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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 26401/2022

DATE: 2022-10-26

REPORTABLE: NO.

OF INTEREST TO OTHER JUDGES: NO.

REVISED.

In the matter between

C [....] C [....] 1

Applicant

And

D [....] C [....] 1

1st Respondent

J H DU PLESSIS N.O.

2nd Respondent

N U SEFANYETSO N.O.

3rd Respondent

J U D G M E N T

WEPENER, J:

In this application, the applicant seeks an order finding the first respondent in contempt of Court and that the respondent be imprisoned for a period of four months.

The history of the matter is of little relevance save to say that the respondent was a party to a divorce settlement agreement between the parties and later more importantly, an order issued by Maier-Frawley, J, the latter which regulated certain obligations of the respondent pending his application to the Magistrate for a variation of his obligations in terms of the first settlement or original settlement agreement.

Maier-Frawley J's order says:

“The respondent is ordered to pay on or before close of business on 31 October 2018 an amount of R65 653.09 to ensure the enrolment of the minor children, TPC and CLC at R [...] School for the school year commencing January 2019. That includes any other amount necessary to ensure the enrolment of the children at R [...] .

Next order:

Pending the final determination of any maintenance inquiry under case 14/3/2/306/2013 in the Randburg Magistrates Court, any variation to the respondent's obligation in terms of the settlement agreement entered into between the parties on 28 September 2011, the settlement agreement regarding the minor children's educational costs, the respondent is ordered to make payment to R [...] School of all the requisite school fees and other associated costs of the minor children together with the amount due in terms of the settlement agreement.”

It is common cause that the respondent is not complying with the interim order and that the enquiry in the Magistrates Court has not been finalised.

The requirements and circumstances when a person will be found to be in contempt of Court has been set out in a number of decisions. In

Victoria Park Ratepayers Association v Greyvenouw CC and others (511/03) [2003] ZAECHC 19, Plasket J, as he then was said at paragraph 5:

“It appears to me that the main purpose of the practice of seeking a *rule nisi* in cases such as this is to regulate how the matter is to proceed. Contempt of Court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged the party has wilfully and in bad faith ignored or otherwise failed to comply with a court order.”

See also *Secretary Judicial Commission of Inquiry into allegations of State Capture v Zuma and others* 2021(5) SA327 CC at paragraph 24:

Plasket J, further said at paragraph 15:

“Contempt of court is a criminal offence. It is committed, generally speaking, when a person unlawfully and intentionally violates the dignity, repute or authority of a judicial body or interferes in the administration of justice in a matter pending before such a body. It serves three important purposes, namely to protect the rights of everyone to fair trials, to maintain public confidence in the judicial arm of government and, to uphold the integrity of orders of the court.”

The test of whether such an order for contempt of Court and consequences should follow is well-known but has been stated in *Fakie NO v CCII Systems Pty Ltd* 2006(4) SA326 SCA 22 and 23 where Cameron J (as he then was) said at 22:

“What is changed is that the accused no longer bears a burden to disprove wilfulness and *mala fides* on a balance of probabilities

but to avoid conviction need only lead evidence that establishes a reasonable doubt.”

In this matter the Court order and the respondent’s knowledge thereof and his non-compliance are common cause. The question to be asked is does the respondent raise a reasonable doubt as to his wilfulness and *mala fides* his conduct.

Save for a hastily prepared counter application for a variation of the settlement agreement between the parties after receipt of the current application, an analysis of the respondent’s version shows that he is indeed in contempt of Court.

I am of the view that the respondent knows full well that his application to vary the deed of settlement is before the magistrate and it was common cause that the matter will be further heard in the near future.

My recollection is that it is in the during the first few days of November, which is next week or the week thereafter.

In that sense, the issues raised in the counter application are *lis pendens* and the Magistrate will be in a better position to consider the full spectrum of the facts and evidence placed before that Court. I have been advised that several days of hearing have already passed.

The counter application in my view, is no more than an attempt to stifle the applicant’s current application. Again, I stress that the counter application, in the main, in my view, is misconceived as it attempts to vary the very same settlement agreement of 2011 which is now being considered by the magistrate.

In those circumstances I am of the view that the counter application falls to be dismissed. In any event the variation application does not the

deal with the order of Maier-Frawley J at all. In addition, the application before the magistrate also does not deal with the order Maier-Frawley J.

The application before the magistrate seeks an order to amend the deed of settlement from the date that the magistrate may so order. It does not seek relief retrospectively. The hearing before the magistrate in my view does not affect these proceedings before me which solely relate to the respondent's failure to adhere to the interim order of Maier-Frawley J.

The respondent's affidavit sets out the history which *inter alia* relies on the applicant's father's financial assistance to her and the children.

He also deals extensively with the deed of settlement of 2021 when the parties became divorced.

I am of the view that neither of these facts impact on the interim order of my sister, Maier-Frawley J. What the respondent does say is that he kept up with the payments until 2019 and said that he was forced to reduce his contributions after the applicant brought a successful sequestration application or successful sequestration proceedings against him in August 2020.

He does not explain the period between 2019 and his sequestration. Despite his sequestration the respondent was still able to pay relatively large amounts to the applicant in relation to maintenance.

The respondent alleges that he cannot afford the amounts payable. He attaches a document which he prepared and submitted to the magistrate some time ago. The document has its difficulties save for the fact that it is also outdated.

He also offers alternative payment models but not those ordered by Maier-Frawley J. In addition, a summary of his evidence at the maintenance inquiry paints a different picture. The applicant sets

out the respondent's monthly earnings up to 2021 as was disclosed in his evidence at the hearing. These amounts are substantially higher than the income of which the respondent alleges that he received.

Save for denying that the annexure and the calculations are correct and explaining why they are not correct the figures set out by the applicant in the affidavit are boldly denied by the first respondent. It is thus clear that the respondent's earning is far in excess of that which he wishes to disclose.

The respondent in my view has failed to set out facts that establishes a reasonable doubt as to his ability to pay. Although it has been held that in contempt cases a rule is an appropriate order as I referred to above, the effect of the order which I am to issue is the same.

In all these circumstances I issue the following order:

1. The first respondent is found to be in contempt of the order of Her Ladyship, Honourable Justice Maier-Frawley under case no 38219/2018 dated 30 October 2018.
2. The first respondent is ordered to pay to R [....] School on or before close of business on 31 October 2022 the amount of R287 400 to ensure the enrolment of the minor children, T and C, at R [....] School for the school year commencing January 2023.
3. In the event of the first respondent failing to comply with paragraph 2 above the first respondent is sentenced to direct imprisonment for a period of four months.

4. The first respondent is to pay the costs of this application.

5. The counter application is dismissed with costs.

WEPENER J

JUDGE OF THE HIGH COURT

DATE: