levin Attorneys
DATE OF ARGUMENT:	19 May 2025
DATE OF JUDGMENT:	25 July 2025

¹ Fakie (n 25 above)