IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MAKHANDA]

CASE NO: CA231/2021
Heard on: 05/09/2022
Delivered on: 04/10/2022

In the matter between:

M[....] H[....] Appellant

And

C[....] A[....] H[....] Respondent

FULL COURT JUDGMENT

NHLANGULELA DJP

[1] This is an appeal against the order of civil contempt made by Lowe J on 2 November 2020. The leave to appeal against the order by the learned Judge was delivered on 27 July 2021.

[2] I set out herein below the contents of the order. They read as follows:

> "1. Respondent be and is hereby directed to pay applicant the arrear amount of R124 454,00 in respect of his non-compliance with the maintenance order granted in this Court on 30 April 2019 under case number 342/2018 ("the order"), at the rate of R4 000,00 per month, such payment to be made by Respondent commencing on 1 December 2020, and

monthly thereafter on the 1st day of each month, until the full sum has been paid together with interest as referred to below.

2. The aforesaid sum of R124 454,00 is to bear interest a *tempore morae* which is to run from 5 November 2020 until date of final payment and is to be calculated on the outstanding maintenance sum from time to time.

3. Respondent be and is hereby declared to be in contempt of the order.

4. Respondent is committed to imprisonment for a period of 60 days.

5. The period of imprisonment imposed on Respondent in paragraph 4 above is suspended for a period of 2 (two) years on condition that:

5.1 Respondent pays to Applicant the sum of R124 454,00 together with interest thereon in accordance with paragraphs 1 and 2 above;

5.2 Respondent complies with the order, including any amendment or variation thereof by any competent court.

6. Respondent be and is hereby directed to pay Applicant's costs of suit on the scale as between attorney and client".

[3] Properly interpreted, the order granted on 12 November 2020, the subject of this appeal, consists of three sections the first being the imprisonment for contemptuous conduct for a period of 60 days, *albeit*, suspended for 2 years. The second section pertains to the payment of arrear maintenance together with legal interest thereon, calculated as at 12 November 2020 in the sum of R124 454,00, monthly in instalments of R4 000,00 retrospectively to 01 December 2020. Further, the order provides in the third section, incorporated in para 5, that the appellant shall continue to pay maintenance for the lifetime of the respondent and until the minor child becomes a major and is independent from parental control and care. It is anticipated in paragraph 5.2 of the Order that the appellant cannot on his own decision stop paying maintenance unless authorised to do so by a competent court.

[4] It is common cause that in December 2019 the appellant stopped paying the full amount of R14 000. Stated differently, the appellant ceased paying the R10 000,00 life-time maintenance due to the respondent. He sustained the monthly payments of R4 000,00 due to the minor child. For that stoppage, which was the conduct clearly perpetrated in contravention of paragraph 8.1.1 of the court order dated 30 April 2019, the respondent brought the contempt proceedings in June 2020, whereafter, those proceedings were concluded in terms of the order that is alluded to in paragraph 2 above. Pursuant thereto, the appellant noted an appeal.

[5] After a date for the hearing of this appeal had been allocated by the Registrar, the appellant deemed it necessary to bring a formal application to the court advancing two causes of action. On the first cause of action, the appellant seeks relief that the order made by the court on 30 April 2019 be rescinded. He bases his relief on the provisions of Rule 42 of the Uniform Rules of the High Court. The thrust of the application in terms of Rule 42 is that some material information was erroneously withheld by the responded during the proceedings which, if it was brought to the attention of the court *a quo*, would have persuaded the court not to grant the order of civil contempt dated 12 November 2020. The second cause of action is premised on the provisions of s 19 *(b)* of the Superior Court Act 10 of 2013 and s 173 of the Constitution, it being alleged that the appellant is entitled to introduce new evidence which, in the interest of justice, will show that the respondent adduced inadmissible false evidence amounting to perjury.

[6] We expressed a view right at the outset of the appeal proceedings that the application for rescission of the judgment dated 30 April 2019 is irrelevant to the appeal against the order dated 12 November 2019. To that extent we indicated our inclination towards removing the application from the appeal roll. The evidence was available at all material times relevant to the hearings that led to the granting of the orders dated 30 April 2019 and 12 November 2020. We made it clear to the appellant that in the absence of an explanation as to why that evidence had not been adduced, the application cannot pass muster. It may be pointed out that confronted with the double-barrel application proceedings lumped into a single founding

affidavit, we deemed it appropriate to dismiss both applications. We will deal later on with the motive for the bringing of these applications.

[7] I now revert to the appeal itself.

[8] The parties were married on 25 November 1989. Their divorce proceedings were commenced on 13 February 2018, and finalized on 30 April 2019 by means of a court order that was premised on a settlement agreement in terms of which the post-divorce spousal maintenance would be paid in favour of the respondent at R10 000,00 per month. In addition, a sum of R4 000,00 would be paid in favour of Joshua, one of four sons of the marriage, for maintenance and education. Both the respondent and Joshua would be kept under the medical aid scheme of the appellant. The parties were legally represented during the divorce proceedings that culminated in the consent order. At the time of divorce, the parties had a business trading as Paint City in which the respondent held shares valued at approximately R369 000,00. In terms of the negotiations that led to the consent order, those shares were traded for the maintenance order that the respondent was granted with the result that the appellant became the sole owner of the business. The appellant would also be the owner of a property situated at Port Alfred (the Green Fountain Farm Chalets). The appellant had a job with FNB, Port Alfred earning a net income of R23 574,28 per month. These assets together with other moveable assets, left him with an asset base valued at R1,8 million approximately in April 2019. Soon after divorce, in October 2019, the appellant raised a complaint against legal bills, and a bitter complaint that his own legal representatives has caused him to sign a deed of settlement under duress when he would not be able to afford maintenance. He also complained about the fact that the respondent would be paid maintenance for the rest of her life without contributing to the growth of Paint City. Such complaint, together with others that followed, persisted until the appellant addressed a written notice to the respondent that payment of R10 000,00 maintenance would be stopped in November 2019. Accordingly, he stopped paying. But he was content with paying the R4 000,00 maintenance that is due to the child. According to the court *a quo* the recurring theme raised by the appellant before and after he stopped the payments was that he did not have financial means to meet his maintenance obligation.

[9] Since the court *a quo* had to answer the question whether the appellant's non-payment of R10 000,00 maintenance was the conduct that amount to civil contempt, the court *a quo* applied the principles set out in the leading case of *Fakie NO v CC11 Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), where Cameroon J had the following to say:

> "(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 protection 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.
>
> (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 declaratory and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[10] In relation to the present matter, it is discernible from the statements of Cameroon J in *Fakie* that the respondent had the *onus* to prove the requisites of contempt, namely that:

> "(i) The order of payment of maintenance by the appellant existed.

(ii) If it did exist, that it was duly served upon the appellant or that notice of its existence was brought to the notice of the appellant.

(iii) If point (ii) above is satisfied, that, as a fact, the appellant did not comply in terms thereof willingly and with malice".

[11] It was common cause that the respondent did discharge its *onus* of proof that the order was granted by the court on 30 November 2019. When that happened, the appellant was present in court; and he did acquire knowledge that the order was made. It also bears mentioning that the appellant had consented to the granting of a decree of divorce incorporating a Deed of Settlement on which the terms of payment for the maintenance of the respondent and her minor child are provided. However, since the reason for non-compliance would invariably lie within the knowledge of the defaulter, the appellant had to adduce evidence that establishes a reasonable doubt that his default was not wilful and *mala fide*. If the appellant fails to adduce such evidence the contempt will have been proved on the criminal law standard beyond a reasonable doubt.

[12] At the outset of the contempt proceedings the court *a quo* found, on the evidence on affidavit, that the order, notice thereof and non-compliance was undisputed, and indeed common cause. It then said at para 27:

"27. The only issue is whether the Respondent has established wilfulness and *mala fide*s beyond reasonable doubt in the failure to pay Applicant's maintenance of R10 000,00 per month (or any part thereof). In this regard Respondent has an evidentiary burden.

28. … This requires respondent to put up a cogent case that he was not wilful, but particularly not *mala fide*, when he established this belief as each date for payment came and went, commencing at the beginning of December 2019 to now."

[13] The court *a quo* investigated the issue concerning the meaning of wilfulness and *mala fides* in the context of civil contempt proceedings. In doing so, it relied on

the case of *AK v JK*, Case No. 19890/2018, Western Cape Division, Cape Town (3 November 2020), in which the following was said:

> "85 Has the respondent discharged the evidential burden he bears to show that his failure to comply with the order of Le Grange, J was not wilful or *mala fide?* In *Maulean t/a Audio Agencies v Standard Bank Ltd* 1994 (3) SA 801 (C) at 803H-I King J described the act of wilfulness thus:
>
> > 'More specifically in the context of a default judgment 'wilful' connotes deliberateness in the sense of knowledge of the action and of the consequences, its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be.'
>
> I consider that the same approach is warranted in considering the element of wilfulness in this matter given that it accords with the following *dictum* of Cameron JA in *Fakie:*
>
> "[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately *mala fide*'. A deliberate disregard us 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 objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith)."

[14] In the final analysis, the court *a quo* found that the appellant, having intimated to the respondent that he would pay a reduced sum of R1 000,00 out of R10 000,00 per month, but still failed to make the reduced payment, deliberately and with bad faith breached the court order. On the issue, the court *a quo* placed reliance to the statement made by Kollapen J in *JD v DD* 2016 JDR 0933 (GP) which reads:

> "… if father were truly not mala fide, one would have expected him at the very least to have made payment of those amounts that he alleged he was

able to pay in his application for reduced maintenance", the conclusion was reached that:

[33] … as pointed out in *Fakie* objective unreasonableness in the failure to comply may be *bona fide* but also can evidence bad faith."

[15] In my opinion, the conclusion reached by the court *a quo* that the appellant was in contempt of the order that monthly payments of R10 000,00 had to be paid readily entitled the respondent to the relief contained in the first, second and third sections of the order dated 12 November 2020. Such a conclusion accords with the principle that objective unreasonableness in the failure to comply with a court order is indicative of bad faith in the same way that it would have been a sign of good faith had the behaviour and attitude of the appellant towards compliance been different.

[16] The court *a quo* rejected the lack of means defence based not only on the unacceptable conduct of self-help on the part of the appellant, but also due to the financial records of Paint City that the appellant had placed before the magistrate in his application for the variation of the maintenance order. The court *a quo* found that the documents and entries appearing in the bank statements exhibited by the appellant were, though selective, indicative of an income stream of approximately R33 027,08 per month, the scenario that remarkably demonstrated that the appellant had deliberately not budgeted to pay R10 000,00 maintenance or, at the very least, R1 000,00 reduced maintenance that he had told the respondent that he could afford to pay, but never did so. It was found that on the information gleaned from the financial records of the appellant, *albeit* irregularly presented, sufficient equity was available that afforded appellant to pay maintenance, but he, that notwithstanding, intentionally and with bad faith chose to disobey the maintenance order. Having found that the appellant's version that he could not afford to pay the maintenance was not cogent, a conclusion of law was drawn that contempt was proved beyond a reasonable doubt.

[17] The appellant is aggrieved by the judgment of the court *a quo*. In challenging it, he raises the following grounds:

"1) The Appellant submits that the Court *a quo erred* in failing to take sufficient cognisance of the fact that the Appellant was a lay litigant, who was not fully aware of all his evidentiary requirements; was at the time suffering with depression and anxiety for which he was booked off work; in all likelihood was not in the correct mental frame of mind to be present in court, let alone attempt to defend himself against highly experienced senior counsel and as such was prejudiced.

2) The learned Judge in the Court *a quo erred* in finding at para 7 of the judgment that the Appellant has a "capacious" home. We further refer to the Honourable Justice Lowe's comment within the granting of appeal dated 12 July 20121, para 34.1 regarding 2 sons, this again in error and should read 3 adult sons.

3) The learned Judge in the Court *a quo erred* in finding at para 57 of the judgment that there was a home valued at R875 000,00, and there was therefore no equity available that could have been utilised to settled the Appellant's obligations.

4) The learned Judge in the Court *a quo erred* in accepting at para 35 of the judgment Respondent's counsel's claim that the Appellant did not declare all income and expenditure. The evidence on the record revealed that the Appellant had disclosed and proven the figures provided, with the exception of groceries, which will always be variable.

5) The learned Judge in the Court *a quo erred* in accepting at para 35 that there was other income which the Appellant received. The learned Judge incorrectly placed an *onus* on the Appellant to prove a negative, ie that he did not receive other income.

6) The learned Judge in the Court *a quo erred* in accepting at para 49 that whilst there were errors within the expenses cited in the Appellant's December 2019 trading accounts, the month reflected losses before overheads and expenses.

7) The learned Judge in the Court *a quo erred* in citing at para 49 and 69 “gross profit/loss” figures for November (Profit) and December (Loss) 2019 as if these indicated available funds to pay the maintenance for which relief was sought, but neglected to take into account that these figures were prior to overheads and expenses and any drawings by partners which would reflect after the net profit/loss line of the bottom page. The directors’ drawings are not shown in the salaries and wages line.

8) The learned Judge in the Court *a quo erred* in accepting the respondent’s (Mrs Harnell) account that no warning of cessation of payment was given, yet she was in receipt of email dated 3 December 2019 reflecting the Appellant’s financial strain, which together with her own admissions of the Appellant’s continuous advice that he could not afford the settlement is evidence enough that the Appellant had certainly tried to advise of the need to cease/re-negotiate payments.

9) The learned Judge in the Court *a quo erred* in failing to take into consideration that a doctor’s referral placed on the record, confirmed that the Appellant had been consulting with him since March 2018 regarding this matter and his financial strain, and that at the time of trial he was booked off from work for depression and anxiety.

10) The learned Judge in the Court *a quo erred* in finding at paras 54 and 55 in respect of income and expenditure that there is no shortfall. If the Honourable Court’s summation were to be accepted, it would reduce a shortfall of R11 559 to R7 559, and by demanding continued payment as per the Deed of Settlement, and the additional R4 000 pm on arrears, the shortfall is increased back to unaffordable levels.

11) The learned Judge in the Court *a quo erred* in para 54 in its assessment of the Appellant’s purchase of a motor vehicle. The record will show that the Appellant was in dire need of funds to pay legal fees. The learned Judge ought to have compared the positions before and after the

divorce in that, during the divorce there was already vehicle finance costing R2 750 pm and thus the acquisition did not change the ability to afford maintenance after divorce.

12) The Appellant respectfully submits that the Court *a quo* had *erred* in not finding, on a conspectus of the evidence on record as a whole that the settlement was unaffordable from the beginning, and the signing of the Deed of Settlement was done under advice of senior legal counsel, not as a reasonable offer, but to prevent ever-mounting legal fees.

13) The learned Court accordingly *erred* in finding that the Appellant had the necessary intent to be found guilty of wilful disregard and was *mala fide* in respect of the judgment dated 5 November 2020".

[18] Counsel for the respondent submitted that in essence the appeal is premised on perceived unjust settlement and financial inability to pay maintenance. This is a correct summation of the grounds upon which the appeal was launched by the appellant. But the ground stated in para 13 of the Notice of Appeal, that the appellant did not harbour an intention to disobey the maintenance order, adds to the summation. It is on the basis of these three legs that the appeal must be decided. These legs involve an enquiry into the facts on which the judgment dated 12 November 2020 was made. Based on this, it may very well be apposite to make the point up-front that the court is not completely at liberty to interfere with the findings of fact made by the court *a quo,* which is the court of first instance. Unless there is a misdirection of fact by the trial judge, the presumption is that the conclusion reached is correct, and the appellate court will only reverse it where it is convinced that it is wrong. See: *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; and *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) at para 5.

[19] In arguments before this court, as is also stated in the notice of appeal, the appellant submitted that the outcome of the contempt application would have been different if the court *a quo* had regard to the fact that the appellant appeared in person, and was not possessed of legal skills to appreciate how to discharge the evidential burden to establish a reasonable doubt that he did not disobey the

maintenance order wilfully, and with *mala fides*. The appeal cannot succeed on the ground of lack of intention because the appellant presented the relevant facts on affidavit which demonstrated that he had engaged into the exercise of self-help by stopping payments of maintenance without having been authorised by the maintenance court to do so. He thereupon displayed an arrogant attitude that he did not owe even a cent to the respondent.

[20] It was submitted in this court on behalf of the respondent that the ground of appeal that the appellant has had to appear in court without being legally represented due to the alleged misrepresentation and / or undue influence by his legal team when the settlement agreement was signed on 30 April 2019 was merely a perception rather than factual. Based on this the court was urged to dismiss the appeal as the Constitutional Court in *Eke v Parsons* 2016 (3) SA 37 (CC) states at para 29 that once:

> "… a settlement agreement has been made an order of court, it is an order like any other";

And as stated in *PL v YL* 2013 (6) SA 28 (ECG) at para 10 as follows:

"

> … the parties … [may] return directly in the court that made the order, and to seek the enforcement thereof without the necessity of commencing a new action".

[21] Further, as stated in *Moraitis Investment (Pty) Ltd & Others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at para 10 the courts are enjoined not to have regard to settlement agreements as a point of departure. It will help to quote the words of the Supreme Court of Appeal at para 10. They read:

> "[10] In my view that was not the correct starting point for the enquiry, because it ignored the existence of the order making the agreement an order of court. Whilst terse the order was clear. It read: 'The Agreement of Settlement signed and dated 05 September 2013 is made an order of court'.
>
> For so long as that order stood it could not be disregarded. The fact that it was a consent order is neither here nor there. Such an order has exactly the

same standing and qualities as any other court order. It is *res judicata* as between the parties in regard to the matters covered thereby. The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165 (5) of the Constitution, which provides that an order issued by a court binds all people to whom it applies".

[22] I am in agreement with the submissions advanced on behalf of the respondent that the court *a quo* could not have been wrong in finding that the order dated 30 April 2019, incorporating the deed of settlement, was enforceable notwithstanding the stance now being adopted by the appellant that he is not bound by the terms thereof.

[23] Even if the appellant was suffering from depression and anxiety at the time before and during the hearing of his matter on 02 November 2020, the record of proceedings does not demonstrate that the court *a quo* approached the matter in a way that was prejudicial to the appellant. That said, this court is unable to find a misdirection with regard to the manner in which it evaluated the evidence placed before it on affidavit. Consequently, the grounds that the settlement agreement was unjust is baseless. Equally so, the alleged inability to explain non-compliance with the order of maintenance is not a sufficient ground for interfering with the judgment of the court *a quo*.

[24] The manner in which the court *a* quo evaluated the evidence and applied the law relevant to the appellant's non- compliance with the maintenance order, cannot be faulted. This conclusion finds support in the reasoning of the court *a quo* which is analysed in paragraphs 11 to 13 of this judgment. Therefore, the grounds listed in the Notice of Appeal that the court *a* quo did not properly consider the income and expenditure accounts of the appellant and Paint City cannot be sustained. More is said on this below.

[25] The appeal does not merit success, notwithstanding that the court *a quo erred* in relying on the incorrect valuation of the home of the appellant at R875 000,00 with an outstanding bond of R521 643,00 for the conclusion it made that based on such valuation the appellant had sufficient equity to comply with the court order. Even if

the court *a quo* had found in favour of the appellant that the correct valuation was R530 000,00 which admittedly would reduce the equity considerably, such an error would not detract from the overall finding that on a balance of probabilities, the appellant's financial profile did not demonstrate a total inability to pay R10 000,00 or, at the very least, the reduced sum of R1 000,00 that he had offered to pay. Similarly, the grounds that the outcome of the proceedings in the court *a quo* would have been different had it been considered that the home of the appellant is not "capacious" and its value is negligible, the trading income and expenditure accounts for Paint City and the appellant do not show a profit and that the acquisition of a new vehicle after divorce was not a reflection of solvency, do not in themselves evidence financial inability to pay maintenance. On the face of valid findings that the appellant had placed reliance on selective documents and bank statements which were unaudited and irreconcilable, the attempt to discover, *albeit* in an irregular fashion, the appellant's, new financial records through the applications purportedly brought in terms of Rule 42 and s 29 of Act 10 of 2013, the appeal premised on the broad ground that the appellant is not able to pay maintenance is disingenuous. At best for the appellant the maintenance court would be the forum best placed to make a determination, with the benefit of full information that was not provided to the court *a quo*, that the appellant is not able to pay maintenance at R10 000,00 per month.

[26] On the consideration of all the valid reasons given by the court *a quo* in support of the order it made on 30 November 2020, the appeal must fail. To the extent that a case has not been made out warranting deviation from the rule of practice that the costs should follow the result, the appellant must pay the costs of the appeal process that commenced with this application for leave to appeal.

[27] In the result the following order shall issue:

> **The appeal is dismissed with costs; including the costs incurred in the prosecution of the application for leave to appeal and the condonation thereof.**

Z. M. NHLANGULELA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT.

I agree:

T. MALUSI
JUDGE OF THE HIGH COURT

I agree:

A. GOVINDJEE
JUDGE OF THE HIGH COURT

For the appellant	**:**	**Mr. M. H[....]** **[In person]** **No. 1 Greenfountain Farm Chalets** **PORT ALFRED.**
Counsel for the respondent	**:**	**Adv. A. Beyleveld SC**
Instructed by	**:**	**Wheeldon Rushmere & Cole Inc.** **MAKHANDA**