IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 19890/2018

In the matter between:

A K Applicant

and

J K Respondent

Coram: P.A.L.Gamble, J

Date of Hearing: 13 June, 2 August, 12 December 2019, 12 March & 24 July 2020

Date of Judgment: 3 November 2020

JUDGMENT HANDED DOWN ON 3 NOVEMBER 2020

GAMBLE, J:

INTRODUCTION

1. The parties to this application were formerly married to each other. It was a second marriage for both of them and unfortunately it did not last all that long – about 14 years. After acrimonious matrimonial proceedings, the parties entered into a settlement agreement in 2013, which was later incorporated into an order of divorce duly granted on 19 September 2013 by Le Grange, J. In terms of that order the respondent undertook to maintain the applicant until her death, or remarriage or until she co-habited with a third party for a period in excess of 6 months. The maintenance was initially fixed at R52 000 per month and was subject to escalation in accordance with an agreed formula. By the beginning of 2018 the monthly sum payable by the respondent had escalated to R63 417,45 and it presently stands at R69 384,48.

2. In February 2018 the respondent unilaterally reduced the maintenance to R30 000 per month. Then, in September 2018 it was further reduced to R20 000 per month and, more recently, during the course of these proceedings to R10 000 per month in May 2020. It is not in dispute that at the end of October 2020 the respondent was in arrears in the sizeable sum of R1 539 158,96.

3. The applicant is still alive, has not remarried nor is she cohabiting with anyone else. The respondent makes no allegations in this regard, either. He claims that he can no longer afford the agreed maintenance and that he was obliged (from a long-term financial point of view) to reduce his liability to the applicant.

4. The applicant tried unsuccessfully to enforce compliance with Le Grange J's order in the local magistrates' court through the issuing of a writ. In the

result, the applicant approached this court as a matter of urgency during October 2018 for relief aimed at enforcing the divorce order. She seeks an order that the respondent be held to be in contempt of that order and that he be sentenced to an appropriate term of imprisonment which is suspended on terms which include the repayment of the arrears and future compliance with the order of Le Grange J.

5. After the exchange of the initial affidavits, duly supplemented, the matter came before Binns Ward J in February 2018. At that stage the applicant complained that the documentation made available by the respondent regarding his financial position was incomplete and she accordingly sought a postponement of the matter. The court was also informed that a referral to oral evidence might be necessary to resolve certain anticipated disputes of fact. In granting the postponement, His Lordship observed that an application for referral to oral evidence required a formal interlocutory application, cautioned against leaving such an application for the referral until too late a stage of the proceedings and directed that any such application should be moved timeously.

6. The Court agreed that respondent had not made a full and proper disclosure of his financial position and to that end Binns Ward J directed the respondent to file an unexpurgated and complete copy of the 2017 financial statements relating to his ophthalmic practice in compliance with an earlier order to that effect issued by the Judge President on 27 November 2018. The matter was accordingly postponed by Binns Ward J and subsequently set down on 13 June 2020 at the direction of the Judge President.

7. The respondent purported to file his practice's financial statements on 6 March 2019. In the interim, the applicant had issued a notice in terms of Rule 35 (12) to procure access to the respondent's bank account to which the respondent replied. On 27 March 2019 the applicant filed an interlocutory application seeking a referral to oral evidence supported by a further affidavit which dealt with the alleged inadequacy of the documents discovered by the respondent in the interim.

THE HEARING ON 13 JUNE 2019

8. The matter came before this Court on 13 June 2019. At that stage the applicant was represented by Advs. J.W.Olivier SC and A. de Wet and the respondent by Adv.J.P.Steenkamp, the same junior counsel having appeared earlier before Binns Ward J. At the commencement of the hearing, Mr. Olivier SC indicated that he was of the view that the matter could be determined without resorting to oral evidence and asked that this Court proceed to hear argument. Counsel relied on the unreported judgment of Conradie J in this Division in *Venter*[1] in asking the Court not to be bound by the earlier request for a referral to oral evidence.

9. The Court heard argument by Mr. Olivier SC during which the point was trenchantly made by counsel that the bank statements discovered by the respondent demonstrated that he had traditionally paid the applicant's maintenance out of an overdraft facility utilized by his incorporated ophthalmic practice. It should be

[1] Jean Venter en andere v Hangklip Aandele Blok 101 (Edms) Bpk en andere, Case No. 8080/93 Judgment dated 18 April 1994.

mentioned that the respondent is a specialist ophthalmologist who practices under an incorporated entity known as Dr.J.A.K. Inc. and is also the guiding mind of Tygervallei Eye Laser Clinic (Pty) Ltd and Khangella Oogteater (Pty) Ltd. The latter companies are evidently utilized by the respondent in the course of his practice. It was submitted that at all material times the respondent had had sufficient credit facility in the Dr.J.A.K Inc. account to meet his maintenance obligations towards the applicant and Mr. Olivier SC moved for an order holding the respondent to be in contempt of the divorce order on this basis alone.

10. Mr. Steenkamp felt that he had been backed into a corner by the change of tack by the applicant. He explained that he had come to court to argue an interlocutory application for a referral to oral evidence and was not in a position to argue the merits of the application. Counsel for the respondent also submitted that it could not be expected of a person in the position of the respondent to incur further debt to comply with the terms of the order. Mr.Steenkamp further indicated that his client required an opportunity to file a response to certain of the new matter traversed in the affidavits filed in support of the interlocutory application.

11. In the result, the matter was postponed to 2 August 2019 for the further hearing of argument with a timetable fixed for the filing of additional papers by both sides. The matter did not proceed on that day as the Court was informed that the parties were attempting to resolve their dispute through mediation. The matter was accordingly held in abeyance pending further advice from the parties' legal representatives.

12. Towards the end of 2019, the Court was informed that the parties had not been able to reach an agreement and they requested that the matter be re-enrolled for further argument. At that stage Mr. Steenkamp had been replaced by Adv.L.Buikman SC. On the resumption of the hearing on 12 December 2019, it was postponed at the request of the respondent to 12 February 2020 when it was further agreed that the hearing would continue on 11 March 2020 when matter then stood down to the following day at the request of the parties.

THE HEARING ON 12 MARCH 2020

13. At the hearing on 12 March 2020, Mr. Olivier SC then proceeded to argue the matter further eschewing any request for the referral to oral evidence. In the course thereof, counsel referred the Court to a report by a specialist forensic accountant, Mr. Allan Greyling, which had been prepared on 30 September 2011 in relation to the pending divorce hearing. Mr. Greyling had then advised the respondent and Mr.A.C. 'Cassie' Venter had advised the applicant.

14. The report of Mr. Greyling recorded that he and Mr. Venter were in agreement that the respondent's assets, and his ability to pay maintenance, were to be calculated with regard to multiple related entities over which he exercised effective control. These entities were reflected in an organogram attached to Mr.Greyling's report as Annexure A and which, for the sake of convenience, is similarly annexed to this judgment. Mr. Greyling referred to this as the "*Dr. J K Group*" and I shall do likewise.

15. Mr. Olivier SC said that, save for the entity on the extreme upper left of annexure A ("*Jo van Heerden Ing.*") in which the respondent formerly held a 50% interest and which he no longer holds, the Dr. J K Group is still similarly constituted. In his report, Mr. Greyling listed the assets which were held through the entities in the Dr J K Group. So, for example,

- The erstwhile luxury family home located on the De Zalze Golf Estate near Stellenbosch is owned by the J K Eye Laser Centre (Pty) Ltd;

- The luxury apartment in the Harbour Edge complex adjacent to Cape Town's V&A Waterfront, and in which the respondent presently resides, is owned by JAK Beleggings (Pty) Ltd;

- A lodge at the Fancourt Golf Estate near George is owned by Platner 717 (Pty) Ltd;

- An apartment on the Keurbooms River near Plettenberg Bay is owned by the J K Kindertrust;

- The 4 bed hospital at which the respondent performs eye surgery in Bellville is owned by Khangella Oogteater (Pty) Ltd;

- The business premises in Bellville at which the respondent conducts his ophthalmic practice is owned by Tygervallei Eye Laser Clinic (Pty) Ltd;

- A finance company used in the course of the respondent's practice is owned by Willvest 15 (Pty) Ltd;

- A piece of undeveloped land at Elsenberg near Stellenbosch and owned by Stellenbosch Wine & Country Estate (Pty) Ltd is effectively controlled by the respondent through his interest in K Vineyards (Pty) Ltd.

It is not necessary to go into the value of the assets held in the Dr J K Group as this is not material to the current application. Suffice it to say that the value of the properties held through the Group runs into tens of millions of Rands.

16. Referring to the financial statements then before Court, Mr. Olivier SC demonstrated that the respondent's financial advisers had helped him establish a tax efficient group of interlinked entities with seemingly legitimate loan claims and liabilities going back and forth. Mr. Olivier SC also submitted that as a capital and income beneficiary of the J K Trust and a capital beneficiary of the J K Kindertrust the respondent was in a position to be allocated benefits through the decisions of the trustees in those entities

17. Ms. Buikman SC's address did not run for very long before it became apparent to her that she would be best assisted in her submissions (and her client assisted in the evidential onus that he bore) by an analysis of the respondent's current financial position. Consequently, on 20 March 2020 a request for a postponement of the matter was granted until 19 May 2020 in terms of an agreed order of court. Pursuant thereto the respondent was directed to deliver a report by Mr. Greyling by 30 April 2020 "*in respect of Respondent's ability to comply with his maintenance obligations to Applicant, including from the overdraft facility of JA K Inc., Respondent's practice, for the period from 1 February 2018 until 1 March 2019…*"

18. The order of 20 March 2020 further made provision for Mr. Venter to have access to all the documentation, financial statements and records made available by the respondent to Mr. Greyling for purposes of compiling his updated report, as also any such other documents etc. as Mr. Venter might require in order that he could, firstly, file a report of his own and then also comment on that of Mr. Greyling. Mr. Venter's report was to be filed by 8 May 2020 and the court order further directed that the two accountants were to meet and file a joint minute by 12 May 2020. Lastly, it was agreed that a pre-hearing would be held on 13 May 2020 to determine whether a referral to oral evidence would be required upon the resumption of the matter. The hearing on 19 May 2020 had to be postponed in light of the COVID-19 lockdown then in place and it resumed during court recess on 24 July 2020 when use was made of a virtual platform.

19. The respondent did not comply with the order of 20 March 2020 in that he did not file a report by Mr. Greyling. Rather, he put up a report dated 19 May 2020 by a certain Mr. Andre du Plessis, a registered chartered accountant and director of a Stellenbosch based company, LDP Compliance (Pty) Ltd. This company is responsible for the preparation of the statutory financial statements of the respondent's practice entities and the Dr J.A.K Group. Mr. du Plessis subsequently filed a short affidavit dated 24 July 2020 (to which I shall refer later) in which it subsequently appeared that Mr. du Plessis had relied on an assessment of the respondent's financial position by his colleague, Mr. Johann van Rensburg, who was responsible for the internal auditing of the respondent's practice books and those of the Group.

20. On 6 July 2020 Mr. Venter deposed to an affidavit in terms of the order of 20 March 2020 in which he dealt, as best he could, with the respondent's ability to afford to pay the maintenance as ordered by Le Grange, J. In this affidavit Mr. Venter complained of a lack of access to relevant documentation which he said limited his ability to comment accurately on the respondent's claim that he was unable to afford the maintenance. He also drew the Court's attention to the fact that there had not been a meeting of experts.

THE VIRTUAL HEARING OF 24 JULY 2020.

21. Ms. Buikman SC continued with her argument during the hearing on 24 July 2020 and sought to rely on the report of Mr. du Plessis to suggest that the

respondent was justified in his assertion that he could not afford the maintenance due to his ex-wife. Counsel submitted that, notwithstanding the fact that the respondent's gross annual income was of the order of R13m -14m, he had fallen on hard times and that the applicant was obliged to bear some of the consequences thereof.

22. Ms. Buikman SC alluded to the fact that in March 2019 the respondent had made application in the Somerset West Magistrates Court for a reduction in maintenance and pointed out that those proceedings were being held in abeyance pending the finalization of this application. She urged the Court to dismiss this application or, in the alternative, to postpone it until the maintenance enquiry had been completed.

23. In reply, Mr. Olivier SC highlighted, once again, that Mr. Venter's latest report demonstrated that at all material times the respondent had sufficient credit available to him on his practice overdraft facility that he could afford the maintenance payable at any given time. I did not understand Ms. Buikman SC to argue that, aas a matter of principle, the respondent was absolved from incurring further debt to meet his further obligations to pay maintenance.

24. Mr. Olivier SC stressed that the said report of Mr. Venter had shown that the respondent had hampered the proper investigation of his financial affairs by refusing Mr. Venter access to the financial statements and books of both the J K Trust and the J K Kindertrust, in respect whereof the respondent was a beneficiary. It was

said that the respondent had intentionally frustrated a proper evaluation of his finances by not facilitating the co-operation of the trustees in this regard.

POST- HEARING DEVELOPMENTS

25. At the conclusion of the virtual hearing, judgment was reserved. On 25 August 2020 the applicant filed an application to submit yet a further supplementary affidavit by her attorney, Mr. André Kruger. In that affidavit the attorney stated that he had recently come upon information which was material to the case, that the information had not been known to either him or the applicant before August 2020 and that it merited inclusion in the application. When the Court enquired of Ms. Buikman SC what her client's attitude was in relation to the application to admit the September 2020 affidavit, she informed the Court that she no longer held instructions to represent the respondent.

26. It subsequently transpired that the respondent's attorney, Mr. van der Meer, would continue to represent his client in the matter without the services of counsel. Initially Mr. van der Meer advised the Court that his client would oppose the application to file the 24 August 2020 affidavit and to this end an affidavit deposed to by the respondent on 11 September 2020 was put up. In the process of arranging a date for the hearing of a further interlocutory application to deal with this affidavit, the respondent backed down and his attorney advised the court that the further supplementary affidavit deposed to by Mr. Andre Kruger could be admitted. The court

was asked to consider the allegations made in the respondent's affidavit opposing the application as constituting his reply thereto.

27. The parties were then advised that the matter would be removed from the list of reserved judgments and they were invited to file short supplementary notes dealing with the contents of the August and September 2020 affidavits. The applicants' counsel complied with this invitation on 20 October 2020 but the respondent's attorney had not done so by date hereof.

28. At the end of it all, an urgent application launched in October 2018 has morphed into a protracted battle on paper. There has been no referral to oral evidence and the Court has been requested to determine the application on the papers. Given the way the matter has developed, there are two sets of files before the Court. The main application runs to some 297 pages while the interlocutory application for a referral to oral evidence and the subsequent documents filed therein runs to 912 pages.

29. The interlocutory application has effectively been utilized to supplement both parties' evidence over the two-year period that the matter has been pending and the main application has really stood still. The time has now come to adjudicate on the application and in doing so the Court will have regard to all of the evidential material placed before it in both files: the interests of justice demand that substance rather than form should prevail. To the extent that each party has had the opportunity to

sequentially respond to the other's fresh allegations as they have been made, there is no prejudice to either party in adopting this approach.

30. And, given that I have come to a firm conclusion on the outcome of the application in the light of all the evidence placed before me, I do not believe that it will be fair to either party that the application be held in abeyance pending determination of the Maintenance Court application which could still take years to be brought to finality. The parties are entitled to know what their respective positions are and to plan their lives accordingly.

THE APPROACH TO PROCEEDINGS FOR CONTEMPT OF COURT

31. The leading case on contempt is *Fakie*[2] which should be read in conjunction with *Bannatyne*[3] where Mokgoro J held that -

"[18] Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief is competent."

The present application is thus constitutionally sanctioned.

32. In *Fakie* Cameron JA gathered the relevant authorities relating to applications for contempt of court and summarized the approach thus -

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[2] Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

[3] Bannatyne v Bannatyne (Commissioner for Gender Equality, as *Amicus Curiae*) 2003 (2) SA 363 (CC)

"[42] To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and willfulness and *mala fides*) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to willfulness and *mala fides*: Should the respondent fail to advance evidence that establishes reasonable doubt as to whether non-compliance was willful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

33. In respect of the first three criteria referred to by Cameron JA in subpara 42 (c) of ***Fakie***, there is no issue between the parties. This matter concerns only the

question whether the applicant has established that the respondent's failure to pay maintenance was willful and *mala fide.*

WAS THE RESPONDENT'S FAILURE TO PAY THE FULL AMOUNT OF MAINTENANCE DUE TO THE APPLICANT AFTER SEPTEMEBR 2018 WILFUL AND *MALA FIDE*?

34. Applying the approach mandated in ***Fakie,*** the respondent bears an evidential burden to establish reasonable dioubt that his failure to pay the full amount of maintenance was justified, the reason advanced being that he could initially (i.e. in February 2018) not afford to pay R63 417,45 and could only afford R30 000, and that thereafter he could only afford R20 000 in October 2018 and R10 000 in 2019. In discharging this evidential burden, the respondent must put up a cogent case that he was *bona fide* when he held this belief at each stage of the self-imposed reduction.

35. In considering whether the respondent has succeeded in discharging this evidential burden the Court will have regard to a multiplicity of factors, including the respondent's allegations made under oath, his correspondence with the applicant via WhatsApp messages, information relating to the respondent's financial affairs and bank documents and the evidence adduced by the two accountants in these proceedings.

EVIDENCE UNDER OATH

36. What do we find in the papers? On 2 February 2018 the applicant's attorney, Mr. Andre Kruger (not related) wrote to Mr. van der Meer pointing out that the respondent had failed to escalate the maintenance in accordance with the order of Le Grange J and had in fact only paid R30 000 when he was liable to pay R63 417.45. Immediate payment of the balance was demanded.

37. On 8 February 2018 Mr. van der Meer replied that "*our client is, due to his financial circumstances, no longer able to afford the maintenance*", adding that the applicant would endeavour to make monthly payments of R30 000.00. Mr. Andre Kruger was also informed in that letter that the respondent reserved the right to approach the court for reduction of his liability to the applicant.

38. In the answering affidavit deposed to in the main application, the respondent suggests that in settling the divorce he was unreasonably cajoled, both into agreeing to pay lifelong maintenance and to agreeing to the amount thereof. He says that *"(r)eluctantly and against my better judgment, I agreed to pay R52 000.00 per month in maintenance with yearly escalations, until death, remarriage or cohabitation."* The respondent goes on to complain in that affidavit that "*(e)ven at the date of divorce I still maintained that I could not afford the maintenance"* which he agreed to pay and says that "*with the benefit of hindsight, I regret having agreed to that maintenance order.*"

39. What is undisputed is that fact that for some four and a half years the respondent complied fully with the order of Le Grange J. That he was able to do so is

confirmed both by the respondent in the answering affidavit, and by Mr. Venter in his recent analysis of, inter alia, the bank statements of the respondent's practice. It is common cause that the practice account of Dr.J.A.K Inc. is held with Nedbank and has been so held for many years. The practice has, at all material times, had an overdraft facility on this account of R1,67m and it is further common cause that, notwithstanding the existence of a separate personal banking facility with Investec Private Bank, the respondent customarily paid the applicant's maintenance out of his practice account. This was his considered choice and it remains so. No doubt the payments would be offset against the respondent's loan account in the incorporated practice.

40. In his affidavit dated 6 July 2020 Mr. Venter analysed the respondent's practice overdraft over the period March 2018 to April 2020 and found that, at no stage during that period in question, did the debit balance on the account exceed the overdraft limit. The following list reflects the month end debit balances during the said period, save for April 2019 when the account was actually in credit:

- March 2018 -R1 292 601,22
- April 2018 -R1 367 421,43
- May 2018 -R1 379 763,19
- June 2018 -R1 048 678,02

- July 2018 -R1 470 262,32
- August 2018 -R1 290 897,81
- September 2018 -R1 382 310,03
- October 2018 -R1 181 652,25
- November 2018 -R1 273 430,59
- December 2018 -R1 015 346,56
- January 2019 -R1 338 499,49
- February 2019 -R1 057 123,93
- March 2019 -R482 654,75
- April 2019 +R49 171,41
- May 2019 -R946 028,20
- July 2019 -R1 361 107,42
- August 2019 -R1 633 763,54
- September 2019 -R1 423 285,96

- October 2019 -R1 270 088,06
- November 2019 -R1 094 541,28
- December 2019 -R1 605 067,75
- January 2020 -R1 518 254,75
- February 2020 -R1 042 811,53
- March 2020 -R1 259 956,92
- April 2020 -R1 252 126,34

41. It will thus be seen that the overdraft limit only breached the R1,6m level on two occasions (August and September 2019) and even in those months there was sufficient credit left in the facility to enable the respondent to meet his liability to the applicant in full. Further, on analysis, Mr. Venter demonstrated that the average debit balance of the facility over the 26 month period under review was of the order of -R1 191 916,70

42. When the respondent intentionally breached the court order in March 2018 the overdraft debit balance stood at -R1,292m. He accordingly had more than R377 000 credit available on that account alone and his professed inability to afford the extra R33 400 odd to fulfill his obligation in terms of the court order at that stage is accordingly not borne out by the undisputed evidence.

ALLEGATIONS MADE IN THE ANSWERING AFFIDAVIT

43. The answering affidavit in the main application was deposed to on 23 November 2018. In that affidavit the respondent made no mention of his practice's bank balance as at 28 February 2018 so as to demonstrate that he simply could not afford another R33 000 odd to pay the applicant what was due to her. Rather he says the following.

"54. The only means by which my practice can afford to pay me my salary, which in turn is used to pay maintenance, is by increasing its credit facility (overdraft) with Nedbank. In fact, I sometimes paid maintenance from the overdraft. In March 2014, the overdraft amounted to –R581 128.27 with a limit of R1,670,000.00. As proof, find attached a copy of the bank statement marked ***Annexure "A3"***. At times, this overdraft came close to R1,600,000.00 and Nedbank will most certainly not increase the overdraft. Currently, this overdraft has increased to almost –R1,500,000.00 as is evident from the October 2018 bank statement marked ***Annexure "A4"***. I am standing surety for my practice's overdraft.

55. I effectively have to borrow from Peter to pay Paul, so to speak. I (and my practice) am in a perilous position. Something has to give.

56. Besides my practice's overdraft facility, I (my practice and I) also have many outstanding creditors who are proverbially knocking on my door for payment. An example of this is a letter I had received in February 2018 from a supplier indicating that the account is on hold due to non-payment. A copy is annexed marked ***Annexure "A5"***.

57. It goes without saying that a specialized practice such as mine requires expensive equipment and running expenses. If I had to close my practice, then it would invariably be a case of killing the goose that lays the golden eggs and would be in nobody's interest.

58. It was upon receipt of this letter from my supplier that it dawned upon me that the current situation is untenable and that I would have to reduce my monthly maintenance payments to R30,000.00. While I realise that, strictly speaking, I was supposed to approach the court for a reduction of the maintenance amount, I was hoping that sense would prevail with the Applicant and that she would agree to a reduction. Alas."

44. The supplier's letter referred to by the respondent (annexure A5) was a standard creditor's demand for payment of the sum of R92 940.63 of which R92 625.00 was said to be 90 days overdue. It is dated 15 February 2018 and thus post-dates the respondent's decision to reduce the maintenance on the first day of that month. As such, it could hardly have constituted the wake-up call that the respondent ascribes to it. After all, his attorney had written to the applicant's attorney a week before informing him of his client's allegedly impoverished financial position. And, as will be shown shortly, the respondent had been complaining about the onerous extent of his obligation to the applicant well before 15 February 2018.

45. The respondent's reliance in November 2018 on annexure A4 - a one page extract from his practice's Nedbank statement for 1 October 2018[4] - does not assist his alleged inability to pay the full amount of maintenance either: on that day

[4] All the entries on that statement relate to one day - "*01/10/2018*"

the overdraft fluctuated between R1 382 310.03 and R1 471 936.44 as monies went in and out of the practice account. Such is the nature of the respondent's practice

46. Turning to Annexure A3, which is further relied on in support of the respondent's allegation of impending financial disaster, it has to be said emphatically that the document does not assist him either. It is the first page of a bank statement dated 31 March 2014 which reflects that –

- The opening balance in that month was –R1 075 268,83;
- The closing balance was –R581 128,27;
- Funds to the value of R1 311 458,03 had flowed into the account during the month in question;
- Funds to the value of R817 317.27 had flowed out of the account; while
- The overdraft limit was R1 670 000,00.

On the contrary, the annexure in question shows substantial sums of money flowing in and out of the account, as one sees in annexure A4. Importantly, one can see that for the period 2014 to 2018 the respondent has maintained a steady overdraft limit – hardly the sign of straightened financial circumstances, or a professional person who does not enjoy the support of his bankers.

WHATSAPP COMMUNICATIONS

47. The respondent is a keen user of the WhatsApp social media tool and his correspondence with the applicant (who he calls by her nickname “L”) reveals that he had been griping about having to maintain her for many years - long before the “true” state of affairs suddenly “dawned” upon him in February 2018. Various extracts from these exchanges, in which the respondent was often most abusive towards the applicant and her attorney, are annexed to affidavits in both the main and interlocutory applications. The respondent has not noted any objection to the use thereof by the applicant and has acknowledged that they reflect correctly what was said.

48. So, for example, one sees at p273 of the interlocutory application papers that on 28 April 2016 the respondent told the applicant that he was no longer prepared to pay what he considered to be a *“*ridiculous” sum of maintenance. He said that he could not afford it, that his practice was failing and that he wished to sever all connection with the applicant, suggesting that a capital payment in settlement of his maintenance obligation might be worthy of consideration.[5] The applicant says that the parties did discuss (through their respective attorneys) repayment of a capital sum but were unable to agree on a figure. I shall revert to this aspect later.

49. On 31 May 2016 the respondent castigated the applicant for proposing too high a capital sum, claiming that he had been reasonable in his offer to her. He

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[5] “*Ek is nie bereid om verder hierdie belaglike onderhouds bedrag aan jou te betaal nie. Ek kan dit nie bekostig nie en boer agter uit. Ek wil graag hierdie naelstring afsny. Hoe kan ons die problem oplos? Wil jy settle vir kapitale bedrag?*”

said that he no longer felt like working so as to pay her maintenance and that he would, in any event, be retiring within five years. The respondent also told the applicant that upon his death she would receive nothing more by way of maintenance.[6]

50. On 31 May 2016 the applicant made further proposals regarding a capital settlement which the respondent derisively brushed aside.[7] The respondent thereupon insulted the applicant and her attorney, telling the applicant that she should move on with her life as he did not intend looking after her forever. He expressly referred to the fact that the applicant was not a beneficiary in the family trust, insinuating that no payment would be made to her from that entity. The respondent also appears to have attempted to intimidate the applicant by suggesting to her that upon his retirement there would be nothing left with which to maintain her.[8]

51. On 5 February 2018, just 3 days after Mr. Andre Kruger gave notice to Mr. van der Meer that his client had short-paid the applicant, the respondent was at it again, telling the applicant that in his view the original order to which he had agreed in 2013 was "ridiculously" excessive, that he did not intend carrying on paying the

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[6] "*'n (sic) belaglike bedrag soos die onderhoudsbedrag wat jy en prokureer (sic) voor oorspronklik gevra het, het nie geslaag nie. En hy het regskostes opgejaag vir sy voor deel (sic)…Oneerlik. Hy het geworry (sic) oor jou of my nie…So dis tyd mors. EK is nie meer lus om te werk vir jou onderhoud nie. Ek is binne vlg 5 jaar weg en afgetree. Wees redelik anders Werk (sic) jy teen jou self. Ek het jou 'n redelike bedrag aangebied wat jou onaghanklik (sic) sal maak. As EK sterf het jy niks.'*

[7] *"Ek kan maar net lag. Julle is belaglik."*

[8] *"Na jou prokureer se belaglike email aan my prokureer mors ons nie ons tyd nie. Kry jou ry. Ek gaan nie vir jou ewig (sic) sorg nie. Jy's niks van my of my kinders nie. Die familie trust maak net voorsiening vir my familie….As EK aftree is daar niks"*

stipulated amount, that he could not afford it and that he would go to court to defend himself. The respondent informed the applicant that he would only be paying R30 000 in the interim and that having regard to his financial position going forward, he would be reducing the figure even further and leave it to the court to decide. The respondent claimed that the original amount was too high and that his income had reduced, and concluded by telling the applicant that there were no assets capable of execution and ordered her to go and find herself a job.[9]

52. On 4 September 2018 the respondent was at it again, telling the applicant that it was time for to find someone else to maintain her. He again claimed that he had been unable to afford the cost of maintaining the applicant for some time and that he would in any event be reducing the maintenance the following month. He again said that there were no assets capable of attachment given that he "leased" everything. The respondent challenged the applicant and her attorney (whom he described as dishonest and a "rubbish") to do their damnedest.[10]

53. Four days later the respondent vented his spleen again telling the applicant on 8 September 2018 that he was waiting for her and her attorney (again

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[9] *"Ek kan nie voortgaan met hierdie belaglike onderhouds bedrag (sic) nie en sal nie voortgaan met daardie bedrag nie. Ek kan dit nie bekostig nie. Ek sal dit in die hof gaan verdedig. Ek is bereid om in die interim slegs R30 000 te betaal. Nagelang van my benarde finansiele posisie sal ek later dit nog verder laat verminder. Die hof sal daaroor besluit. Die bedrag wat ons vantevore ooreengekom het was te hoog. My inkomste het verminder. Daar is geen bates om op beslag te le nie. Groete en gaan kry vir jou 'n werk."*

[10] "*Kry vir jou iemand anders om jou te onderhou. Ek verminder in elk geval van volgende maande (sic) die onderhoud. Ek kan jou lankal nie bekostig nie. Ek besit niks wat julle kan vat nie. So maak jy en jou skelm Prokureer gemors wat julle wil."*

referred to as a "rubbish") in court, while suggesting that she should stop loafing around on her couch all day but rather go out and find a job.[11]

54. On 8 October 2018 the respondent told the applicant and her attorney that they were being greedy and labelled her a "parasite", like her father. He opined that the Court would agree with his assessment of the applicant's greed.[12]

55. I have recited the contents of just a few WhatsApp messages which take up many pages and cover a protracted period. The respondent has throughout treated the applicant contemptuously and in a most demeaning fashion, all of which was no doubt intended to put pressure on her to agree to a capital settlement of his future maintenance obligations. To her credit, the applicant conducted herself with dignity and treated the respondent politely in all her replies.

56. The respondent did not let up. Mr. André Kruger's affidavit of 24 August 2020 reveals that after the virtual hearing on 24 July 2020 and on 21 August 2020, the respondent showed his disrespect towards the applicant, her attorney, Mr. Olivier SC, Ms. de Wet and even the Court when he sent her a series of cryptically worded WhatsApp messages.

- *Greed and stupidity and arrogance get u nowhere;*

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[11] *"Se vir daai gemors ek se I'm waiting for him and for you in court and go and earn your own money. I'm tired and not willing to fund your lying on your couch every day."*

[12] *"Ek sien vir jou en jou greedy prokureer in die hof. Jy is 'n regte parasite nes jou pa…the judge I'm sure will agree with me."*

- *Good luck with #GEMORS#Clownolivier#GAMBLING WITH ROYALTY#DEWETGEMIRSDEPUTY;*

- *#WATCHTHISSPACE;*

- *#GAMBLINGWITHTHEGREATESTFUTUREBECAUSEYOUVE-NEVERBEENPARTOFITBECAUSEYOUNOTWORTH IT.*

57. A contextual reading of these messages over the years reveals that respondent is in truth a law unto himself. He considered that he concluded the divorce settlement on adverse terms and that, come what may, he was ultimately not going to honour his obligation. He persistently complained about a lack of funds (which, as will be seen shortly, was not the case) and took it upon himself to unilaterally reduce the agreed amount which he had paid for several years. He knew that he was obliged to approach the court before he did so yet he showed scant regard for the court. Indeed, it was only in March 2019 (more than a year after he first defaulted) that he eventually applied for a reduction in the Maintenance Court in Somerset West.[13]

A GENERAL OVERVIEW OF THE RESPONDENT'S FINANCIAL POSITION

58. Reference has already been made to Annexure A to this judgment, which has its genesis in the report of Mr. Greyling prepared during the matrimonial

[13] The applicant says that she was obliged to give up her well-appointed apartment in Sea Point and take up lodgings in cramped conditions with one of her children in Somerset West as a consequence of the drop in maintenance, hence the fact that that court has jurisdiction over the application for reduction.

proceedings. The purpose of that report was to attempt to determine the respondent's monthly income, monthly expenses and financial position in order to meet the applicant's claims in the divorce. While Mr. Greyling expressed some reservations at that time regarding the ability of the respondent to afford the applicant's demands, it is significant that the respondent nevertheless saw his way clear to agree to pay the sum of R52 000 per month in 2013, and was able to pay that sum (with inflationary increases) for another five years.

59. Against that background, it is necessary, for purposes of this application, to have regard to certain aspects of that report insofar as the respondent has suggested in his affidavits filed in these proceedings and WhatsApp exchanges with the applicant, penury on the one hand, and on the other the existence of trusts to which the applicant has no entitlement and the fact that the respondent has no assets capable of attachment.

60. In the latter regard, it bears mention that in the process of seeking to execute on the order of Le Grange J the applicant's attorneys received a *nulla bona* return in respect of the respondent's property after the Sheriff served a writ of execution on the respondent personally on 14 September 2018:

"He stated that he has no insured (sic) assets but a negative balance in his account. He insisted that he is going to send proof of the balance only to your offices."

61. In the report dated 30 September 2011[14] prepared on behalf of the respondent, Mr. Greyling (through his company Accountants @ Law – "A@L") made the following remarks which are relevant to an assessment of the source of funds then available to the respondent to fund his lifestyle and maintenance for the applicant.

"[8] There are some 13 financial entities associated with Dr K which appear in the organogram appended hereto as annexure A hereto (sic).

[9] The majority of these entities are owned by two trusts in which it is noted in the financial statements that Dr K has a significant influence.

[10] A@L has been provided with a report dated 11 August 2011 from AC Venter (Venter) the accountant acting for Mrs. K in the divorce proceedings. Venter also assumes that the various trusts are the *alter ego* of Dr.K. **A@L for the purposes of reviewing the financial position of Dr.K and his earnings capacity reviews the financial performance of the greater Dr.K group because the transactions are inter mingled and the viability of the entities owned by the two trusts are funded primarily from the ophthalmology practice operated by Dr.K through Dr.J.A.K Inc.…**

11. Dr.K makes no admissions regarding the allegations that both of the trust's (sic) assets are controlled by him. Some of the entities are co-owned by his son, J K and he is also a director of Khangella….

[14] The full report is annexed to the applicant's founding affidavit in these proceedings.

13. The four main trading entities which are the primary sources of income are JA K Inc., Khangella Eye Theatre (Pty) Ltd, Jo van Heerden Inc. and the J K Trust. The financial group of Dr.K as set out in annexure A hereto is particularly complex.

14. There are numerous inter group loans which are used to fund the various operations. It is evident that Willvest Fifteen (Pty) Ltd ("Willvest") is a principal funder of the group through borrowings of some R15 million from Rand Merchant Bank (RMB).

15. Furthermore Dr K funds many of the operational expenses of the business as well as his personal lifestyle through his personal Investec credit card. Many of the personal expenses are in fact charged to the ophthalmology practice conducted by Dr K…as Dr K does not physically take a salary and are recorded as directors' remuneration as contained in the AFS[15] for Dr JA K Inc.

16. Dr K has at times purchased equipment with his personal cards, and sometimes funds practice related expenses with his personal cards." (Emphasis added)

CAPITAL PAYMENTS AND ACTIVITIES RELATING TO THE J K TRUST

62. In the founding affidavit in the main application the applicant made mention of the fact that during their exchanges in the past the parties had discussed a capital settlement in lieu of monthly maintenance. She pointed out that in about 2017 the respondent had offered to pay her the sum of R5m which, said the applicant, was hardly demonstrative of a person in financial straits.

[15] Annual financial statements

63. This offer is confirmed by the respondent in certain of the WhatsApp messages, in particular in a message that he sent to a mutual friend of the parties, who in turn forwarded it on to the applicant. The respondent did not deny in these proceedings that he had made the offer to the applicant in 2017 but claimed that the source of the funds was his son from a previous marriage, J K, who the respondent said was earning well as a professional rugby player in Europe and was willing to assist his father financially.

64. In the further affidavit filed by Mr. Andre Kruger in August 2020, he refers to information that he says only came to his attention after the conclusion of the hearing on 24 July 2020. The applicant's attorney refers to an email that came to his attention regarding the sale of the shares of one of the entities reflected in Annexure A, namely Stellenbosch Wine & Country Investment Holdings (Pty) Ltd and calls on the respondent to produce the necessary documentation in that regard.

65. In so doing, the applicant's attorney refers the court to para 19.3 of Mr.Greyling's aforesaid report which reads as follows.

" Dr.K through various trusts and other interposed entities has a 23.7% interest in vacant land planned for development, currently valued at some R55 million, owned through two entities called Stellenbosch Wine and Country Investment Holdings and its 100% subsidiary Stellenbosch Wine and Country Estate."[16]

[16] 23.7% of R55m equates to R13,035m

The respondent took up the challenge and filed a further affidavit dated 11 September 2020 which included a copy of an agreement for the sale of shares in K Vineyards' interest in Stellenbosch Wine and Country Estate to a company called Kaalfontein Developments (Pty) Ltd. The document reflects that the contract for sale of shares was concluded in September 2015 for R14m, that K Vineyards was represented by the respondent and Kaalfontein Developments by Mr. Gerhardus Jacobus Strydom. This is almost R1m more than the value of the shareholding referenced by Mr. Greyling in 2011.

66. In his affidavit of 24 August 2020 Mr. Andre Kruger further refers the Court to an email of 5 October 2015 from Mr. van der Meer (who represented both the respondent and K Vineyards at the time) to one Gert Strydom confirming payment into the attorney's bank account on that day of the sum of R14m and an undertaking to immediately pay the funds directly to the respondent.[17]

67. In his affidavit in reply to Mr. Andre Kruger's affidavit dated 11 September 2020, the respondent acknowledges that he represented the company as its sole director in this transaction and delivers proof of the fact that the proceeds of the sale[18] were paid into the Nedbank account of the J K Trust by Mr. van der Meer on 6 October 2015. The respondent goes on to show that on 13 October 2015 the sum of R13 998 888,49 was paid to his son Mr. J K: no explanation is offered as to

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[17] "*Daarna betaal ek die fondse aan Johann K"*

[18] The actual amount was R13 965 270.00

the reason for the payment to the respondent's son other than an averment that the latter is a beneficiary of the J K Trust.

68. While it might reasonably be speculated that the respondent was using his son's bank account to harbour funds belonging to the J K Trust, what is clear is that Mr. Greyling was correct when he reported on the effective control of the respondent in relation to the entities referred to in Annexure A and, further, the centrality of this trust in the respondent's financial affairs. Indeed, if regard is had to the very bank statement of the trust in question which reflects the payment to his son, one sees further, for instance, that -

- On 8 October 2015 an amount of R46 152,30 was paid into the trust's Nedbank account via ABSA Bank by an entity referenced only as "MSEP 157 huur";

- On 14 October 2015 the said trust received payment of the sum of R100 000 from the account of Dr.J.A.K Inc. and

- On 15 October 2015 a payment in the sum of R150 000,00 was received via Investec Private Bank referenced "Khangella-rent". We know that Khangella Oogteater (Pty) Ltd is the entity that houses the day hospital at which Dr K performs ophthalmic surgery.

69. Further, the Nedbank statement shows that during the period 1-5 October 2015 the J K Trust made the following large payments (in addition to a number of smaller amounts) -

- R86 000,00 to the Lucca Trust;

- R81 776,77 to an Investec Private Bank Account with number 01756017 (This is not the respondent's personal account with Investec Private Bank, to which reference is made below); and

- R143 414,73 to RMB Private Bank.

70. In his report Mr. Greyling further remarked as follows in relation to the financial affairs of Stellenbosch Wine and Country Estate and the respondent at the time.

" 19.3.1. Currently the overdraft in Stellenbosch Wine and Country Estate (Pty) Ltd of some R4 million funds the operational costs of this investment property which is being borne by the bank as creditor. Nevertheless, due to the current state of the property market it is unlikely that this property will be realized in the short to medium term to alleviate the financial pressures facing Dr.K and his various entities. It is hence expected that Dr.K will be required to fund his share of the operational costs and interest in future."

71. While the various *causae* for the payments to, and by, the J K Trust are neither here nor there for purposes of the present application, they are relevant to demonstrate the accuracy of Mr.Greyling's assessment of the respondent's role in the

affairs of that trust. So too the respondent's central role as the guiding mind of that trust in the sale of shares agreement: firstly as the sole director of the seller company (whose entire equity is held by the trust), then, in instructing that the payment of the purchase price be paid into the trust's Nedbank account (where it belonged) and finally directing payment of the said sum to his son, who, it was said, was a person of sufficient wealth that he could afford to pay R5m on behalf of his father to settle his maintenance obligations to the applicant.

72. While the 2015 disposal of the interest in Stellenbosch Wine and Country Estate may have been to alleviate financial pressure on the respondent (as Mr.Greyling forecast in 2011), the significance of the disposal lies in the fact that it demonstrates the respondent's effective control of the entities in the Group to benefit his peronal position.

73. There can thus be little doubt that when one assesses the respondent's financial position and his ability to pay the agreed sum of maintenance it is imperative (as has always been the case) to consider the Dr. K Group as a whole and not just look at, for instance, the salary which he purports to draw from his practice account.

THE AFFIDAVIT OF MR. VENTER DATED 6 JULY 2020

74. Pursuant to the agreed order of 20 March 2020, Mr. Venter was required to investigate the respondent's current financial position and to report to the Court in

regard thereto. Mr. Greyling was to do likewise and the 2 independent experts were then required to meet and produce a joint minute so as to assist the Court in assessing, inter alia, the veracity of the respondent's claim that he could not afford the maintenance payable to his ex-wife in 2018 and thereafter.

75. The respondent did not abide by the terms of the agreed order, which he had expressly sought through Senior Counsel so as to put himself in a position to explain the full extent of his finances over the relevant period. Rather, the respondent instructed the company responsible for compiling the various AFS of the entities in the Dr J K Group[19] to prepare a report, hence the report of Mr. Andre du Plessis of 19 May 2020. The first criticism of the report then is that it is not prepared by an independent expert as contemplated in the order of 20 March 2020 but by an entity rendering services to the Group.

76. But more importantly, as the report reflects, the documentation relied upon by Mr. du Plessis has little probative value. There were eight sets of AFS for various of the entities in the Group for the periods 2013 to 2019 produced and relied upon, but all were unsigned and some were still in draft form. Tellingly, Mr. du Plessis remarked by way of a *caveat* that -

"It was not possible to access actual documents and source documents as we did not have access to the Inc's premises. LDP provides monthly management accounts, but the

[19] LDP Compliance (Pty) Ltd

accounting functions are handled by the client and Xpedient[20]. LDP is not in possession of the source documents."

77. As Annexure T to his report, Mr. du Plessis attached certain statements drawn from the respondent's personal bank account with Investec Private Bank under account no. 10010903749. In so doing Mr. du Plessis remarked that "*The private bank account of Dr. K was used for private and business expenses in these periods.*" These randomly selected bank statements are for the months ending 31 December 2017, 31 January 2018, 29 February 2020 and 31 March 2020. As such, they do not reflect a great deal of detail.

78. Nevertheless, what one can glean from these bank statements is the following. Firstly, the respondent has throughout the period 1 December 2017 to 31 March 2020 enjoyed a personal overdraft facility with Investec of R100 000,00. Secondly, at no time has that facility been fully utilized and, importantly, at the end of December 2017 and January 2018, the respondent had more than R40 000,00 credit available to him on the said account – this at a time when he was in need of some R33 417,45 to make up the difference in his short payment of his ex-wife's maintenance.

79. Thirdly, at the end of February 2020, the Investec account was in credit to the extent of R6 710,63 and similarly at the end of March 2020 it was in credit to the extent of R11 329,65. In those months the respondent only paid the applicant

[20] According to www.xpedient.co.za this is a company that provides administrative and billing services to medical professionals

R20 000,00 per month, both payments to “L K” having been made electronically from that Investec account. In the circumstances, the respondent could quite easily have made up the shortfall of R49 384,48 then due to the applicant from this account alone. This is in addition to the credit which, as pointed out earlier, was available to the respondent on his practice’s Nedbank account.

80. Fourthly, one sees in each of the four statements, payments from the Investec account to the J K Trust. In December 2017 and January 2018 there are payments each month of R12 000,00 under the reference “Rent Eq” while in February and March 2020 there are unreferenced payments of R10 288,00 in each month. This is consonant with Mr.Greyling’s assessment of the money flows between the various entities and accounts resorting within the Dr J K Group.

81. In the affidavit of 6 July 2020, which forms the basis of his report to the Court, Mr. Venter stresses the inadequacy of the documentation made available to him by the respondent for purposes of compiling the very report sought by his senior counsel prior to the postponement of the matter in March 2020.

“6. Despite Applicant’s attorneys and myself requesting on various occasions that the financial statements of the Trusts and the related companies as disclosed in the records of the Dr.J.A.K Incorporated company be made available to me, no such documents have been provided to me. I point out that Respondent’s expert, Mr. du Plessis, has access to unsigned financial statements of the Trust from 2013 to 2019 which was (sic) prepared by Respondent, which statements had not been provided to me. I attach hereto marked “B” and “C” my requests in this regard as well as the answers received. I also refer to the report of Mr. du

Plessis wherein he states that the statements of both trusts for the period 2013 to 2019 was made available to him. When I required the financial of the trusts from the Respondent's personal assistant, Anne Kelly, she informed me that she was instructed not to give me any information and documents of the trusts."

82. The latter remark is confirmed by Mr. du Plessis in an affidavit deposed to on 24 July 2020, the day of the last hearing of this matter.[21]

"6. When a demand was made by Mr. Cassie Venter to have access to these financial statements [i.e. of the two trusts], I had to first obtain permission from the trustees of the two trusts. I therefore discussed the matter with the trustees, but they were unwilling to give permission that draft financial statements be made available to Mr. Venter (and the Applicant)."

83. Notwithstanding the absence of adequate documentation, Mr. Venter was in a position to depose to the following facts and express the following professional opinions.

(i) The respondent's practice is a professional firm which has operated since 1998 (i.e. 22 years) and has an annual turnover of R14m (VAT excl).

[21] The affidavit was prepared after counsel for the applicant informed the court that no meeting of the experts had taken place and further that Mr du Plessis' report, unlike that of Mr Venter, was not under oath.

(ii) The statement that the practice and the respondent are insolvent and unable to pay their debts makes no sense at all.

(iii) The respondent's alleged salary of R1 020 000 per annum has been structured purely in order to receive certain tax benefits. The salary is not drawn on a monthly basis and merely amounts to book entries. This is confirmed in the nominal ledger accounts.

(iv) The respondent's income, based on the incorporated company's profit, amounted to more than R3m per annum before tax in respect of the last two years.

(v) On a monthly basis, the respondent had more than sufficient access to funds to comply with the order of Le Grange, J with effect from 28 February 2018. In support of this opinion the witness attached a table reflecting the balance of the respondent's practice overdraft with Nedbank during the period in question, as set out above. He did not include, in this regard, an assessment of the respondent's facility on his Investec personal account. Had he done so, it is axiomatic that the respondent's ability to pay would have been even more favourable given the facts set out earlier in regard to that account.

84. It has to be said that the instruction that Mr. Venter not be given proper access to the AFS of the two trusts in which the respondent has an interest is deeply

troubling, and is really only capable of the reasonable inference that there is information therein that is detrimental to the case advanced by the respondent and, on the other hand, favourable to the applicant's case. This view is strengthened by the information contained in the last set of affidavits of Mr. Andre Kruger and the respondent (August and September 2020) relating to the sale of the shares in Stellenbosch Wine and Country Investment Holdings (Pty) Ltd and the consequent payment of almost R14m to the respondent's son, Mr. J K.

CONCLUSIONS

85. Has the respondent discharged the evidential burden he bears to show that his failure to comply with the order of Le Grange, J was not willful or *mala fide?* In *Maujean*[22] King J described the act of willfulness thus:

"More specifically in the context of a default judgment 'willful' connotes deliberateness in the sense of knowledge of the action and of the consequences, its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be".

I consider that the same approach is warranted in considering the element of willfulness in this matter given that it accords with the following *dictum* of Cameron JA in *Fakie*.

[22] Maujean t/a Audio Video Agencies v Standard Bank Ltd 1994 (3) SA 801 (C) at 803H – I.

"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach 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 unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)." (Internal references omitted)

86. In the circumstances, the Court firstly has regard to the respondent's claim in his answering affidavit in the main application that it fortuitously came to his attention in February 2018 that his finances were such that he could no longer afford the applicant's maintenance. That is simply not true. The respondent had for years been complaining about his alleged inability to pay.

87. Next, the Court has regard to he undisputed facts put up by the applicant's expert Mr. Venter with reference to the available credit on the Nedbank account and the respondent's witness Mr. du Plessis with reference to the Investec account, both of whichestablish that the respondent has always been able to afford the full amount of the order of Le Grange J, and can still do so.

88. Then, it is not in issue that prior to the divorce settlement, Mr. Greyling expressed certain reservations about the long-term sustainability of the respondent's income and expenditure, while Mr. Venter held a contrary view. This notwithstanding, the applicant solemnly and unreservedly undertook to pay a substantial amount of maintenance (together with increases) in August 2013 and thereafter paid each

amount as and when it fell due. His complaint now that he should never have agreed to the order as it was beyond his means is false and self-serving. The respondent is, and always has been, a man of substantial wealth with a lucrative specialist medical practice that brings in more than R14m per annum and permits him earnings of more than R3m per annum.

89. Thereafter we see that in about 2016 the respondent began complaining that he considered that he was paying too much and that he began badgering the applicant to agree to a reduction, including an offer to settle the terms of the order through payment of a capital sum of R5m. During these exchanges the respondent referred to the Jn K Trust and told the applicant that she should forget about receiving any benefits from that entity as she was not a member of the K family. The clear implication was that the respondent regarded himself as a beneficiary of that trust (of which he and his sister were then trustees) and that he intended to utilize its benefits to his financial advantage. The respondent has subsequently been shown to have regarded that trust as an integral part of his financial planning through the central role it plays in the Dr. Jn K Group and has enjoyed benefits from the trust while he asserted control over it and the corporate entities it owned.

90. The respondent’s true motivation for ultimately not complying with the court is not hard to find. As illustrated above, in a WhatsApp message to the applicant on 31 May 2016 the respondent told her that he did not feel like working any longer in

order to maintain her.[23] He said that he was contemplating retirement within the following 5 years[24] (i.e. 2021) and a year later (on 2 August 2017), the respondent told the applicant to get a move on as he did not intend maintaining her forever.[25]In short, the respondent told the applicant that he did not want to support her rather than claiming not to be able to do so.

91. It is important to note also that the respondent was aware that he could not simply disobey the court order and unilaterally reduce the maintenance. As already demonstrated, he said as much in his answering affidavit of 23 November 2018.

"58. …While I realise that, strictly speaking, I was supposed to approach the court for a reduction of the maintenance amount, I was hoping that sense would prevail with the Applicant and that she would agree to a reduction. Alas."

Yet knowing full well what his legal obligations were, the respondent acted brazenly and unilaterally reduced the maintenance without the sanction of the court. He did not approach a court at the beginning of 2018 for a variation of the order nor did he file a counter application in this matter asking for a reduction of the maintenance. It was only more than a year after he had intentionally defaulted that the respondent eventually approached the Maintenance Court in Somerset West for a variation of the High Court's order. Thereafter, and while this matter has been pending, he has

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[23] "*Ek is nie meer lus om te werk vir jou onderhoud nie."*

[24] *"Ek is binne die vlg 5 jaar weg en afgetree."*

[25] *"Kry jou ry. Ek gaan nie vir jou ewig sorg nie."*

unilaterally reduced the maintenance even further – from R30 000 to R20 000 to R10 000 – in circumstances where he was manifestly capable of paying the full amount.

92. Lastly, it must be said that the respondent has shamelessly attempted to bully the applicant into submission through reducing her financial lifeline, knowing full well that as an unemployed woman who is presently 62 years of age she is entirely dependent on him for her livelihood – that, after all, is why she agreed to the terms of the divorce order. In the process, the respondent has insulted and belittled the applicant and her legal representatives and even taken a swipe at this Court. His failure to adhere to the court order is, in the circumstances, manifestly willful and the respondent has failed to put up a case to the contrary.

93. But, not only has the respondent behaved willfully he has also been shown to be *mala fide.* For instance, one sees in the answering affidavit that he undertook to provide the court with full details of his financial position.

"9….It is my intention to take the court into my confidence and make a full and frank disclosure of my means. This obviously would include disclosing details of the financial state of my practice, which is in a perilous state for the reasons I shall revert to *infra.* I do however not expect the court (or the Applicant) to take my word for it. To this end I have instructed auditors to prepare comprehensive financial statements in respect of my practice. This (sic), so I am told by them, will only be available by January 2019."

94. Despite that undertaking, the respondent did not furnish the AFS as promised and, further, had to be directed by Binns Ward J to provide documents put up earlier in an un-redacted form. The applicant was also obliged to resort to the rules of court in 2019 to procure additional financial information relevant to the respondent.

95. And, even after Adv. Buikman SC had made it clear to the court in March 2020 that she required a proper assessment of the respondent's finances before she could discharge her professional duty, the respondent still trifled with the Court. He refused that Mr. Venter should have full access to the documents he required in order to be in a position to report fully to the court and only made unsigned (and thus unaudited) financial statements and documentation available to the applicant's expert. The respondent also precluded Mr. Venter from having access to the finances of the two trusts and failed to instruct an independent expert as agreed to in March 2020, relying rather on functionaries of the Group who lacked the requisite degree of independence.

96. In the result, the respondent has failed to take either the Court or the applicant into his confidence regarding the true extent of his financial position and has failed to make good on his promise to demonstrate the alleged "parlous state" of his practice which "dawned" upon him in February 2018 and caused him to decide there and then to default on his obligations towards the applicant. This, in my considered view, is demonstrative of an unwillingness on the part of the respondent to establish his claims of financial distress and leads to the reasonable conclusion that his defence to the application for a finding of contempt is *mala fide.*

97. In the result, I conclude that the respondent has failed to adduce evidence to establish a reasonable doubt that he acted without willfulness and was not *mala fide*. In all the circumstances of the matter, I am thus satisfied that the applicant has established conclusively that the respondent is in contempt of the order of this court of 6 September 2013.

AN APPROPRIATE ORDER

98. In the answering affidavit the respondent goes to some lengths to suggest that, by permitting an application for contempt of court to be lodged by the beneficiary of a maintenance order, the court is acting unreasonably and unconstitutionally.

"24. I respectfully submit an arbitrary distinction is accordingly drawn between ordinary monetary judgments and monetary judgments that were granted pursuant to maintenance claims. While I appreciate that, generally speaking, women (who statistically constitute the majority of beneficiaries of maintenance orders) require protection, the distinction does not address the plethora of other examples of 'ordinary' creditors who do not enjoy the benefit of contempt proceedings whilst being in an equally disadvantaged position."

99. It seems as if the person who furnished the respondent with the legal advice upon which this paragraph is based was either not familiar with the extent of the *dictum* in *Bannatyne* nor the subsequent comments thereon in *Fakie*, or, if s/he was, s/he did not interpreted these authorities properly. *Bannatyne* at [19] to [32] provides the constitutional basis for the High Court to exercise its inherent jurisdiction

to bring out a finding of contempt of court in respect of the non-payment of maintenance for both children and indigent women. ***Fakie*** at [7] footnote 9 confirms the approach in ***Bannatyne*** as permitting the use of contempt proceedings to enforce payment of maintenance orders.

100. In any event, the argument foreshadowed in the affidavit was not advanced by Ms. Buikman SC during the virtual hearing on 24 July 2020. On the contrary, counsel specifically referred to the approach mandated in ***Fakie*** and attempted to persuade the Court that the respondent had indeed discharged the evidential onus that he bore on the basis of that case.

101. In ***Fakie*** Cameron JA referred to the unique nature and purpose of contempt proceedings.

"[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law." (Internal references omitted)

102. And, at [11] of the judgment in ***Fakie*** , Cameron JA cited with approval the following passage (as translated from the original Afrikaans text by His Lordship)

of Steyn CJ in the pre-constitutional decision of the erstwhile Appellate Division in *Beyers*[26].

"Even though enforcement of a civil obligation is the primary purpose of the punishment, it is nevertheless not imposed merely because the obligation has not been observed, but on the basis of the criminal contempt of court that is associated with it. The fact that the punishment is generally suspended on condition of compliance with the order in issue, and that the punishment is thus not enforced if the applicant should abandon his rights under the order, does not detract from this at all. Depending on the nature and seriousness of the contempt, the court would accordingly be able to suspend only a portion of the punishment, and then the abandonment of rights by the applicant would not affect the unsuspended portion."

103. However, it is not only the Supreme Court of Appeal which has sanctioned the use of imprisonment (suspended in whole or in part where appropriate) as a mechanism for enforcing compliance with court orders. In *De Lange*[27] the Constitutional Court approved of the process (which it described as the exercise of an extraordinary power) on condition that there was an acceptable degree of procedural fairness.

"The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly, it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and

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[26] S v Beyers 1968 (3) SA 70 (A) at 80 C-H

[27] De Lange v Smuts 1998 (3) SA 785 (CC) at [147]

the procedures followed are fair. In this case, there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness."

104. In accordance with the approach considered with these judgments, Mr. Olivier SC asked the court to impose a period of imprisonment on the respondent but to suspend same on condition (i) that he paid the arrears (together with interest thereon) due to the applicant, and (ii) that he continues to comply with the order of Le Grange J, or any amendment or variation thereof by any competent court. Costs were sought on the punitive scale.

105. In an updated memorandum delivered to the Court during the week ending 23 October 2020, counsel for the applicant confirmed that the current monthly maintenance payable to the applicant (after inflationary increases in terms of the court order) is R69 384,48. The arrears owing to the applicant total R1 539 158,06 exclusive of *mora* interest. These figures were not challenged by the respondent's legal representatives.

106. In my view, the order sought is an appropriate one in the circumstances and adequately addresses the respondent's persistent and willful breach of the order of this court. I am further of the view that, in light of the respondent's conduct throughout these proceedings, it is appropriate that the applicant not be left out of pocket in respect of her legal fees and that a punitive costs order is warranted.

ORDER OF COURT

Accordingly, it is ordered that:

1. The respondent is directed to pay to the applicant the amount of **R1 539 158,96** in respect of his non-compliance with the maintenance order granted in this Court on 6 September 2013 under case number 26048/2010 (“the order”), such payment to be made by the respondent within one month of this order.

2. The aforesaid sum of R1 539 158,96 is to bear interest *a tempore morae* which is to run from 1 February 2018 until date of payment and is to be calculated on each unpaid maintenance instalment during the said period

3. The respondent is declared to be in contempt of the order.

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

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

    5.1 the respondent pays to the applicant the sum of R1 539 158,96 together with interest thereon calculated in accordance with paragraphs 1 and 2 above;

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

6. The respondent is directed to pay the applicant's costs of suit (which shall include the costs of two counsel) on the scale as between attorney and client.

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GAMBLE, J