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

Case Number: 2014/11667

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

13 December 2024

DATE SIGNATURE

In the matter between:

D[…] L[…] H[…] Applicant

and

A[…] D[…] H[…] First Respondent

J[…] H[…] Second Respondent

JUDGMENT

LAMPRECHT, AJ:

Background

[1] This is an opposed application in which the applicant seeks an order declaring the first and second respondents to be in contempt of an order ("the order") granted by this court on 18 February 2022. The relief sought includes a committal order in respect of the respondents, to be suspended on condition that the respondents comply with the order within 14 days from the date of service on them of any order granted.

[2] The order was granted pursuant to divorce proceedings instituted by the applicant against the first respondent. In terms of the order a decree of divorce was granted and a settlement agreement dated 15 October 2021 ("the settlement agreement"), made an order of court. The second respondent, the first respondent's father, signed the settlement agreement in his capacity as surety for the performance of some of the first respondent's obligations in terms of the settlement agreement.

[3] The salient terms of the settlement agreement for purposes hereof are the following:

a. The first respondent undertook to register and retain the applicant as a dependent on a comprehensive medical aid scheme for a period of 24 months from date of signature of the agreement.
b. The first respondent undertook to make payment to the applicant of an amount of R1.5 million, with the second respondent binding himself as surety for this obligation. The first respondent had to make payment of an amount of R200 000.00 within seven days from date of signature of the settlement agreement, with the balance of R1 300 000.00 to be paid within four months from the date of granting of the decree of divorce.
c. The first respondent undertook to settle all the arear utility bills inclusive of water, electricity, rates and taxes in respect of the former matrimonial home within four months from the date of granting the decree of divorce.
d. The first respondent undertook to settle all arrear mortgage payments relating to the former matrimonial home within four months from the date of granting of the decree of divorce.

e. The first respondent undertook to settle the outstanding mortgage bond on the property within four months from the date of granting of the decree of divorce, with the second respondent binding himself as surety in respect of this obligation.
f. The first respondent undertook to purchase a comprehensive five year motor service plan in respect of the applicant's vehicle.

The parties' affidavits and versions

[4] The applicant alleges, in the founding affidavit, that the respondents failed to comply with the order as read with the settlement agreement, in the following respects:

a. The first respondent failed and/or refused and/or neglected to register and retain the applicant as a dependent on a comprehensive medical aid scheme. The applicant avers that Discovery Health confirmed that her medical aid cover had been stopped, and reliant on certain WhatsApp messages exchanged between her and the first respondent, contends that she was left with no option but to take out a medical aid scheme at a cost of R96 960.00 for the 24-month period. She avers, furthermore, that an amount of R8 000.00 representing outstanding unpaid medical bills had not been paid by the first respondent *"as contemplated in the Settlement Agreement"*.
b. In respect of the amount of R1 500 000.00, the applicant avers that the second respondent only made payment to her (on behalf of the first respondent) in the amount of R1 million, with the respondents having failed to pay the balance of R500 000.00.
c. In respect of the utility bills, the applicant avers that the first respondent failed to make payment of the aforesaid amount, with the current amount in respect of arrears amounting to R25 000.00.
d. With reference to the mortgage bond, the applicant avers that an amount of R600 000.00 remains outstanding under the mortgage bond, with an amount of R200 000.00 being in respect of arrear mortgage bond instalments, which the respondents failed to pay.

e. In respect of the motor service plan, the applicant avers that the first respondent failed to purchase the motor service plan, with the result that the applicant had no option but to maintain her motor vehicle and make payment of repairs at her own cost, in an amount of R19 800.00, which the first respondent had failed to reimburse to her.

[5] Reliance is placed, in the founding affidavit, on a letter of demand dated 30 November 2022 addressed by the applicant's attorneys to the respondents' attorneys, demanding compliance by the respondents with their obligations in terms of the settlement agreement. A letter in response from the respondents' attorneys dated 14 December 2022 ("the 14 December 2022 letter") was annexed, stating inter alia as follows:

a. That an amount of R1.2 million had been paid pursuant to clause 10.1.1 of the settlement agreement, leaving an outstanding balance of R300 000.00, not R500 000.00.
b. That an amount of R600 000.00 had been paid during the period April 2022 to August 2022 in respect of the outstanding mortgage bond.
c. That the respondents were not sure as to what the actual outstanding balance was on the mortgage bond and that the applicant had been requested, pursuant to a communication dated 2 November 2022, to sign a special power of attorney authorising access to banking records in respect of the bond account, not responded to.
d. That a further amount of R200 000.00 had been paid directly into the mortgage bond account by T Swartz Attorneys during the period March to April 2022.
e. That the first respondent had applied for a motor maintenance plan with Dotsure during November 2022. Dotsure had advised that they were not able to provide a motor maintenance plan for any vehicle older than 15 years and/or having a mileage reading of more than 300 000 kilometres. It was averred, in the letter, that the mileage on the applicant's car at the time of request was 301 000 kilometres, with the result that it was impossible for the first respondent to render performance of this obligation relating to the motor service plan.

f. In respect of the comprehensive medical aid plan, that the first respondent had requested the applicant to apply for a comprehensive medical plan with KeyHealth Medical Scheme, which request has been refused by the applicant and that the applicant had instead proceeded to obtain the Discovery Classic Comprehensive Plan, which is more expensive than the plan offered by the first respondent, despite both plans having the same coverage.

g. That an amount of R102 597.38 had been paid in respect of municipal arrears during the period May to July 2022 and that the respondents were not aware of any other municipal arrears.

[6] The respondents, in opposing the application, on 27 June 2023 filed an answering affidavit together with a confirmatory affidavit by the second respondent. The answering affidavit largely repeats what had been raised in the respondents' attorneys letter of 14 December 2022. The respondents deny being in contempt of the order and state that there was no deliberate or intentional refusal or failure to comply with the order by the respondents.

[7] The first respondent says that he had during April 2022 emailed details of the KeyHealth Medical Scheme to the applicant, but that the applicant refused his request to join the KeyHealth Medical Scheme and insisted, without providing any proof, that the KeyHealth Medical Scheme is not a comprehensive plan. The first respondent avers that the Discovery Plan is similar to the Equilibrium option (an option available under the KeyHealth Medical Scheme) in terms of benefits offered but is more expensive. The respondents contend that the applicant failed to attach any proof in support of the averment that she paid R96 069.00 in respect of medical aid scheme or in respect of medical expenses in the amount of R8 000.00.

[8] With reference to the obligation to pay R1.5 million, the first respondent alleges that the outstanding balance owed is an amount of R300 000.00 and not R500 000.00 and that *"because of the dispute, the Second Respondent and I have not made payment of the amount of R300 000.00 to the Applicant, the Second Respondent and I hereby tender immediate payment of the full amount of R300 000.00 to the Applicant".*

[9] With reference to the arrear utility bills allegations, the respondents contend that the applicant failed to attach any proof in support of the averment that the amount of R25 000.00 represents the arrears. The first respondent, with reference to the letter from his attorneys, states that an amount of R102 597.38 had been paid and states that he is unaware of any further municipal arrears in respect of the former matrimonial home. Reference is made to the fact that the applicant failed to attach any proof in the form of a municipal account substantiating her averments.

[10] In respect of the mortgage bond aspect, the respondents contend that the applicant failed to attach any proof supporting the averment that an amount of R600 000.00 remains outstanding on the mortgage bond or that R200 000.00 represented the arrear mortgage bond instalments.

[11] The first respondent reiterates, with reference to the letter from his attorneys, that an amount of R600 000.00 had been paid by the respondents in respect of the outstanding mortgage bond and that further payments in an amount of R125 000.00 had been made. The first respondent alleges that the applicant failed to respond to a request for her to sign a special power of attorney authorising access to statements and records in respect of the mortgage bond account. Reference is made to an email dated 14 March 2023 from the respondents' attorneys, which requested updated statements in respect of the mortgage bond account, and repeated the request for a special power of attorney to be furnished, not responded to. The respondents aver that they have no way of knowing what the outstanding balance, if any, on the mortgage bond is, without such statements.

[12] With reference to the motor maintenance plan issue, the first respondent reiterated what was contained in the letter from his attorneys dated 14 December 2022. Maintenance plans from Liquid Capital and Motoplan were annexed to the answering affidavit, in support of an allegation that the mileage on the motor vehicle purchased by the applicant (alleged to have been 301 000 kilometres at the time of the request to Dotsure), made it impossible for the first respondent to comply with the order relating to the maintenance plan aspect.

[13] In conclusion, the respondents aver that the applicant had been aware by 14 December 2022 of the respondents' contentions, that she had failed to respond thereto and had not attached any proof to the founding affidavit in support of her averments that the respondents had failed to comply with the settlement agreement.

[14] On 5 September 2023 the applicant filed a replying affidavit. The applicant's core allegations in the replying affidavit are as follows:

a. The KeyHealth Medical Scheme proposed by the first respondent is not a comprehensive scheme in that, for instance, it provides for annual savings of R2 208 whereas the Discovery Plan provides for annual savings of R21 945. She says it cannot reasonably be argued in the circumstances that the plans are comparable or that a plan providing for savings of just R2 208 per year is *"comprehensive"*. The applicant avers that she had no alternative but to take out her own medical aid scheme because the first respondent had removed her from the Discovery Scheme and that the first respondent is liable for the cost of premiums paid by her in respect of the Discovery Scheme taken out by her.

b. With reference to the obligation to pay R1 500 000.00, the applicant avers that the respondents had, subsequent to service of the application on them, made payment of an amount of R300 000.00 on 27 June 2023. She alleges, furthermore, that the respondents are still indebted to her in an amount of R200 000.00, which they were required to pay in terms of clause 10.3.1.1 of the settlement agreement.

c. In respect of the water utility bill aspect, the applicant alleges that the first respondent is still in contempt and annexed a water supply interruption job card, issued by the City of Johannesburg on 11 July 2023, reflecting that the first respondent had failed to make payment of the arrears in the amount of R21 804.76. She avers, furthermore, that she is unable to obtain a monthly municipal account from the City of Johannesburg as the account is in the name of the first respondent, who has to date refused to transfer and open an account in her name.

d. With reference to the outstanding mortgage bond issue, the applicant annexed a statement from Absa Bank Limited reflecting an outstanding balance of R504 498.49. She avers that a certain Mr Aitken had assisted

her and paid an amount of R146 030.00 in order for the property not to be repossessed by the bank. She says that the first respondent is obliged to reimburse and pay the amount. In respect of the request to sign a power of attorney, she alleges, with reference to an alleged WhatsApp exchange with the second respondent's assistant on 16 September 2022, and a screenshot thereof annexed to the replying affidavit, that up-to-date mortgage bond statements had been furnished. She furthermore annexed mortgage bond statements dated 7 September 2022, reflecting the outstanding balance in respect of the mortgage bond as at 7 September 2022 in an amount of R684 170.59. She alleges that the respondents had been in possession of the statements since 16 September 2022.

e. In respect of the motor vehicle plan aspect, she avers that she acquired the car on 25 March 2022, when it had a mileage of 286 000 kilometres. She contends that the first respondent had failed to explain why he waited until 10 November 2022 to apply for a vehicle plan and that the mileage was not 301 000 kilometres on that date. She avers furthermore that it is not conceivable that she could drive 15 000 kilometres in a matter of eight months. She annexed, additionally, an email from her to the first respondent dated 8 July 2022, in which she enquired whether a motor plan will be in place for her vehicle and that it was clear that the first respondent, as at that date, had not taken out a maintenance plan for her vehicle. She furthermore alleges that she had provided a quote to the first respondent and annexed, in this regard, email correspondence exchanged between herself and a representative of Motoplan.

f. With reference to the letter from the respondents' attorneys dated 14 December 2022, she in her replying affidavit, annexed correspondence from her attorneys to the respondents' attorneys dated 15 December 2022.

[15] Following service of the replying affidavit, the respondents filed a notice to remove cause of complaint, in which it was contended that the applicant's replying affidavit had been filed on 7 September 2023, that the affidavit was late by approximately 40 court days and that the applicant had failed to seek condonation for the late delivery of the replying affidavit. The respondents contended, on that basis,

that the replying affidavit constituted an irregular step within the meaning of Rule 30(2).

The condonation application

[16] During October 2023 the applicant filed a condonation application seeking condonation for the late filing of the replying affidavit. This application is opposed by the respondents, with an answering affidavit and a replying affidavit having subsequently been exchanged. The parties' core contentions in the condonation application are to the following effect:

a. It is contended by the applicant that she was required to source documentation which had to be annexed to her replying affidavit. Counsel had to be consulted to finalise the first draft and the applicant's attorney (who deposed to the founding affidavit in the condonation application) was involved in an urgent application and trial which required undivided attention. Counsel was involved in other matters resulting in the replying affidavit only being served on 7 September 2023.

b. The respondents, in response, aver that the documents annexed to the replying affidavit ought to have been attached to the founding affidavit and that some of the documents date back to 2022, whereas the applicant deposed to her founding affidavit in the main application on 13 April 2023. The respondents contend, furthermore, that the applicant is trying to in impermissible manner make out her case in the replying affidavit. The respondents say that the reliance on the unavailability of counsel is not a sufficient ground for the late filing of the replying affidavit, and neither is the fact that the applicant's attorney of record had to prepare for an urgent application and a trial which was set down for hearing after the replying affidavit was due on 11 July 2023. They contend that no explanation had been provided for the delay for the period from 21 August 2023 to 6 September 2023.

Issues for determination

[17] Against the backdrop of the aforegoing, the issues arising for consideration are the following:

a. Whether the late filing of the replying affidavit should be condoned.
b. Whether the replying affidavit ought to be disregarded on the basis that the applicant, in impermissible manner, seeks to make out a case in reply.
c. Whether the respondents are in contempt of Court in one or more of the respects referred to.

The condonation issue/Should the replying affidavit be disregarded

[18] It is convenient and appropriate to deal with the condonation aspect and the question whether the applicant, in impermissible manner, seeks to make out a case in reply, simultaneously.

[19] In terms of Rule 27(3) of the Uniform Rules of Court, a Court may, on good cause shown, condone any non-compliance with the Rules. Rule 27(1) provides that the Court may upon application on notice and on good cause shown, make an order extended or abridging any time period prescribed by the Rules.

[20] A Court has a wide discretion to condone non-compliance which should, in principle, be exercised with regard also to the merits of the matter as a whole.[1]

[21] The principle requirements for the favourable exercise of a Court's discretion are firstly that the applicant's delay should be satisfactorily explained. The explanation should be sufficient to enable the Court to understand how it really came about and to assess a party's conduct and motives. It is inadequate for an applicant to show that condonation will not result in prejudice to the other party. Put differently, it is not sufficient to show that condonation will not result in prejudice in circumstances where an applicant for relief is unable to show good cause.[2]

[22] The standard for considering an application for condonation has also been expressed as *"the interests of justice"*. Relevant factors include the nature of the relief

[1] *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307C-308A.
[2] *Standard General Insurance Company Limited v Eversafe (Pty) Ltd* 2003 (3) SA 87 (W) at 95E-F.

sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation of the delay, the importance of the issue to be raised and the prospects of success. The particular circumstances of each case will determine which of these factors are relevant.[3] A Court has a wide discretion.[4]

[23] The evidentiary basis on which an application is brought must be set out in the founding affidavit, because of the principle that *"an applicant must stand or fall by his petition and the facts alleged therein"*.[5] The Supreme Court of Appeal in **Mostert & Others v Firstrand Bank t/a RMB Private Bank & Another**[6] dealt with the principle as follows:

> *"It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence. As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit. See the oft-quoted dictum in Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at 177G-178A and the judgment of this court in Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & others [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 26. In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs."*

[3] *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 75H – 76C.
[4] *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 460I-J.
[5] *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68.
[6] 2018 (4) SA 443 (SCA), par 13.

[24] A distinction must be drawn between the case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for relief sought by the applicant. In the latter type of case the Court would more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.[7]

[25] An applicant is entitled to introduce further corroborating facts by means of a replying affidavit should the contents of the answering affidavit call for such facts.[8]

[26] The applicant's replying affidavit was due by 11 July 2023 but was only served on 7 September 2023, some two months later. The applicant's attorney explains the delay by averring that the applicant was required to source documentation, which had to be annexed to her replying affidavit. Counsel had to be consulted to finalise the first draft and the applicant's attorney (who deposed to the founding affidavit in the condonation application) was involved in an urgent application set down for hearing on 25 July 2023 and 1 August 2023. A trial set down for hearing during the week of 14 August 2023 required undivided attention. Counsel was involved in other matters resulting in the replying affidavit only being served on 7 September 2023.

[27] When assessing the explanation, the lack of particularity is self-evident. Tellingly, the applicant fails to explain which documentation was sourced or when it was sourced. In circumstances where it is alleged that the applicant was required to source documentation, the absence of any confirmatory affidavit from the applicant herself, is conspicuous in its absence. Moreover, no explanation is furnished for the period from 27 June 2023, when the answering affidavit was served, to the period 11 July 2023, when the replying affidavit was due. The reliance on the applicant's attorneys involvement in an urgent application, some two weeks later, on 25 July 2023, does not assist in discerning what transpired during the preceding four-week

[7] *Finishing Touch 163 (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at 212C-D.*
[8] *eBotswana (Pty) Ltd v Sentech (Pty) Ltd* 2013 (6) SA 327 (GSJ) at 336G-H.

period. The bald allegation relating to counsel's unavailability, does not take the matter any further.

[28] It is relevant, in assessing the condonation issue, to have regard to the contents of the replying affidavit itself. I agree with the respondents' contention that it includes matter that should have been included in the founding affidavit, and that the applicant is seeking to make out a case in reply. It virtually without exception, includes documentary evidence, dated earlier that April 2023, when the application was instituted. No explanation whatsoever has been furnished justifying the conclusion that such evidence was not available earlier. In regard to the contention that the respondents are still indebted to her in an amount of R200 000.00, which they were required to pay in terms of clause 10.3.1.1 of the settlement agreement, this aspect was not relied on or raised at all in the founding papers. The failure to adduce the additional evidence in the founding affidavit, particularly insofar at it relates to the mortgage bond, the motor service plan, and the utility bills issues, is inexplicable, and even more so when regard is had to the letter of 14 December 2022, annexure F to the founding affidavit.

[29] *In casu*, and in circumstances where the respondents have not had the opportunity to respond to new matter raised in the replying affidavit, where this is not a matter where exceptional circumstances dictate that such new matter should be permitted, where there is no adequate explanation for the late filing of the replying affidavit, or why information contained therein was not included in the founding affidavit, and regard being had to the serious nature of the relief sought by the applicant, I am of the view that the applicant has failed to show good cause for the late filing of the replying affidavit. It is also not in the interest of justice to do so. Consequently, the condonation application is dismissed.

Are the respondents in contempt of court?

[30] Civil contempt, which is at the heart of the matter insofar as it relates to the merits, refers to contempt by disobeying a court order. At its origin, the crime being denounced is the crime of disrespecting the Court and, ultimately, the rule of law.

Contempt of court includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders.[9]

[31] At its essence, contempt of a court order constitutes the violation of the dignity, authority and reputation of the court.[10]

[32] The test for contempt of court is whether a breach of a court order was committed deliberately and *mala fide*. A deliberate disregard is 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 unreasonably may be *bona fide*.[11]

[33] Mere disregard of an order and non-compliance that is *bona fide*, accordingly does not amount to contempt of a court order. The requirements for contempt are –

a. the existence of the order;
b. the order must be served on or brought to the notice of the contemnor;
c. non-compliance with the order; and
d. the non-compliance must be wilful and *mala fide*.[12]

[34] The standard of proof to be applied in civil contempt applications depends on the nature and consequences of the remedies sought. Where the civil contempt remedies of committal to prison or the imposition of a fine are sought, then the criminal standard, beyond reasonable doubt, applies.[13]

[35] Motion proceedings are not intended to be used to resolve factual disputes, because they are not designed to determine probabilities, and the question of onus does not arise in motion proceedings. Additionally, under the *Plascon-Evans* rule, the

[9] *Pheko & Others v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC) at paras [35] - [32].
[10] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para [6].
[11] *Fakie supra* at para [9].
[12] *Matjhabeng Local Municipality v Eskom Holdings Limited & Others* 2018 (1) SA 1 (CC) at para [76].
[13] *Matjhabeng supra* at paras [61] - [67].

questions whether there has been non-compliance with an order and whether it was wilful and *mala fide* fall to be assessed on a respondent's version.[14]

[36] An applicant for committal is required to prove all elements of contempt beyond reasonable doubt. Once an applicant has proved the service and/or notice of the court order to the respondent and non-compliance, the respondent however bears an evidentiary burden to show that its non-compliance is not wilful and *mala fide*.[15] A presumption exists that when the first three elements of the test for contempt of Court have been established, that a respondent is *mala fide* and wilful, unless the respondent is able to lead evidence sufficient to create reasonable doubt as to their existence.[16] An inability to comply with a court order, despite best endeavours to do so, is a relevant consideration.[17]

[37] *In casu*, the only issues arising for determination in the context of the merits of contempt, are whether the respondents have not complied with the order in one or more respects, and if so, whether such non-compliance is wilful and *mala fide*.

[38] These aspects fall to be assessed with reference to the parties' respective versions and evidence as set out in the founding and answering affidavit, and with due regard to principles applicable to contempt of court and motion court proceedings.

The Medical Aid Issue

[39] In terms of the settlement agreement, the first respondent was obliged to register and retain the applicant as a dependent on a comprehensive medical aid scheme for a period of 24 months from date of signature of the agreement

[40] The applicant in the founding affidavit alleges, without elaboration, that the first respondent failed to register and retain her as a dependent on a comprehensive

[14] *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A); *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras [28] - [29].
[15] *H v M* 2009 (1) SA 329 (W) at 332; *Els v Weideman & Others* 2011 (2) SA 126 (SCA) at paras [66] – [67].
[16] *Pheko supra* at para [36].
[17] *Okavango Minerals (Pty) Ltd v Bila Mining (Pty) Ltd* 2019 JDR 0653 (GJ) at para 10

medical aid scheme. She says that she had to take out a medical aid scheme at a cost of R96 960 for the relevant 24-month period and had to pay R8 000 representing outstanding unpaid medical bills not paid by the first respondent.

[41] The first respondent says that he during April 2024 requested the applicant to apply for a comprehensive medical plan with KeyHealth Medical Scheme, which she refused, insisting that the KeyHealth plan was not comprehensive.

[42] Notably, the respondents' attorneys already contended, in the 14 December 2022 letter, that the plan offered by the first respondent had the same coverage. Inexplicably, and despite being aware of the first respondent's contentions prior to launching the application, the applicant failed to deal with this aspect at all in the founding affidavit.

[43] Whether the KeyHealth plan is to be considered comprehensive as envisaged in the settlement agreement, would at first glance depend on a wide range of factors, which would as a bare minimum include consideration of the nature of benefits and services to be provided, policy limits and the like. These are aspects that would, in the normal course, require evidence to be led relating to the nature of plans offered, a comparison between such plans, and conceivably with reference to industry standards and practices.

[44] Ultimately, it cannot be concluded in these proceedings, that the plan alleged by the first respondent to have been offered by him, was not comprehensive as envisaged in clause 9.1.1 of the settlement agreement.

[45] In any event, clause 9.1.1 of the settlement agreement provided that the first respondent had to retain the applicant on such medical aid scheme for a period of 24 months from date of signature of the agreement, which period lapsed during October 2023. The first respondent accordingly cannot be said to presently be in contempt of court relating to that obligation.

[46] Counsel for the first respondent argued that the clause should be interpreted as extending for a further 24 months from the date on which any content order is

granted. He also argued that the first respondent should be directed to reimburse the applicant for any expenses incurred. I disagree. The first contention is inconsistent with the express wording of clause 9.1.1. Additionally, the relief sought by the applicant does not include relief directing the first respondent to make payment of any amounts to the applicant.

[47] In any event, and as already held above, regard being had to the first respondent's version, the applicant has not established that the tender made by the first respondent did not constitute adequate compliance with his obligations as envisaged in clause 9.1.1 of the settlement agreement.

Payment of the amount of R1 500 000

[48] The respondents, reliant on the 14 December 2022 letter and proof of payments included therewith, alleged that an amount of R1 200 000 had been paid when these application proceedings were instituted. The respondents, in their answering affidavit, tendered to make immediate payment of the balance of R300 000 to the applicant.

[49] It was common cause, during the hearing of the matter, that the amount of R300 000 had been paid to the applicant during June 2023.

[50] The applicant alleged that the second respondent only made payment to her (on behalf of the first respondent) in the amount of R1 million, with the respondents having failed to pay the balance of R500 000.00. Nothing was said in the founding affidavit regarding the respondents' contentions in the 14 December 2022 letter. In any event, this aspect falls to be assessed on the basis of the respondents' version.

[51] On the admitted facts, the respondents were in contempt of the order, relating to the payment of the R1.5 million amount, as at the time when these proceedings were instituted. Despite the subsequent purge by the respondents of their contempt in this regard, this aspect remains relevant to the question of costs. I will deal with this again later in this judgment.

[52] The applicant has failed to establish that the respondents are in contempt relating to this obligation.

Arear utility bills

[53] The applicant alleges, again without elaboration, and without annexing any supporting documentation, that the first respondent was in breach of clause 10.2.1.1 of the settlement agreement in that *"the current amount of R25 000 (twenty-five thousand rand) represent the arrears"*. No information whatsoever was furnished, indicating which period the arrears relate to, or how the amount had been calculated and arrived at.

[54] The founding affidavit was deposed to on 13 April 2023, whereas clause 10.2.1.1 of the settlement agreement imposed an obligation on the first respondent to settle all arrear utility bills within four months from the date of granting of the decree of divorce. The decree of divorce was granted on 18 February 2022, some 14 months prior to the date on which the founding affidavit was deposed to.

[55] As a point of departure one would have expected the applicant, in seeking to establish a failure to comply by the first respondent, to adduce evidence relating to the outstanding arrears as at date of the decree of divorce.

[56] In the letter of 14 December 2022, the first respondent contended that an amount of R102 597.38 had been paid in respect of municipal arrears during the period May to July 2022, and that the respondents were not aware of any other municipal arrears. These contentions were perpetuated in the respondents' answering affidavit, and reference made to the failure of the applicant to attach any proof in support of the averment that the *"current amount of R25 000 represents the arrears"*.

[57] These contentions were not dealt with by the applicant in the founding affidavit.

[58] A bald allegation relating to arrears as at April 2023, does not establish that the first respondent was in breach of his obligation to pay arrear utility bills as at date of the decree of divorce.

[59] In any event, this aspect falls to be determined on the basis of the respondents' version to the effect that amount of R102 597.38 had been paid in respect of municipal arrears during the period May to July 2022, and that the respondents were not aware of any other municipal arrears.

[60] It accordingly cannot be concluded that the respondents are in contempt of the order insofar as it relates to this aspect.

The mortgage bond

[61] In terms of clause 10.2.2.1 of the settlement agreement, the first respondent and second respondent (as surety for the first respondent) undertook to settle the outstanding mortgage bond within four months from the date of granting of the decree of divorce.

[62] The applicant, in the founding affidavit, simply averred that the respondents had failed to comply with their obligations and that an amount of R600 000 *"remains outstanding under the mortgage"* and that an amount of R200 000 *"represents the arrear mortgage bond instalments"* which the respondents failed to pay. As in the instance of the utility bills, no information whatsoever was furnished indicating how the amounts had been calculated and arrived at, or which period it relates to, and no supporting documentation was annexed. More importantly, it also does not establish what the outstanding balance as at date of the decree of divorce was, or how such amount is to be reconciled with what is currently alleged to be outstanding.

[63] The respondents allege that an amount of R600 000 had been paid during the period April to August 2022, a further amount of R200 000 during March to April 2022 and that they *"were not sure as to what the actual outstanding balance was"*. They allege that the applicant had not responded to a request to sign a special power of attorney pursuant to a communication dated 2 November 2022. These allegations

are in accordance with what was stated on the respondents' behalf in the 14 December 2022 letter. These aspects were not addressed in the founding affidavit.

[64] The respondents also aver that they, by means of an email from their attorney to the applicant's attorney dated 14 March 2023 requested updated statements in respect of the mortgage bond, alternatively that the applicant furnish the special power of attorney, not responded to. They say they have no way of knowing what the outstanding balance, if any is, without such statements.

[65] Oddly, the amounts averred by the respondents to have been paid by them are identical to the amounts the applicant contends remain outstanding under the bond and representing the arrears on the bond. I also find it peculiar, in the extreme, that as at the date of the applicant's founding affidavit, the outstanding amounts would be precisely R600 000 and R200 000 respectively.

[66] Irrespective, regard being had to the manner in which the applicant's case has been presented in the founding affidavit, the absence of supporting documentation annexed to the founding affidavit, the bald allegations by the applicant relating to the outstanding amounts, seen in conjunction with the respondents' version, do not justify a finding that the respondents have failed to comply with their obligations, or done so wilfully and *mala fide*.

[67] In the circumstances the applicant has similarly failed to establish that the respondents are in contempt of court insofar as it relates to this aspect.

The motor service claim

[68] The applicant in bald manner alleged that the first respondent failed to purchase a 5-year motor service plan.

[69] This aspect was addressed in the 22 December 2022 letter, where the first respondent contended that he applied for a motor maintenance plan with Dotsure and was advised that they are unable to provide a motor maintenance plan for any

vehicle older than 15 years and/or with a mileage of more than 300 000 kilometres. The letter made specific reference to the mileage on the applicant's car having been 301 000 kilometres at the time of the request, therefore making it impossible, so it was contended, for the first respondent to render performance of his obligations. This was backed up with what purports to be a WhatsApp communication between the applicant and the first respondent, in which the applicant stated that the mileage was 301 000 kilometres.

[70] Inexplicably, yet again, these aspects were not dealt with at all in the applicant's founding affidavit.

[71] On the first respondent's version, he attempted to but was unable to comply with his obligation to purchase a 5-year motor service plan.

[72] It cannot be concluded, in these proceedings, that the first respondent failed to, or wilfully and *mala fide* failed to comply with the order in this regard.

Conclusion

[73] This is not a matter, regard being had to nature of the relief sought and the findings above, where it is appropriate to either dismiss or refuse the application, as this will have the effect of a finding in favour of the respondents.[18] This is of particular relevance to the mortgage bond aspect, where the respondents aver, in the answering affidavit, that they are unaware what the outstanding balance, if any, is on the mortgage bond. No order is to be made on the application.

[74] In the normal course, and where the applicant has not succeeded with the application, the applicant should bear the costs of the application. The court, however, has a wide discretion insofar as it relates to costs.

[75] In circumstances where the respondents had, on their own version, failed to fully comply with the obligation to pay R1 500 000 as at the time when the application

[18] See, for instance, *Sparks v Sparks* 1998 (4) SA 714 (W)

was launched, and were accordingly in contempt of court, such conduct requires strict censure. The respondents' conduct, in the normal course, would have warranted punitive costs against them on the attorney and client scale for the period up to at least the date on which payment of the amount of R300 000 had been made.

[76] In the exercise of my discretion, I am of the view that it is equitable for the parties to bear their own costs of the application and for no order to be made in respect of costs.

No order is made on the application.

LAMPRECHT AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:	Adv N G Louw instructed by Manley Inc
For the Respondents:	Adv E Dreyer instructed by Marion Clark Attorneys
Date of hearing:	23 October 2024 – Open Court
Date of judgment:	13 December 2024