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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 15012/2020

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

DATE: 5 May 2026

SIGNATURE OF JUDGE:

In the matter between:

L[...] L[...]

Applicant

and

E[...] L[...]

Respondent

JUDGMENT

Woodrow, AJ:

Introduction:

- [1] The applicant brings an application seeking to hold the respondent in contempt of a divorce court order incorporating a settlement agreement.
- [2] The respondent opposes the contempt application. The respondent further counter applies for a variation of the deed of settlement (which was made an order of court and upon which the contempt application is based.)
- [3] In terms of the draft order furnished by the applicant, the applicant seeks an order against the respondent as follows:¹
1. The Respondent is declared in contempt of the Court Order granted by the HONOURABLE JUSTICE LUKHAIMANE AJ on 12 OCTOBER 2020 under case number 15012/2020 as mentioned above;
 2. The Respondent is [ordered] to purge his contempt by making payment in the amount of USD 237,500.00 to the Applicant within 30 days of the granting of this order.
 3. That in the event that the Respondent fails to purge his contempt, he be committed to imprisonment for contempt of court for 30 (THIRTY) days;

¹ Draft order, CaseLines, 008-328 (which is largely in line with the notice of motion: Notice of motion, CaseLines, 008-1).

4. In the event that the Respondent does not comply with the abovementioned order the Applicant is to approach the Police Station closest to the Respondent with this Court Order whereby the Police Official at the Police Station will immediately employ all lawful measures to lawfully ensure compliance with this Court Order;
5. That the Respondent pay the costs of this application on an attorney and client scale including the costs of an attorney appearing as counsel on scale B;

[4] The respondent seeks an order in the counter application as follows:²

1. That the deed of settlement marked Annexure "B" to the applicant's founding affidavit be varied in the following manner:

- 1.1 Variation of clause 1 of the deed of settlement, to be varied and substituted with the following, and incorporated into the said order:

"1. MAINTENANCE:

- 1.1. *The Plaintiff has up to date paid an amount of \$ 137 500.00 (one hundred and thirty thousand five hundred United States dollars) in respect of maintenance to the Defendant.*
- 1.2. *The plaintiff will pay an amount of R 1 million South African rand in full and final settlement of the maintenance obligation to the Defendant.*
- 1.3. *The amount of R 1 million rand is to be paid on/before 31 December 2025.*

² Notice of motion in counter application, "EL8", CaseLines, 008-151.

1.4. *The aforementioned amount of maintenance will be a gross amount, including the United States tax levied by the tax authority of the United States government, if at all.*

1.5. *The maintenance amount will be paid into the bank account nominated by the defendant from time to time."*

1.2. Variation of clause 2 of the deed of settlement, to be varied and substituted with the following, and incorporated into the said order:

"2. CAPITAL AMOUNT:

2.1. *The Plaintiff has up to date paid an amount of \$ 150 000.00 (one hundred and fifty thousand United States dollars) in respect of the capital amount to the Defendant.*

2.2. *The Plaintiff undertakes to pay an amount of R 3 million South African Rand to the Defendant in the following monthly installments:*

2.2.1. *One million South African Rand to be paid [on] / before 31 January 2026.*

2.2.2. *One million South African Rand to be paid [on]/ before 28 February 2026.*

2.2.3. *One million South African Rand to be paid [on]/ before 31 March 2026.*

2.2. *The payments as per prayers 2.2.1 - 2.2.3 towards the capital amount is in full and final settlement and is a gross amount including any United States tax levied by the tax authorities of the United States government if at all."*

2 The order referred to in prayer one (inclusive of prayer 1.1 and 1.2 thereof) will be of a retrospective effect, effective 31 December 2023.

3. That the Applicant be ordered to pay the costs of this application on an attorney and client scale, alternatively on a party and party scale, Scale B in terms of Uniform Rule 67A.
4. Further and/or alternative relief which the Honourable Court deems reasonable and appropriate under the prevailing circumstances.

Background facts:

- [5] The parties were married. Their marriage relationship broke down.
- [6] On 21 February 2020, the parties concluded a written ‘deed of settlement’ (the “**settlement agreement**”) which would later be made an order of court on date of divorce of the parties.
- [7] In April 2020, the applicant returned permanently to the United States of America.³
- [8] On 12 October 2020, this court, Lukhaimane AJ (as she then was), granted a final decree of divorce dissolving the marriage and making the settlement agreement an order of court.⁴ (the “**divorce order**”) (In the divorce action, the applicant was the defendant and the respondent was the plaintiff. The settlement agreement refers to the parties as such).

³ This is of relevance to the pro-rata amount of maintenance due in terms of the settlement agreement for 2020, as addressed later herein.

⁴ Decree of divorce, order of Lukhaimane AJ, CaseLines, 008-13, incorporating settlement agreement between the parties, CaseLines, 008-14.

[9] The clauses of the divorce order / settlement agreement that are relevant to the present application are quoted below.

a. Under the heading “*MAINTENANCE*” in clause 1 of the settlement agreement, the following:

- 1.1 The Plaintiff will pay an amount of USD50 000 (fifty thousand United States dollars) per calendar year to the Defendant, as maintenance.
- 1.2 The aforementioned amount of maintenance will be a nett amount, after United States Tax levied by the tax authorities of the United States Government, if at all.
- 1.3 The amount of maintenance will be paid annually on or before the 31st of December, however commencing in 2020 by payment of a pro-rata amount relative to the months remaining in 2020 calculated from the end of the calendar month that the Defendant returns from South Africa to the United States of America permanently. The Second payment for 2021 will be paid on or before 31 December 2020 and then annually thereafter before 31 December of each subsequent year.
- 1.4 Maintenance will be payable by the Plaintiff to the Defendant for the rest of her life, subject thereto that should the Defendant enter into a marriage subsequent to the Divorce Order being granted, the maintenance obligation of the Plaintiff towards the Defendant will cease.

1.5 The maintenance amount will be paid into a bank account nominated by the Defendant to the Plaintiff in writing from time to time.

1.6 The Parties confirm that they will, in their capacities as trustees of the T[...] Trust (Registration number: IT12295/98 (T)), have the attached resolution to be adopted by the trustees of the trust, with respect to the payment of the maintenance provided for herein, to be paid to the Defendant in the event that the Plaintiff dies prior to the Defendant and insufficient funds is available in his estate to satisfy the maintenance payable to the Defendant.

b. Under the heading "*CAPITAL AMOUNT*" in clause 2 of the settlement agreement, the following:

2.1 The Plaintiff undertakes to pay an amount of USD750000 (seven hundred and fifty [thousand] United States dollars) to the Defendant upon the first of the following occurring:

2.1.1 Upon the property or the shares of E[...] F[...] E[...] (Pty) Ltd (Registration number: 1999/013127/07) a company of which the Plaintiff and Defendant have full control, being transferred to any prospective buyer; or

2.1.2 5 (Five) years from date of the Divorce Order.

2.2 The capital amount will be a nett amount after United States Tax levied by the tax authorities of the United States Government, if at all.

2.3 In the interim, until payment of the capital amount to the Defendant, the Plaintiff will pay USD50 000.00 (fifty thousand United States dollars) per annum, as of 31 December 2020 and annually thereafter on the 31st December in redemption of the capital and to be deducted from the USD750000.00 (seven hundred and fifty thousand United States dollars), as [and] when it becomes payable in terms of clause 2.1.1 or 2.1.2 above.

[10] The respondent states that he has paid the following amounts over the years in respect of (a) maintenance (b) the capital amount (referred to as “settlement” in the answering affidavit of the respondent):

YEAR:	MAINTENANCE:	SETTLEMENT:
2020	\$ 37 500.00	\$ 50 000.00
2021	\$ 50 000.00	\$ 50 000.00
2022	\$ 50 000.00	\$ 50 000.00

[11] In respect of the amounts due in terms of the divorce order under the heading “*MAINTENANCE*” in clause 1 of the settlement agreement, it is not in dispute that the respondent has failed to make payment of maintenance in terms of the divorce order for the years 2023 to 2025. It is not in dispute that the respondent has breached the divorce order and his maintenance obligations to the applicant. The respondent states that he made regular and due payments in terms of the divorce order up until about December 2022 but that his financial position reached such a state thereafter that it was not possible to comply with the divorce order any further.⁵ For the period 2023 to

⁵ Answering affidavit, CaseLines, 008-92, par 13.2.

2025, the respondent is in arrears in respect of maintenance due in terms of the divorce order in the sum of USD 150,000.00 (one hundred and fifty thousand United States dollars).

[12] In respect of the amounts due in terms of the divorce order under the heading “*CAPITAL AMOUNT*” in clause 2 of the settlement agreement, and as appears from the affidavit of the respondent, the respondent states that he has made payment of the total sum of USD 150,000.00 (one hundred and fifty thousand United States dollars), leaving a balance of USD 600,000.00 (six hundred thousand United States dollars). It is further apparent that the trigger events referred to in clause 2.1.1 and 2.1.2 of the settlement agreement have occurred. In terms of the divorce order, the respondent is indebted to the applicant in terms of clause 2 of the divorce order in respect of the “*CAPITAL AMOUNT*”.

[13] The respondent provides some detail regarding how his financial affairs have significantly deteriorated. At the time of the divorce, the respondent had a successful business which was doing very well financially. He was able to make the payments as required in the divorce order. He states that he made such payments until about December 2022, but that during or about 2021 the success of the business changed drastically. The respondent explains that his business was affected first by the Covid 19 pandemic and thereafter by the looting that occurred in Kwa-Zulu Natal in 2021.

[14] The respondent addresses facts regarding how his financial affairs have significantly deteriorated in support of (a) his defence that he was not in a financial position to comply with the divorce order and accordingly not in wilful default, and (b) his counter application for a variation of the divorce order. In my view however, and insofar as the contempt application is concerned, these details need not detain us as on the version of the respondent himself, he has funds available to make payment of the arrear maintenance amounts.

[15] In this regard further, the respondent states that the T[...] Trust sold shares in E[...] F[...] E[...] (Pty) Ltd, and that the shares were sold for R6,000,000.00 (six million rand). The respondent then states that: *“I made an offer which I again repeat herein, to pay R4 000 000.00 (four million rand) to the Applicant, and for me to retain only R2 000 000.00 (two million rand) to take care of my personal situation ...”*.⁶ This offer is reflected in the notice of counter application, being an offer in ‘full and final settlement’ of the maintenance and capital obligations of the respondent in terms of the divorce order.

⁶ Answering affidavit, CaseLines, 008-84, par 5.10 – 5.13. See also: CaseLines, 008-87, par 6.7.

The evidence tendered by the applicant:

[16] The respondent, in his affidavits (his answering affidavit⁷ and his replying affidavit to the answering affidavit filed on behalf of the applicant in answer to the respondent's counter application⁸), questions who the driving force is behind the contempt application,⁹ expresses doubt over whether the applicant is of sound enough mind to bring the application,¹⁰ and states that the replying affidavit deposed to by the applicant's daughter constitutes hearsay and establishes disputes of fact.¹¹

[17] In heads of argument on behalf of the respondent, it is contended that the fact that the applicant's daughter is the deponent to the replying affidavit "... *creates a situation where the replying affidavit ought to be disregarded alternatively treated with circumspection.*" It is further contended that this "... *then either creates a Plascon Evans scenario or a dispute of fact.*" The respondent attacks the weight to be attached to the evidence in the affidavits filed on behalf of the applicant and not the mandate given by the applicant to her attorney of record to bring the contempt application. Pursuant to a question from the court to counsel for the respondent the aforesaid position was confirmed in open court.

⁷ Commencing at CaseLines, 008-73.

⁸ Commencing at CaseLines, 008-244.

⁹ At *inter alia* CaseLines, 008-78, par 3.19; 008-89, par 8; 008-91, par 11.9, *et cetera*.

¹⁰ At *inter alia* CaseLines, 008-78, par 3.20 - 3.21; 008-79, par 3.20, *et cetera*.

¹¹ At *inter alia* CaseLines, 008-247 to 252, par 3.1 – 3.30, *et cetera*.

- [18] In an application, it is for the parties to set out and define the nature of their dispute in their affidavits (which serve the function of both pleadings and evidence). It is for the court to adjudicate upon those issues. But for certain exceptions, it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.¹²
- [19] The respondent argues that the deponent to the replying affidavit is the daughter of the applicant who has no personal knowledge of the facts and that “... *the replying affidavit ought to be disregarded alternatively treated with circumspection.*” The respondent alleges that there is a dispute of fact on the papers which ought to have been foreseen.
- [20] Whilst it is so that there may be some concerns regarding the weight to be attached to parts of the evidence tendered on behalf of the applicant, and that parts of the evidence deposed to by the daughter of the applicant would not fall within her personal knowledge – such as the financial position of the respondent – the argument on behalf of the respondent does not take his case any further as far as the contempt of court application is concerned. This is due to the fact that, insofar as the contempt application is concerned, the facts which are either common cause on the papers or deposed to by the respondent himself make out a case for contempt.

The contempt application:

¹² **Fischer and Another v Ramahlele and Others** 2014 (4) SA 614 (SCA) par [13]. See also par [14] of the aforesaid SCA judgment.

[21] The trite principles of law relevant to contempt were again set out in **Snowy Owl Properties 284 (Pty) Ltd v Celliers and Another**¹³ as follows:

[22] It is trite that an applicant who alleges contempt of court must establish that: (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.

[22] *In casu*, it is common cause that the requirements in (a) to (c) have been met.¹⁴

It is common cause that there is a court order, that the respondent is aware of the order and that the respondent has failed to comply therewith. These material facts are not in dispute.

[23] The respondent contends that the element of ‘wilfulness and mala fides’ “... *proves to be the problem.*” The respondent stakes his defence on his changed financial position and an impossibility to perform in terms of the maintenance order.

¹³ (1295/2021) [2023] ZASCA 37 (31 March 2023) at par [22].

¹⁴ See *inter alia* Respondent’s heads of argument, CaseLines, 008-275, par 3.1 – 3.2.

[24] However, on the version of the respondent himself he has R6,000,000 (six million rand) available. On his version, he wishes to retain R2,000,000 (two million rand) for his own needs and he offers to make payment to the applicant of R4,000,000 (four million rand) in full and final settlement of his maintenance and capital obligations in terms of the divorce order. The offer to pay is conditional on such payment being in full and final settlement. The offer does not constitute an offer to comply with the court order.

[25] The stance adopted by the respondent and the facts that he deposes to put pay to the defence raised by the respondent that he is unable to make payment in terms of the divorce order. On his own version he has funds available to make payment of the arrear maintenance. Accepting for the moment the dollar–rand exchange rate stated by the respondent in his answering affidavit of R17.50 to the USD,¹⁵ the maintenance liability for the period 2023 to 2025 of USD 150,000.00 (one hundred and fifty thousand United States dollars) equals R2,625,000 (two million, six hundred and twenty-five thousand rand). On the version of the respondent himself he is able to comply with his arrear maintenance obligations. The respondent has not met his evidential burden to establish a reasonable doubt regarding wilfulness¹⁶ – he has in fact confirmed wilfulness under oath and beyond a doubt. The defence of the respondent is without merit. The respondent is in contempt of the divorce order.

¹⁵ Answering affidavit, CaseLines, 008-93, par 14.5.

¹⁶ **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at par 42(d).

- [26] The applicant bases her case not only on the maintenance obligations in terms of the divorce order but also on the arrear amounts due in terms of clause 2 of the divorce order / settlement agreement in respect of the “*CAPITAL AMOUNT*”. In this regard, the applicant makes out no case – the order in respect of payment of the capital amounts constitutes an order *ad pecuniam solvendam*, not *ad factum praestandum*. The applicant is at liberty to exercise her rights regarding execution in respect of the ‘capital’ portion of the divorce order. No case is made out for contempt in this regard.¹⁷
- [27] The respondent is in contempt of clause 1 of the settlement agreement regarding his maintenance obligations under the heading “*MAINTENANCE*” of the divorce order. The respondent continues with such contempt. An appropriate order shall issue.
- [28] I intend to afford the respondent an opportunity to purge his contempt. Should he fail to do so, the order I intend to grant will make provision for the applicant to take further steps in pursuit of committal for such contempt.
- [29] The applicant seeks costs on an attorney and client scale. In my view, the applicant is entitled to such costs. The respondent states under oath that he

¹⁷ See **Montsha v Road Accident Fund and Others** (2025/105649) [2026] ZAGPPHC 225 (6 March 2026) and the cases referred to therein, including **Jayiya v Member of the Executive Council for Welfare, Eastern Cape and Another** 2004 (2) SA 611 (SCA) at par [15]: “*Save for one exception, an order for the maintenance of one whom the judgment debtor is liable to maintain, a money judgment is not enforced by contempt proceedings but by execution. ...*”.

has funds available, which funds, on his version, exceed the amount due as maintenance in terms of the divorce order, yet has failed to make payment and persists with his contempt of the court order. The respondent has put the applicant to unnecessary trouble and expense which the applicant ought not to bear. Such conduct is vexatious and justifies the cost order sought.¹⁸

The respondent's counter application:

[30] The respondent brings his counter application in terms of section 8(1) of the Divorce Act, Act 70 of 1979 (the “**Divorce Act**”). The relief that he seeks in his counter application is quoted in the introduction section of this judgment.

[31] Section 8 of the Divorce Act is titled “*Rescission, suspension or variation of orders*”. The portion of section 8(1) of the Divorce Act that is relevant to the present counter application reads as follows (those portions that are irrelevant have been omitted from the quote below):

A maintenance order ... made in terms of this Act, may at any time be rescinded or varied ... if the court finds that there is sufficient reason therefor:
...

[32] Apart from seeking to amend the section of the divorce order dealing with maintenance, the respondent also seeks to amend the section of the divorce order dealing with the payment of the capital amount. No case is made out

¹⁸ In re Alluvial Creek Ltd 1929 CPD 532 at 535.

for such amendment of the divorce order. Apparent from the wording of subsection 8(1) of the Divorce Act is that the existence of a 'maintenance order made in terms of this Act' is a prerequisite to the exercise of the court's power in terms of s 8(1).¹⁹ The amounts due in terms of the divorce order under the heading "*CAPITAL AMOUNT*" in clause 2 of the settlement agreement do not constitute amounts due in terms of a maintenance order. Simply put, clause 2 of the settlement agreement does not constitute a maintenance order. The respondent makes out no case for the variation of the court order insofar as the respondent seeks a variation of the clause dealing with payment of a capital amount.²⁰ This portion of the relief in the counter application stands to be dismissed.

[33] Insofar as the case for a variation of the maintenance order is concerned, the case of the respondent is that his financial position has drastically changed, that he is in dire financial straits, and that the aforesaid and his changed circumstances constitute 'sufficient cause' for the amendment of the maintenance order. The respondent states that the situation of the applicant and her needs have also changed since the signing of the settlement agreement.

[34] The allegations of the respondent are disputed by the deponent on behalf of the applicant. The disputes of fact go directly to whether the respondent is able to demonstrate sufficient cause or sufficient reason as contemplated in

¹⁹ **Georghiades v Janse van Rensburg** 2007 3 SA 18 (C) par [14].

²⁰ Notice of motion in counter application, EL8, CaseLines, 008-151, prayer 1.2.

section 8(1) of the Divorce Act. Without being exhaustive, such disputes include disputes regarding whether the respondent is unable to make payment in terms of his maintenance obligations in the divorce order, whether the respondent has access to further funds and means of satisfying his maintenance obligations, what the financial circumstances of the respondent in fact are, including also his access to funds from other sources and entities. These disputes are set out in more detail in the affidavits filed by the parties. Ultimately, the counter application cannot properly be decided on affidavit as these disputes of fact impact directly upon whether the respondent has shown sufficient cause or sufficient reason for variation of the maintenance order as contemplated in section 8(1) of the Divorce Act.

[35] The respondent states that insofar as a dispute of fact is found to exist, that the matter be referred to oral evidence, alternatively referred to trial.

[36] In my view there are disputes of fact regarding the relief sought by the respondent in his counter application, and the counter application cannot properly be decided on affidavit.

[37] Rule 6(5)(g) of the Uniform Court Rules provides as follows:

Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact

and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

[38] In my view, it is in the interests of justice to refer to trial the claim of the respondent for the variation of clause 1 of the deed of settlement in terms of section 8(1) of the Divorce Act.

[39] The costs of the counter application shall be reserved for determination of the trial court.

Order:

[40] Accordingly, I make the following order:

a. In respect of the applicant's contempt application:

1. The respondent is declared in contempt of clause 1 of the settlement agreement that was made an order of court in terms of the court order granted by this court on 12 October 2020 under case number 15012/2020.
2. The respondent is ordered to purge his contempt by making payment to the applicant within 30 days of the granting of

this order of the arrear maintenance due in terms of clause 1 of the settlement agreement for the years 2023 to 2025 in the amount of USD 150,000.00 (one hundred and fifty thousand United States dollars).

3. In the event that the respondent fails to purge his contempt, the applicant is granted leave to supplement her affidavits in order to seek an order for the committal of the respondent to imprisonment as sought in prayers 3 and 4 of the notice of motion.
4. The respondent is directed to make payment of the costs of the applicant's application on an attorney and client scale.

b. In respect of the respondent's counter application:

1. The order sought in prayer 1.2 of the notice of counter application, filed as "**EL8**" at CaseLines, 008-151 (the "**notice of counter application**"), for variation of clause 2 of the deed of settlement is dismissed.
2. The claim of the respondent for the variation of clause 1 of the deed of settlement in terms of section 8(1) of the Divorce Act, Act 70 of 1979, is referred to trial.
3. The notice of counter application, excluding prayer 1.2 of the counter application, will stand as a simple summons.

4. The applicant's replying affidavit will stand as the notice of intention to defend.
5. The respondent is granted leave to amend the notice of counter application and, insofar as the respondent elects to amend the notice of counter application, will deliver such amended notice of counter application together with his Declaration within 20 (twenty) days of this order.
6. The respondent shall within 20 (twenty) days of this order deliver his Declaration.
7. The applicant shall within 20 (twenty) days of delivery of the respondent's Declaration deliver her plea thereto.
8. The further exchange of pleadings and pre-trial procedures, including discovery and the request for and provision of trial particulars, shall be regulated by the uniform rules of court in respect of action proceedings. Discovery of documents not forming part of the application papers shall take place in accordance with the provisions of the rules of court.
9. The costs of the counter application are reserved for determination in the trial.

WOODROW AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 5TH day of May 2026.

Appearances:

Attorney for the Applicant: TJ Dawson (with right of appearance) of Naude Dawson Incorporated

Counsel for the Respondent: J Prinsloo
instructed by: Benennecke Thom Incorporated

Date of Hearing: 12 March 2026

Date of Judgment: 5 May 2026