

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

CASE NUMBER: 2021/28640

**(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. YES
DATE: 14 March 2023**

In the matter between:

Y[....] R[....] D[....]1

Applicant

and

K[....] L[....] D[....]2

Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 13 March 2023

JUDGMENT

WANLESS AJ

Introduction

[1] In this application, one Y[....] R[....] D[....]1, adult female (*“the Applicant”*), seeks an order declaring her ex-husband one K[....] L[....] D[....]2, adult male (*“the Respondent”*) to be in contempt of an order made by the Regional Court, Johannesburg on the 25th of January 2015 under case number 14/2134 (*“the January Order”*) the terms of which were confirmed by an order of this Court on the 30th of August 2021 under case number 2021/28640 (*“the August Order”*).

Common cause facts

[2] The Applicant and the Respondent were married and subsequently divorced on the 27th of January 2015 at the Regional Court, Johannesburg. At the time of divorce the parties concluded a settlement agreement (*“the agreement”*) which was made an order of that court (*“the January Order”*).

[3] In terms of the January Order the following was agreed between the Applicant and the Respondent and made an order of the Johannesburg Regional Court, namely:

“2.1 Immovable Property

2.1.1 The parties own property more fully described as ERF [...], Bassonia, Johannesburg.

2.1.1.1 The abovementioned property is encumbered by a bond currently held by Investec Private Bank and shall be administered as follows:

2.1.1.1.1 The property shall be sold and the proceeds, after settlement of the outstanding bond amount shall be paid to the Defendant [the Applicant in casu];

2.1.1.1.2 Should any of the parties refuse to sign the transfer documents after a reasonable and legitimate offer has been made taking into account the current market circumstances, the Sheriff of the Court shall be authorised to sign such documents on behalf of the parties;

2.1.1.1.3 *The [Applicant] shall be entitled to acquire a house up to the value of R1,5 million after the divorce and the [Respondent] shall, should he have the financial means to do so, pay the bond on such property until it is settled. The house shall be registered in both parties' names but shall be transferred to the [Applicant] when the bond is settled.*

2.2 *Movable Property*

2.2.1 *The parties currently own two motor vehicles which they each use. The vehicles are currently financed by Mercedes Benz. The parties hereby agree that the [Respondent] will continue to pay the remaining balance of the vehicles and each party shall retain his/her vehicle.*

2.2.2 *The [Respondent], should he have the financial means at the time, will replace the [Applicant]'s motor vehicle every 5 years, with a second hand or new motor vehicle of a similar price escalated by inflation.”¹*

[4] On or about the 1st of September 2015 the parties entered into a *Memorandum of Agreement (“the MOA”)* which dealt with, *inter alia*, the manner in which the immovable property owned by the parties would be sold.

[5] Thereafter the immovable property owned by both parties was sold and it was further common cause that once the mortgage bond was settled in respect thereof there was no residual payable to the Applicant.

[6] During or about the period December 2020 to March 2021 the attorneys representing the respective parties engaged with one another in correspondence. The Applicant's attorneys requested the Respondent's attorneys to advise when the Respondent would comply with the January Order. In response thereto the Respondent's attorneys advised that, in light of the parties having entered into the MOA, the Respondent was no longer obliged to comply with the January Order. Thereafter, the Respondent's attorneys placed the interpretation, implementation and conclusion of both the January Order and the MOA in dispute.

¹ *Emphasis added.*

[7] This gave rise to the Applicant instituting an application in this Court for a declarator that the Respondent was indeed still obliged to comply with the January Order and that there had been no variation thereof.

[8] That application was not opposed by the Respondent and on the 30th of August 2021 the August Order was granted, in terms of which, *inter alia*, the clauses of the January Order dealing with the issues of the immovable property and the motor vehicle were declared to still be of full force and effect. The August Order reads as follows:

“Clauses 2.1.1.1.3 and 2.2 (including respective sub-clauses thereof) of the court order of 27 January 2015 granted in the Magistrate’s Court for the Region of Johannesburg under case number 14/2134, have not been varied and remain of full force and effect.”

[9] The Respondent has not complied with the January Order and the Applicant has instituted the present application of contempt. It is not disputed by the Respondent that he is well aware of the January and August Orders. The relief sought by the Applicant in the Applicant’s Notice of Motion is as follows:

“1. Declaring Respondent to be in contempt of the court order made by the Regional Court, Johannesburg on 25 January 2015 under case number 14/2134 (“the Order”);

2. Committing Respondent to imprisonment for a period to be determined by this Honourable Court;

3. Alternatively to paragraph 2 above, committing Respondent to imprisonment for a period to be determined by this Honourable Court, which period shall be wholly or partially suspended on the following conditions:

3.1 That Respondent shall within 30 days from date hereof, comply with the Order in that:

3.1.1 Respondent shall acquire a house for Applicant up to the value of R1,5 million and register such immovable property in the names of both Respondent and Applicant;

3.1.2 Respondent shall pay the bond on such property until it (sic) such bond is settled, whereafter Respondent will transfer the property into the name of the Applicant;

3.1.3 Respondent will replace Applicant's motor vehicle with a second hand or new motor vehicle of a similar price escalated by inflation.

4. That Respondent shall pay Applicant's costs of this application on the scale as between attorney and client.

The Respondent's case

[10] The Respondent raises a number of defences to the relief sought by the Applicant. These are:

10.1 that contempt proceedings are not legally competent to enforce the clauses of the agreement that the Applicant seeks to enforce;

10.2 that the Applicant has not proven that the Respondent is in breach of the agreement that was made an order of court;

10.3 hat to the extent that the Applicant has proved non-compliance with the agreement (which the Respondent denies) that the Applicant has failed to prove wilfulness and *mala fides* on the part of the Respondent beyond reasonable doubt; and

10.4 that there are disputes of fact relating to the requirements of contempt which prevents the adjudication of these proceedings by way of motion.

Are contempt proceedings legally competent to enforce the clauses of the agreement that the Applicant seeks to enforce?

[11] The above heading (in the form of a question) is posed using the same terminology as put forward by the Respondent's Counsel. Of course, when considering this point *in limine* as raised by the Respondent in this application, it is imperative to note that the clauses in

question, whilst having their genesis in the agreement entered into between the parties at the time of divorce, ultimately formed part of the January Order of which the Applicant avers the Respondent is in contempt. Since interpreting the January Order is fundamental to arriving at the correct answer in respect of the point *in limine* raised by the Respondent and as set out above, this context (as only one of the factors to be applied in the interpretation of a court order) should not be forgotten. It is for this reason that this Court was, *inter alia*, provided with and referred to, the application papers in respect of the unopposed application for a declarator in this Court to the effect that the Respondent was still bound to comply with the terms of the January Order (which had incorporated the terms of the agreement) and resulted in the granting by this Court of the August Order. Throughout this judgment the clauses or paragraphs of both the agreement and the January Order will be referred to interchangeably as will (dependent upon the context in which they are used) references to the agreement; the January Order and the August Order. It is common cause between the parties that this Court has the requisite jurisdiction to determine this application (being a contempt application in respect of an order of a lower court within the jurisdiction of this Court the terms of which have been confirmed by this Court).

[12] At the heart of the Respondent's opposition to the application based on this point *in limine* is the fact that contempt of court proceedings are not competent where they relate to proceedings *ad pecuniam solvendam* (the payment of money).² Indeed, this principle is fairly trite. Coupled thereto however are the following. Whilst contempt proceedings are *not* competent where they relate to orders *ad pecuniam solvendam*, contempt proceedings *are* competent where they relate to orders *ad factum praestandum* (performance of an act).³ In addition thereto, contempt proceedings *are* applicable in respect of the payment of maintenance arising from divorce proceedings.⁴ Adv Pye SC, who appeared on behalf of the Respondent, conceded both of these latter principles. However, it was his submission that the relief sought by the Applicant is in substance for the payment of money and relates to the patrimonial consequences of the marriage between the parties rather than to maintenance. As such, it was submitted that the relief sought by the Applicant (contempt) was not competent and that the application should be dismissed on this ground alone.

² *Uncedo Taxi Service Association v Maninjwa and Others* 1998 (3) SA 417 (E); *Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 (1) SA 224 (T).

³ *Uncedo* at 420; *Metropolitan* at 227.

⁴ *Metropolitan* at 227-230.

[13] In order to properly decide this issue, it is necessary (as already stated) to interpret the relevant clauses relied upon by the Applicant in support of the application. When doing so, it is essential to bear in mind the applicable principles of interpretation as set out by the Supreme Court of Appeal (“SCA”) in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵ where it was held:-

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”⁶

Of course, the aforesaid principles governing the interpretation of contracts apply equally to the construction of a settlement agreement which was made an order of court.⁷

⁵ 2012 (4) SA 593 (SCA).

⁶ At para [18]; *Emphasis added*

⁷ *Engelbrecht and Another NNO v Senwes Ltd* 2007 (3) SA 29 (SCA) at 32D; *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-758E.

[14] As dealt with above, in order for the point *in limine* raised on behalf of the Respondent to be upheld the relevant provisions of the agreement pertaining to the immovable property and the motor vehicle must not be either the performance of an act or payments made in respect of maintenance.

[15] In the matter of *Hawthorne v Hawthorne*⁸ the Court was essentially tasked with interpreting a settlement agreement which had been made an order of court. When considering the meaning of “*maintenance*”, Herbstein J cited, with approval,⁹ the words of Scott LJ in *Ackworth v Ackworth*¹⁰ where it was held that maintenance “*is a very wide word...It includes much more than food, lodging, clothes, travelling and so on.*”

[16] When searching for an answer as to what may constitute an order *ad factum praestandum* (performance of an act) or payment made in terms of a maintenance order the matter of *Metropolitan Industrial Corporation (Pty) Ltd v Hughes*¹¹ provides an excellent platform. In that matter the Court¹² referred to the matter of *Carrick v Williams*¹³ where Schreiner J held¹⁴ the following:

“It seems to me that the reason for holding maintenance orders..... to be orders ad factum praestandum is that they are not really money judgments at all. In their essential nature they are orders that the defendant do something, namely maintain his wife, or the children. This duty might be performed in various ways including the provision of housing, clothing, and food in kind, or the transfer of property;
.....”¹⁵

[17] In the matter of *Strime v Strime*¹⁶ it was held¹⁷ that not only must an order for maintenance, like any other court order, be meticulously carried out but it is also final and

⁸ 1950 (3) SA 299 (C).

⁹ At 304.

¹⁰ 1943 P at page 22.

¹¹ 1969 (1) SA 224 (T).

¹² At 227 and 228.

¹³ 1937 WLD 76.

¹⁴ At page 83.

¹⁵ *Emphasis added.*

¹⁶ 1983 (4) SA 850 (C).

¹⁷ At page 852.

enforceable until varied or cancelled.¹⁸ It was also held that arrears of maintenance could be recovered either by way of contempt proceedings or by way of writ of execution.¹⁹

[18] When attempting to ascertain the true meaning of “*maintenance*” to enable one to draw a distinction between an order to pay a sum of money or perform a certain act to comply with a “*maintenance order*” and the payment of money to comply with an order in respect of the proprietary consequences of a marriage upon divorce, one would expect, in the first instance, to find a definition (or definitions) which would assist in the *Maintenance Act, 99 of 1998* (“*the Maintenance Act*”). Unfortunately, in section 1 of the *Maintenance Act*, “*maintenance*” is not defined. However, “*maintenance order*” is defined as follows:

“maintenance order” means any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person.

[19] “*Maintenance*” is also not defined in the *Divorce Act 79 of 1979* (“*the Divorce Act*”) or the *Matrimonial Property Act, 88 of 1984* (“*the Matrimonial Property Act*”). The *Concise Oxford English Dictionary* defines “*maintenance*” as “*a husband’s or wife’s provision for a spouse after separation or divorce*”.

[20] Wunsh J, when dealing with the powers of the Maintenance Court to make certain orders in terms of the *Maintenance Act 23 of 1963* (“*the old Maintenance Act*”) in the matter of *Schmidt v Schmidt*²⁰ drew the distinction²¹ between “*the quantified payment*” and the “*unquantified obligations*” included in the same maintenance order. It should be noted that the definition of a “*maintenance order*” in the old Maintenance Act has remained the same in the Maintenance Act.

¹⁸ *Williams v Carrick (supra)* at 152, 158; *Hawthorne* at 306H.

¹⁹ *Williams v Carrick* at 158; *Young v Coleman 1956 (4) SA 213 (D)* at 220C.

²⁰ 1996 (2) SA 211 (W).

²¹ At page 218.

[21] What the Court in *Schmidt* was ultimately asked to decide was whether, in terms of the provisions of subsection 5(4)(a) of the old Maintenance Act the maintenance court could make an order for treatment and therapy given by a person who is *not* a medical practitioner (the maintenance court been specifically empowered to make orders pertaining to medical expenses in terms of subsections 5(4)(a)(ii) and (iii) of the old Maintenance Act) and recurring costs of education on the basis that these would be orders for the payment of “*at such times, and to such person, officer, organisation or institution....and in such manner as may be specified in the order, of sums of money so specified, towards the maintenance of such other person.*”²²

[22] In deciding this issue, Wunsh J held²³ that:

*“The payments would be made towards the **maintenance** of a person, bearing in mind the wide meaning of the word (see, for example **Hawthorne v Hawthorne** 1950 (3) SA 299 (C) at 304E-F; *Scott v Scott* 1946 TPD 399 at 401-2). They would be periodic as distinguished from a lump sum payment (see Hahlo **The South African Law of Husband and Wife** 5th ed at 357). The fact that they are not made at regular intervals does not mean that they are not periodic – the word can mean from time to time – compare para (ii)(bb) of the exclusions from the definition of “remuneration” in para 1 of the Fourth Schedule to the Income Tax Act 58 of 1962 which refers to amounts paid for services which are “payable at regular daily, weekly, monthly or other intervals”.*

*And if an order specified that amounts charged by a category of service-providers, for example occupational or speech therapists, schools and suppliers of school books, but it could be more general – should be paid, there is no reason why those should not be amounts “specified” in the order – such a specification will enable one to ascertain accurately what is payable (for example, **Pattinson and Another v Fell and Another** 1963 (3) SA 277 (D) at 279A-C). Finally, payments of such amounts will be made to payees who fall within the class provided for in s 5(4).*

²² At page 220.

²³ At page 220.

*It would be anomalous if a party seeking to enforce an order or have it replaced, which occurs frequently in matrimonial and post-matrimonial proceedings, incorporating an undertaking to pay a quantified monthly amount and medical expenses and also an undertaking to pay other unqualified obligations, would have to have recourse to different courts or that two maintenance orders' would be extant dealing with the maintenance (using the word in a neutral sense) obligations between the same two parties. It is also not practical or in the interests of justice that two different courts enquire into and deal with separate components of a general maintenance obligation. The determination of the obligation to pay towards unquantified obligations must be influenced by the amount of the quantified payments and **vice versa**.”²⁴*

[23] Having regard to the agreement, it is noted that in the preamble thereto, it is stated, *inter alia*, that

“WHEREAS the Parties wish (sic) this settlement agreement to replace all pleadings filed to date and form the basis of the division of the joint estate as well as the parental plan regarding the minor children and maintenance obligations between the parties.”

So, at the outset, the parties identified the issues which they wished to deal with in the agreement upon their divorce. This is carried through to the body of the agreement itself, which is divided up into numbered paragraphs and various headings.

[24] Paragraph 1 of the agreement bears the heading of **“CHILDREN”** and then has a number of sub-paragraphs dealing with various aspects which are applicable to the minor children born of the marriage between the Applicant and the Respondent. Subparagraph 1.10 of the agreement deals with maintenance in respect of the minor children and reads as follows:

“ 1.10 Maintenance

²⁴ *Emphasis by the Court in Schmidt in bold; emphasis added by underlining.*

The parties agree that they will ensure that the children are cared for to the best of their financial resources. The parties agree that they will jointly make financial decisions about the financial wellbeing of the children.

Provision for maintenance

The Plaintiff (Respondent) shall be responsible for the maintenance of the children, providing for their education and all expenses necessary for the (sic) wellbeing and sustainable living. “

[25] Paragraph 2 of the agreement bears the heading “**Division of Assets**”. It is also divided up into a number of subparagraphs with various headings. Paragraph 2 of the agreement reads as follows:

“2. Division of assets

2.1 Immovable Property

2.1.1 The parties own property more fully described as ERF [...], Bassonia, Johannesburg.

2.1.1.1 The abovementioned property is encumbered by a bond currently held by Investec Private Bank and shall be administered as follows;

2.1.1.1.1 The property shall be sold and the proceeds, after settlement of the outstanding bond amount shall be paid to the Defendant.

2.1.1.1.2 Should any of the parties refuse to sign the transfer documents after a reasonable and legitimate offer has been made taking into account the current market circumstances, the Sheriff of the Court shall be authorised to sign such documents on behalf of the parties.

2.1.1.1.3 The Defendant shall be entitled to acquire a house up to the value of R1,5 million after the divorce and the Plaintiff shall, should he have the financial means to do so, pay the bond on such property until it is settled. The house shall

be registered in both parties names but shall be transferred to the Defendant when the band is settled.

2.2 Movable Property

2.2.1 The parties currently own two motor vehicles which they each use. The vehicles are currently financed by Mercedes Benz. The parties hereby agree that the Plaintiff will. continue to pay the remaining balance of the vehicles and each party shall retain his/her vehicle.

2.2.2 The Plaintiff, should he have the financial means at the time, will replace the Defendants motor vehicle every 5 years, with a second hand or new motor vehicle of a similar price escalated by inflation.

2.2.3 All furniture effects which are currently in the household shall become the property of the Defendant upon the decree of divorce being granted.

2.3 Pension Interest

2.3.1 The parties agree that the Defendant shall be entitled to half the benefits to which the Plaintiff is entitled to as a member of his pension fund according to the statutes when such pension benefits are paid out.

2.4 Life Policies

The Plaintiff shall ensure that his three children will be equal beneficiaries of his current life policies.

2.5 Provision of Maintenance for the Defendant

*Each Party shall be responsible for his/her own maintenance. Should the Plaintiff's financial position change in future, the Plaintiff will pay maintenance towards the Defendant.*²⁵

²⁵ *Emphasis added.*

2.7(sic) **Plaintiff's yearly Bonus payments**

The Defendant will be entitled to half of the Plaintiffs yearly bonus paid out at the end of June of every year and half of the Plaintiff's 13^o cheque bonus paid during the month of December every year for the rest of her natural life.

[26] Upon a cursory reading, it may appear that the agreement makes (or purports to make) a distinction between maintenance and the division of assets of the joint estate (the parties having been married in community of property). Presumably this is the basis upon which Counsel for the Respondent submitted that the relief sought by the Applicant is in substance for the payment of money and relates to the patrimonial consequences of the marriage between the parties rather than maintenance. However, whilst paragraph 2 ostensibly deals with the “*division of assets*” of the joint estate and contains a number of subparagraphs which clearly do so, it also contains subparagraph 2.5 which deals specifically (and solely) with the provision of maintenance by the Plaintiff (*Respondent*) to the Defendant (*Applicant*) in the future. It must also be noted that subparagraph 2.7 (which should be subparagraph 2.6) which deals with “*Plaintiff's yearly Bonus payments*” and provides that one-half of the Respondent's bonuses paid to him at the end of June and during December each year will be paid to the Applicant for the remainder of her natural life, creates, *inter alia*, an ongoing obligation and as such (in light of the principles dealt with above and as will be seen from that which follows later in this judgment) can hardly be classified as a division of assets but should rather be interpreted to fall under the general classification of maintenance.

[27] In the premises, it would be incorrect to rely solely (or at all) on the structure of the agreement when interpreting same in order to ascertain whether the point *in limine* as raised by the Respondent should be upheld or dismissed.²⁶ As can immediately be ascertained the proper interpretation of the agreement is not as simple or as straightforward as Respondent's Counsel would suggest.

²⁶ *In the context of a challenge to an arbitral award in terms of subsection 33(1)(b) of the Arbitration Act the Supreme Court of Appeal, in the matter of Enviroserv Waste Management (Pty) Ltd v Wasteman Group (Pty) Ltd [2012] JOL 28939 (SCA), has held that the structure of the award is cardinal in deciding what the tribunal decided and why.*

[28] It is the considered opinion of this Court that a single factor in the interpretation of a term or terms of an agreement which has been made an order of court should never be over-emphasised to the detriment of others. This Court is also well aware of the caution issued by the Supreme Court of Appeal (“SCA”) of the danger of “*context*” being over-utilised²⁷ as a tool of interpretation. Nevertheless, it is the opinion of this Court that in this particular matter the context as to how the terms relied upon by the Applicant were incorporated into the January Order before being confirmed by the August Order, is a fairly significant factor in the interpretation of the agreement (and ultimately the January Order). Of course, this does not mean that this Court should not be alive to (and apply) other relevant factors when adopting a correct and objective approach to interpreting the agreement which gave rise to the January Order.

[29] At the outset, it is imperative to note that the parties were married in community of property. Hence the provision (and *prima facie* distinction between proprietary consequences of the marriage and maintenance, as noted above) for a recordal of the division of the joint estate which had existed between the parties upon divorce. In this regard, it has already been noted that “*Provision of Maintenance for the Defendant (Applicant)*” is a subparagraph (*subparagraph 2.5*) under the general heading of “*Division of Assets*” which is paragraph 2 of the agreement. The other subparagraphs also falling thereunder are “*Immovable Property*” (*subparagraph 2.1*); “*Movable property*” (*subparagraph 2.2*); “*Pension Interest*” (*subparagraph 2.3*); “*Life Policies*” (*subparagraph 2.4*) and “*Plaintiff’s (Respondent’s) yearly Bonus payments*” (*subparagraph 2.7* which, as noted above, is a typographical error and should be 2.6).

[30] Upon closer scrutiny, it is clear that the first subparagraph of the agreement which forms the subject matter of the dispute between the parties, namely subparagraph 2.1 “*Immovable Property*” is divided up into two parts. In the first part the agreement makes provision for the sale of the immovable property owned jointly by the parties by virtue of their marriage in community of property (*subparagraphs 2.1.1.1.1 and 2.1.1.1.2*). The second part of this subparagraph provides for the acquisition by the Defendant (*Applicant*) of an immovable property to a limited value after the date of divorce (*subparagraph 2.1.1.1.3*). Importantly, the second part of this subparagraph is not conditional upon the first

²⁷ *Tshwane City v Blair Athol Homeowners Association 2019 (3) SA 398 (SCA) at paragraphs [63] and [64]*.

part thereof; the bond in respect of the immovable property to be acquired by the Defendant (*Applicant*) was to be paid by the Plaintiff (*Respondent*) provided he had the financial means to do so and the parties would own the immovable property jointly until the bond was fully paid whereupon the said property would be transferred to the Defendant (*Applicant*). From the foregoing the only reasonable and objective interpretation to be given thereto, giving the wording of the subparagraph its normal grammatical meaning and interpreting same in a sensible manner to give it business efficacy, is that provided the conditions contained therein were satisfied the Applicant would have the right to reside at the immovable property; the Respondent would be obliged to pay the monthly bond instalments in respect thereof and, once the bond in respect of the property was settled, the Applicant would become the owner of the property.

[31] This clear and distinct separation between the sale of the immovable property owned by the parties and the acquisition of an immovable property by the Applicant is further borne out by the parties entering into a *Memorandum of Agreement* (“*the MOA*”) on the 1st of September 2015. The primary purpose of the MOA was to deal with the sale of the immovable property owned by the parties. It made no reference to and was in no manner whatsoever connected with the acquisition of an immovable property by the Applicant.

[32] As set out in *Hawthorne*, maintenance “*is a very wide word which includes much more than food, lodging, clothes, travelling and so on*”. At the very least, for present purposes, it must obviously include the provision of an immovable property (“*lodging*”). Further, as seen from *Metropolitan*, the duty to maintain can be carried out in various ways which would include, *inter alia*, the provision of housing or the transfer of property. Moreover, as dealt with earlier in this judgment, “*maintenance order*” is defined in the Maintenance Act as “*any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person*”. Having regard to the foregoing, it is the opinion of this Court that the provisions of subparagraph 2.1.1.1.3 of the agreement whereby the Respondent, should he have the financial means to do so, pay the bond on an immovable property to be acquired by the Applicant up to the value of R1,5 million, when made an order of this Court, became a maintenance order and, as such, an order *ad factum praestandum*. This view is fortified by the findings of the Court in *Schmidt* as also set out earlier herein.

[33] Further support for this finding is to be found in the wording of the subparagraph with particular reference to “*should he have the financial means to do so*”. If this subparagraph of the agreement had been intended to deal specifically with the proprietary consequences of the marriage or, put slightly differently, a division of the joint estate, wording of this nature would have been inappropriate and superfluous. On the other hand, these words wholly support an interpretation that this subparagraph is one which provides for a maintenance obligation. In addition to the foregoing the provision of assets (such as an immovable property or motor vehicle) as a means of providing maintenance has long been a common and acceptable practice within the wider meaning of that term.²⁸ Also, as is clear from *Schmidt*, an order which incorporates an “*unquantified amount*” payable to service providers in respect of maintenance is perfectly competent.²⁹

[34] The second subparagraph of the agreement which forms the subject matter of the dispute between the parties is subparagraph 2.2. More particularly, it is subparagraphs 2.2.1 and 2.2.2 which are in dispute. As is clear from the excerpt of the agreement set out in this judgment (above) these subparagraphs, like the previous subparagraph in dispute, fall under the general heading of “*Division of Assets*”. Further, similar to the subparagraph in the agreement dealing with immovable property, it is important to note that the two subparagraphs (2.2.1 and 2.2.2) are clearly separate and distinct.

[35] Subparagraph 2.2.1 of the agreement deals with the retention of each party of their own motor vehicle and that the Plaintiff (*Respondent*) shall continue to pay the remaining finance in respect of both motor vehicles. In terms of subparagraph 2.2.2 of the agreement, an obligation is imposed upon the Plaintiff (*Respondent*) to replace the Defendant’s (*Applicant’s*) motor vehicle with a second hand or new motor vehicle of a similar price escalated by inflation every 5 years, provided the Plaintiff (*Respondent*) has the financial means at the time to do so. Whilst the Respondent may have had some basis upon which to argue that the provisions of subparagraph 2.2.1 should be categorised as relating to the proprietary consequences of the marriage and hence are in respect of proceedings *ad pecuniam solvendam* (the payment of money) it cannot be said that this is true for subparagraph 2.2.2 of the agreement.

²⁸ Paragraph [16] *ibid.*

²⁹ Paragraphs [20] to [22] *ibid.*

[36] This is so in light of, *inter alia*, the same factors and the application of the same principles as dealt with by this Court earlier in this judgment when considering the provisions of the agreement in respect of the sale of the immovable property owned by the parties and the acquisition of the Applicant of an immovable property. In addition thereto, is the fact that the duty to provide a replacement motor vehicle is ongoing (every 5 years). It is not a single event or even a number of limited events which gives rise to a division of assets. In the premises, subparagraph 2.2.2 of the agreement must, as in the case of subparagraph 2.1.1.1.3 of the agreement, be categorised as relating to orders *ad factum praestandum* (performance of an act) and, more particularly, in respect of the payment of maintenance arising from divorce proceedings.

[37] In the premises, the point *in limine* taken by the Respondent that contempt proceedings are not legally competent to enforce the clauses of the agreement that the Applicant seeks to enforce, cannot be upheld.

Has the Applicant proven that the Respondent is in breach of the agreement that was made an order of court?

[38] It is common cause between the parties that in order to succeed in contempt proceedings the Applicant must prove, beyond a reasonable doubt, the grant of the August Order and the service thereof; non-compliance by the Respondent with the August Order and that the Respondent's non-compliance was wilful and *mala fides*.³⁰ Further, it is common cause that once the Applicant proves service and non-compliance as aforesaid the Respondent bears an evidential burden in relation to wilfulness and *mala fides* to advance evidence that establishes a reasonable doubt as to whether his non-compliance was indeed wilful and *mala fides*. Being motion proceedings (and this was also common cause between the parties), where there was a genuine or bona fide dispute of fact on the application papers before this Court, the "*Plascon-Evans*" rule applies in that subject to the "robust" elimination of denials and "fictitious disputes" this Court must decide the matter on

³⁰ *Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at paragraph [42].*

the facts stated by the Respondent together with those the Applicant avers and the Respondent does not deny.³¹

[39] As already noted in this judgment, it was common cause between the parties (and as is clear from the facts of this matter) that the Applicant had proved the first two requisites of a successful contempt application, namely the grant of the August Order and the service thereof (more particularly that the Respondent was aware of the granting of that order and the terms contained therein) and that the Respondent had not complied with the August Order. What remained for this Court to decide was whether the Respondent's non-compliance with the August Order was wilful and *mala fides*.

[40] On the 8th of December 2020 the Applicant's attorneys addressed a letter to the Respondent's attorneys. In this letter it was stated, *inter alia*, that the Applicant had identified a house for sale in the Parkhurst area of Johannesburg which was for sale and for which the seller was seeking a sale price of approximately R3 million. The Applicant's attorneys sought a financial contribution from the Respondent in the amount of R1,5 million with the remainder of the purchase price to be financed by the Applicant. This was prior to the granting of the August Order. On the 16th of September 2021, after the granting of the August Order, the Applicant's attorneys addressed a further letter to the Respondent's attorneys in terms of which, *inter alia*, a demand was made that the Respondent make a payment to the Applicant, up to the value of R1,5 million in respect of the acquisition of an immovable property.

[41] In support of the argument put forward on behalf of the Respondent that the Applicant had failed to prove that the Respondent was in breach of the relevant clauses of the agreement, it was submitted that subparagraph 2.1.1.1.3 comprises of the following rights and obligations, namely (a) the Applicant is entitled to acquire a house up to the value of R1,5 million; (b) the Respondent may finance the purchase of the house by way of mortgage bond finance; and (c) the house must be registered in the names of the Applicant and the Respondent until the mortgage bond is repaid and (d) after such repayment the Respondent must transfer the said property to the Applicant. Of course, it was emphasised on behalf of the Respondent that the Respondent's obligations in terms of this

³¹ *Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at paragraph [63].*

subparagraph of the agreement were conditional upon him having the financial means to comply therewith. In support of the foregoing, it was correctly submitted by Counsel appearing on behalf of the Respondent that a court order, like any document, must be interpreted with due regard to its language, context and purpose.³²

[42] Based on the foregoing, Adv Pye SC submitted that this subparagraph contemplates the purchase of a home of the Applicant's choice and for her benefit up to a value of R1,5 million. Counsel accepted (correctly in this Court's opinion) that a proper interpretation of this subparagraph did not include the right of the Respondent to select any property in any area and foist it upon the Applicant as a property contemplated in terms of the agreement. However, what was further submitted, was that on a proper interpretation of subparagraph 2.1.1.1.3 of the agreement the Applicant is required to, *inter alia*, (a) source and identify a property of her choice that does not exceed R1,5 million in value; and (b) present the Respondent with a Purchase and Sale Agreement that complies with the provisions of the Alienation of Land Act 68 of 1981(as amended) for signature. In addition thereto the Respondent had to be given a reasonable opportunity to apply for mortgage bond finance.

[43] It was the Respondent's case, as set out in his answering affidavit, that if the Applicant did not identify a property that satisfied the requirements of subparagraph 2.1.1.1.3 of the agreement, a valid sale agreement could not be concluded; the Respondent would be unable to apply for mortgage bond finance and the relevant transfer documents could not be signed and/or completed to enable the transfer of the property from the name of the seller into the names of the Applicant and the Respondent. The argument put forward on behalf of the Respondent concluded by pointing out to this Court that the demands made by the Applicant upon the Respondent (as dealt with above) do not comply with the provisions of subparagraph 2.1.1.1.3 of the agreement and thus the Respondent cannot be held to be in contempt thereof.

[44] This Court is in agreement with all of the aforesaid submissions made on behalf of the Respondent. The foregoing interpretation satisfies all of the relevant requirements of

³² *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D; *Natal Joint Municipal Pension Fund v Endumeni Municipality* (supra); *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC); *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA).

interpretation dealt with earlier in this judgment and provides a reasonable and objective interpretation of the subparagraph under scrutiny. It is worthy to note that when this interpretation was put forward by the Respondent in his answer, it was merely denied by the Applicant in her reply. In the premises, this Court finds that the Applicant has failed to prove that the Respondent is in contempt of subparagraph 2.1.1.1.3 of the agreement which was made an order of court. For the reasons set out above and the basis upon which this finding is reached, it is unnecessary for this Court to consider whether the Respondent has the financial means to finance a bond of up to R1,5 million in respect of a property and whether he has discharged the evidential burden in relation to wilfulness and *mala fides* by advancing evidence that establishes a reasonable doubt as to whether his non-compliance was indeed wilful and *mala fide*. In passing, with regard to the condition that the Respondent would only be obliged to assist the Applicant by financing the purchase of the property if he had the financial means to do so, this would obviously have become self-evident had the Applicant properly interpreted subparagraph 2.1.1.1.3 of the agreement and when the Respondent applied for mortgage bond finance from the appropriate institutions who would, in the normal course, have determined his financial status prior to granting or refusing an application for a mortgage bond to purchase the property.

[45] Subparagraphs 2.2.1 and 2.2.2 dealing with the obligation of the Respondent to replace the Applicant's motor vehicle every 5 years was also dealt with by the Applicant's attorneys in the letter of the 8th of December 2020. In that letter it was stated, *inter alia*, that 5 years had passed since the date of divorce; the Applicant was in possession of a Mercedes-Benz C180 Coupe (2014 model) which had a new list price of approximately R468 875.00 and a current retail value of R205 000.00. It was requested that the Respondent replace the said motor vehicle with an A-class Mercedes Benz (with a maintenance plan) which would be of a similar price to the motor vehicle in the Applicant's possession taking into account inflation over the past 5 years. Finally, it was stated that the A-class vehicle did not have to be a new vehicle and could be second-hand, provided it was in good condition and came with a maintenance plan. The Applicant also offered to source such a motor vehicle to assist the Respondent and avoid any delays in procuring same. In the letter of the 16th of September 2021 (also referred to above) the demand is simply made that the Respondent replace the Applicant's motor vehicle with a second-hand or new motor vehicle of a similar price, escalated by inflation.

[46] In support of the Respondent's argument that the Applicant has failed to prove that the Respondent is guilty of contempt in respect of subparagraphs 2.2.1 and 2.2.2 of the agreement the first submission made is that the said subparagraphs do not require the replacement motor vehicle to be a Mercedes Benz or to have a maintenance plan. This is quite correct but, as set out above, the demand in the letter of the 16th of September 2021 (after the granting by this Court of the August Order) makes no reference to either.

[47] It was further submitted (as stated by the Respondent in his answering affidavit) that properly interpreted the agreement requires the Applicant to hand over her current motor vehicle as a trade-in and that the Applicant has not tendered the motor vehicle to him in order for him to trade the motor vehicle in. In this regard, it was conceded by the Applicant in her replying affidavit that she was obliged to return her current motor vehicle as a trade-in and stated that she agreed with the Respondent's interpretation of the agreement in this regard. In fact, she went so far as to state that she does not interpret the order to mean that the Respondent is to "*provide for a fleet of motor vehicles*". Despite the foregoing the argument that the Respondent could not be held to be in contempt of the subparagraphs dealing with the replacement of the motor vehicle was persisted with on the basis that this tender was not made by the Applicant prior to the institution of the application for contempt. This argument cannot be sustained by this Court. Firstly, it is clear that the subparagraphs can only be interpreted on the basis that the Applicant would be required to give up possession of the motor vehicle which was being replaced to the Respondent in order that he could realize the value thereof towards the expense he would incur in replacing the Applicant's motor vehicle every 5 years. This fact was so obvious it did not require to be dealt with in either of the two letters from the Applicant's attorneys referred to above or in the Applicant's founding affidavit. Moreover, the fact that this "tender" (if it even is a tender in the true sense) is dealt with in the Applicant's replying affidavit, is not new evidence but arises directly as a result of the "issue" being raised by the Respondent in his answering affidavit. The fact that the Respondent attempts to rely on this point at all in order to support an argument that the Applicant has failed to prove that the Respondent is guilty of contempt in respect of subparagraphs 2.2.1 and 2.2.2 of the agreement is, in the opinion of this Court, rather disingenuous.

[48] It is worth mentioning at this stage that whilst it is obviously open to the Respondent (as it is to any Respondent in contempt proceedings) to criticise the interpretation placed

upon the agreement by the Applicant and point out to the Court the shortfalls in the Applicant's demands or requests for the Respondent to comply with the order in line with those interpretations, what is ultimately the test as to whether the Respondent is in contempt, is the proper interpretation of the order and, in light thereof, whether the Respondent's non-compliance was wilful and *mala fides*.

[49] Possibly the high-water mark in the Respondent's defence to the Applicant failing to have proved that he is guilty of contempt in respect of failing to replace the Applicant's motor vehicle are the submissions made in the answering affidavit that the agreement does not require him to enter into a credit agreement in order to purchase a replacement motor vehicle and that he does not have the cash available to purchase such a motor vehicle.

[50] This interpretation which the Respondent wishes to give to subparagraph 2.2.2 of the agreement (the answering affidavit singles out this subparagraph for interpretation only) is untenable, for one or more of the following reasons. Firstly, it is common cause on the application papers before this Court that at the time of the divorce and during the subsistence of the marriage between the parties the motor vehicles in possession of both parties were subject to finance agreements. In this regard (as dealt with above), subparagraph 2.2.1 of the agreement recorded that both motor vehicles in possession of the parties were financed by Mercedes Benz and that the Respondent was paying the instalments in respect thereof. In the premises, simply because the agreement is silent as to how the Respondent is to pay for the replacement motor vehicle and in fact gives the Respondent an election in this regard (either to finance the outstanding purchase price of the replacement motor vehicle or pay the balance in cash after trading in the motor vehicle presently in the Applicant's possession) does not mean that the Respondent can avoid his obligation in terms of the agreement to replace the motor vehicle by refusing to enter into a credit agreement to enable him to do so. It must have been envisaged at the time when the agreement was entered into that in light of the fact that (and once again this was common cause) the motor vehicles in the possession of both parties were subject to finance agreements which were being paid by the Respondent the Respondent would once again enter into a finance or credit agreement to enable him to replace the Applicant's motor vehicle thereby fulfilling his obligation in terms of the agreement. This is in no manner of means "making up a contract for the parties" but simply, once again, applying the relevant requirements to interpret this subparagraph objectively and thereby give it a sensible

meaning with business efficacy. Of course, the Respondent's ability to comply with this obligation would always be determined when he applied for finance from the relevant institutions and whether such institutions, upon consideration of his financial status, either granted or refused his application for credit to finance the purchase of the replacement motor vehicle.

[51] It is interesting to note that when opposing the Applicant's application for contempt in respect of the provision of an immovable property for the Applicant the Respondent relies (as he is entitled to do) on the fact that, *inter alia*, it will be necessary for a mortgage bond to be registered over the property. In that instance the Respondent has no objection thereto. However, when it comes to the Respondent's obligation to replace the Applicant's motor vehicle every 5 years the Respondent, simply on the basis that subparagraph 2.2.2 of the agreement (looked at in isolation) does not specifically mention the fact that the Respondent shall be entitled to apply for finance in terms of a credit agreement, seeks to do precisely the opposite by complaining that he "*cannot be forced to incur credit in order to meet the applicant's unreasonable demands*".

[52] This Court holds that upon a proper interpretation, subparagraphs 2.2.1 and 2.2.2 of the agreement include any means available to the Respondent to finance the replacement of the Applicant's motor vehicle, including the Respondent applying for finance in terms of a credit agreement and paying the monthly instalments in respect thereof, read with the remaining provisions of the said subparagraphs. It is in this manner that the aforesaid subparagraphs are not only given their ordinary grammatical meaning within the context and purpose thereof but, perhaps most importantly in this instance, are interpreted sensibly and given business efficacy.

Has the Applicant proved wilfulness and mala fides on the part of the Respondent beyond a reasonable doubt?

[53] Having decided that subparagraphs 2.2.1 and 2.2.2 of the agreement do indeed create clear and certain obligations upon the Respondent with which he has failed to comply, it then becomes necessary to examine whether the Respondent has the financial means to replace the Applicant's motor vehicle. The inclusion of the relevant provision in the agreement ("*should he have the financial means at the time*") really amounts to a re-

instatement of the common law in that it is inextricably bound to the question of whether the Respondent's non-compliance has been wilful and *mala fides*. As seen earlier in this judgment the Respondent bears an evidential burden in relation to wilfulness and *mala fides* to advance evidence that establishes a reasonable doubt as to whether his non-compliance was indeed wilful and *mala fides*. In the present matter this equates to placing evidence before this Court to establish a reasonable doubt that he has the financial means to replace the Applicant's motor vehicle as contemplated by subparagraphs 2.2.1 and 2.2.2 of the agreement.

[54] It was submitted by Adv De Wet on behalf of the Applicant that the Respondent had failed to prove that he is incapable of complying with the August Order and that the allegations made by him in his answering affidavit are largely bald and unsubstantiated. It was also pointed out on behalf of the Applicant that despite requests made by the Applicant's attorneys for the Respondent to provide proof of his financial position, he had failed to do so. Finally, it was further submitted that no application had ever been instituted by the Respondent to vary the terms of the January Order (confirmed by the August Order) if indeed the Respondent did not have the financial means to comply therewith.

[55] In his answering affidavit the Respondent avers that he earns a net salary of R60 000.00 per month. In support thereof he attaches a copy of a salary advice as an annexure to the said affidavit which reflects a gross monthly salary (cash) of R113 894.08; various deductions and a net salary of R60 000.00. No explanation is given in the answering affidavit as to the nature of the deductions and no affidavit was filed by the Respondent's employer to elucidate any facts for this Court in relation to the said salary advice.

[56] Following thereon, in another annexure to his answering affidavit, the Respondent puts up a schedule (with supporting documentation) in terms of which he seeks to illustrate that his monthly expenses amount to R60 297.33. In the premises, on his version, his monthly expenses exceed his monthly income by R297.33. It is also averred by the Respondent that he is liable to pay his daughter's University tuition fees in the sum of R53 205.00 per annum. The Respondent did not include this expense as a monthly expense but this would equate to an amount of R4 433.75 per month. On the Respondent's version (without stating so) it would appear that he then has a monthly deficit of R4 731.08

per month. There is no attempt in the answering affidavit to explain the various expenses; whether these expenses are fixed or vary from month to month and how the various documents correspond to the schedule allegedly reflecting the Respondent's monthly income and expenditure.

[57] The Respondent has only utilised two paragraphs in his answering affidavit to deal with this extremely important issue and, when doing so, simply refers broadly to what he states is his monthly income and expenditure without providing this Court with any detail whatsoever in respect thereof. In the premises, this Court is left with the distinct impression that, despite the Respondent's utterings to the contrary, he has failed to take this Court truly into his confidence and has failed to fully disclose his true financial position to enable this Court to properly adjudicate same. Arising therefrom, this Court must hold that the Respondent has failed to place evidence before this Court to establish a reasonable doubt that he has the financial means to replace the Applicant's motor vehicle as contemplated by subparagraphs 2.2.1 and 2.2.2 of the agreement.

[58] As submitted by the Applicant, there is nothing to show a change in the Respondent's financial position from the time when he was paying the monthly instalments in respect of two Mercedes Benz motor vehicles. Furthermore, no application has been made by the Respondent to vary the terms of the January Order. At the same time the fact that the Respondent made no attempt whatsoever to apply for finance to enable him to replace the Applicant's motor vehicle has not escaped this Court. Had he made an earnest and honest attempt to do so and had those efforts proven fruitless, he would have had the evidence thereof to place before this Court in support of the fact that financial institutions had refused to grant him credit because of his financial position. Instead, he elected to hide behind a position that he should not be forced to incur credit to comply with his obligations in terms of the agreement. Moreover, it is important to remember that the Respondent's ability to obtain credit to replace the Applicant's motor vehicle will be measured without the liability to finance a property for the Applicant up to the value of R1,5 million until the Applicant correctly implements the relevant subparagraph of the agreement (as dealt with earlier in this judgment).

[59] Sight should also not be lost of the Respondent's conduct as set out in the application papers before this Court pertaining to, *inter alia*, the various denials of liability and various

interpretations placed upon the agreement by the Respondent giving rise to the Applicant seeking the August Order which was then not opposed by the Respondent. In the premises and taking all of the foregoing factors into consideration, it must follow that the failure of the Respondent to comply with subparagraphs 2.2.1 and 2.2.2 of the agreement is both wilful and *mala fides*.

Are there disputes of fact relating to the requirements of contempt which prevents the adjudication of these proceedings by way of motion?

[60] This is the final ground of opposition raised by the Respondent to avoid being held in contempt of the January Order. Whilst it was raised by Adv Pye SC on behalf of the Respondent this Court does not recall that the point was argued with much conviction. This was possibly due to the fact that Counsel had conceded (correctly) that the Respondent bore the evidential burden of proving that his non-compliance with the January Order was neither wilful or *mala fides*. As set out above the Respondent has failed to discharge this onus or what has been described as this “*weerlegingslas*” (*evidential burden*). As a result, this largely (if not wholly) does away with the need to consider whether, on the application papers before this Court, there exists a genuine or *bona fide* dispute of fact in respect of whether the Respondent’s non-compliance was wilful or *mala fides* (it being common cause that the other requirements of contempt had been proven by the Applicant).

[61] Considering the facts of this matter it cannot be said that such a dispute of fact exists. On the one hand the Applicant merely seeks to enforce the terms of the January Order. These terms remain intact and are enforced by the August Order. In addition thereto the Respondent has never sought to vary the terms of the January Order and elected not to oppose the granting of the August Order. Rather, the Respondent has sought to avoid liability in terms thereof by attempting to cast doubt upon the interpretation of the agreement. The Respondent has also sought to illustrate that he does not have the financial means to comply with his obligations. In this regard, he has failed to place before this Court sufficient evidence (having regard to all of the facts before the Court) to raise a reasonable doubt that he has such means. In the premises, having particular regard to the onus of proof and evidential burden in this matter, there exist no genuine or *bona fide* disputes of fact in this matter which prevent this Court from adjudicating these proceedings by way of motion.

Conclusion

[62] In light of the foregoing it is clear that (a) the Respondent cannot be held to be in contempt of subparagraph 2.1.1.1.3 of the January Order; and (b) the Respondent is in contempt of subparagraph 2.2.2 of the January Order.

[63] With regard to the issue of costs, it is also clear that both parties have been partially successful in this matter. Looked at from a different perspective the Applicant has succeeded in proving that the Respondent is guilty of contempt in respect of the replacement of her motor vehicle but failed to prove that the Respondent is guilty of contempt in respect of the acquisition by her of an immovable property. On the one hand, this Court is acutely aware of the importance that orders of court be obeyed. This is fundamental to the upholding of the rule of law which is a founding value of our Constitution.³³ However, it is also true that this Court cannot ignore the underlying tension and historical disputes that have arisen between the parties which (as unfortunately is so often the case in these type of matters) taints the entire proceedings. Allied to the foregoing, is the unfortunate manner in which the agreement was drafted which has, in no small way, contributed towards the litigation in this matter.

[64] Taking all of the foregoing factors into careful consideration and in the exercise of the general and wide discretion vested in this Court in respect of the issue of costs, this Court deems it just and equitable that each party be ordered to pay their own costs.

Order

[65] In the premises, this Court makes the following order:

1. The application that the Respondent be declared to be in contempt of subparagraph 2.1.1.1.3 of the court order made by the Regional Court, Johannesburg on 25 January 2015 under case number 14/2134 is dismissed.

³³ *Fakie NO (supra)*.

2. The Respondent is declared to be in contempt of subparagraph 2.2.2 of the court order made by the Regional Court, Johannesburg on 25 January 2015 under case number 14/2134.

3. The Respondent is committed to imprisonment for a period of six (6) months which period is wholly suspended on the condition that the Respondent shall, within sixty (60) days from the date of this order, replace the Applicant's motor vehicle with a second hand or new motor vehicle of a similar price escalated by inflation.

4. Each party shall pay their own costs.

B.C. Wanless

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 19 October 2022

Judgment: 14 March 2023

Appearances

For Applicant:

Adv L de Wet

Instructed by:

Petker & Associates Inc.

For Respondent:

Adv WB Pye SC

Instructed by:

Dyasi M Inc.

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/28640

- (1) REPORTABLE: YES
 - (2) OF INTEREST TO OTHER JUDGES: YES
 - (3) REVISED: YES
- [14 March 2023]

In the matter between:

Y[....] R[....] D[....] Applicant

and

K[....] L[....] D[....] Respondent

SUMMARY

WANLESS AJ

Contempt of court – failure of Respondent to comply with provisions of a settlement agreement upon divorce which was made an order of the Magistrates' Regional Court and confirmed by an order of the High Court – point in limine raised by the Respondent that he could not be held in contempt of court since upon a proper interpretation the clauses of the agreement related to the proprietary consequences of the marriage (a division of the joint estate the parties having been married in community of property) and contempt proceedings are not competent where they relate to proceedings ad pecuniam solvendam (the payment of money).

Held – properly interpreted the relevant clauses whereby the Respondent was to assist the Applicant to acquire an immovable property to a certain value and the Respondent was to replace the Applicant’s motor vehicle every five (5) years, relate to orders ad factum praestandum (performance of an act) in terms of which contempt proceedings are competent – in addition, these clauses, properly interpreted, are in respect of the payment of maintenance arising from divorce proceedings in respect of which contempt proceedings are competent – point in limine accordingly dismissed.

Maintenance - meaning and definition of discussed with reference to various authorities and statutes – “maintenance” to be given a wide meaning.

Interpretation – principles confirmed and applied.

Onus and evidential burden – onus upon Applicant to prove, beyond a reasonable doubt, the grant of the order- the service of the order – non-compliance with the order by the Respondent and that the Respondent’s non-compliance with the order was wilful and mala fides – evidential burden upon the Respondent to advance evidence to create a reasonable doubt as to whether his non-compliance was wilful and mala fides.

Held - Respondent not in contempt of clauses in respect of the Applicant acquiring an immovable property but in contempt of the clauses dealing with the replacement of the Applicant’s motor vehicle every five (5) years – Respondent committed to imprisonment for a period of six (6) months which period was wholly suspended on the condition that the Respondent, within sixty (60) days from the date of the order, replace the Applicant’s motor vehicle with a second hand or new motor vehicle of a similar price escalated by inflation.

Costs - on the one hand Court acutely aware of the importance that orders of court be obeyed - this is fundamental to the upholding of the rule of law which is a founding value of our Constitution - however, also true that the Court could not ignore the fact that both parties partially successful and the underlying tension, together with the historical disputes that had arisen between the parties which (as unfortunately is so often the case in these type of matters) had tainted the entire proceedings - allied to the foregoing was the unfortunate manner in which the agreement had been drafted which had, in no small way,

contributed towards the litigation in this matter – just and equitable that each party pay their own costs.

B.C. WANLESS

Acting Judge of the High Court

Gauteng Division, Johannesburg