

SOUTH AFRICA / JUDGMENT

A R v M N (26583/2014) [2020] ZAGPJHC 215 (21 September 2020) [2020] ZAGPJHC 215

COURT

South Gauteng High Court, Johannesburg

BEFORE

FA Snyckers

CASE / FILE NUMBER

26583/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 26583/2014

In the matter between:

R,
A
Applicant
and
N,
M
Respondent

JUDGMENT

HEARD REMOTELY VIA ZOOM PLATFORM ON 4 SEPTEMBER 2020]

FA SNYCKERS AJ:

INTRODUCTION

1 I shall refer to the parties as mother and father. At issue is a familiar story – mother brings contempt proceedings when father has, for an extended period of time, failed to pay any maintenance towards two minor children, in violation of a court order that maintenance be paid.

2 The parties were divorced in 2017 and a settlement agreement that provided for maintenance to be paid by father towards two minor children was made an order of court. The order also regulated contact by father with the minor children and a mechanism for dispute resolution in this regard.

3 Mother alleges, and there is no proper dispute about this, that, after February 2018, apart from one payment in August 2018, father has made no payments at all in compliance with the court order. At the time the application for contempt was brought, in April 2020, the arrears outstanding amounted to some R540 000. By the time a supplementary affidavit was filed on 4 August 2020, the arrears were said to have amounted to some R742 000. In a with prejudice offer, made on the eve of these proceedings, father acknowledged an outstanding indebtedness of just under R500 000.

4 Father has brought a counter-application, also for contempt. This is based on alleged non-compliance on the part of mother with the contact provisions of the court order.

5 The children were born in 2011 and 2014 respectively. In terms of the court order, after transfer of the erstwhile matrimonial home had been finalised, father was liable to pay to mother by way of maintenance for the children the sum of R7 500 per child month, liable to increase in terms of the annual CPI. In addition, father was to pay half of the medical aid expenses, school fees, tuition fees, school uniforms and extramurals and various other expenses listed in the court order that were to be proved by mother by way of the production of invoices or vouchers. There was no maintenance payable by the parties to each other personally.

6 The dispute resolution mechanism for purposes of contact entailed the appointment of a “parenting co-ordinator” and the need to refer disputes to the co-ordinator before they were taken to court.

7 Towards the end of 2017 father started defaulting on the maintenance payments. At the time, father was employed at an auditors firm. Mother eventually applied for an emoluments attachment order and, at the point when execution was going to be levied, it emerged that father was no longer employed at the auditors firm in question. In February 2018 father paid what at that stage was the arrear amount of some R63 000 which at the time cleared all obligations in

terms of the court order. Since then, however, father failed to make any payments at all, save for one payment made in August 2018. The papers are vague as to the precise quantum of the payment made in August 2018. It appears from the allegations in the papers, and from a schedule prepared by mother and attached to the papers, that what was paid in August 2018 was one month's cash maintenance amount which by that stage had grown to the amount of R15 600.

8 No other payment of any kind was made. Father adopted the attitude that he was out of work and had debts to pay off and could not afford making any of the payments. It may be noted that, apart from the proceeds of the matrimonial home, in relation to which it was alleged that father obtained in excess of R1 million, father was also paid the value of a retirement policy in a pre-tax amount of some R3.2 million. These amounts, according to father, were spent, in the period of about 15 months during which it appeared, on father's account, that he was unemployed.

9 According to a schedule of alleged income and expenses produced by father in August 2019, father cleared a net amount of some R74 000 a month in income. Father listed numerous creditors and expenses and alleged in August 2019 that he retained a surplus of only some R2 600 odd per month. A bank statement indicated that in September of 2019 the net amount paid into a bank account as far as salary was concerned was some R83 000. We know that, by the time the matter came to court, in August 2020, father was earning a salary of a gross amount of R147 000 odd per month, also clearing some R83 000 a month. In addition, an amount in excess of R10 000 was paid by his employer into a provident fund for his retirement

savings.

10 One of father's expenses entails payments made towards the purchase of a BMW 2 series, 2017 vehicle. Included in the papers is what purports to be a "post-judgment settlement" between the vehicle financier and father. The agreement purports to record that judgment had been taken against father in respect of his debt owing on the BMW, when it appears no such judgment had ever been taken. Be that as it may, the agreement records that the financier was to take repossession of the vehicle as the relief sought in the "judgment" and that in order to ward this off, and because father wished to remain in possession of the vehicle, he was to pay a monthly amount in respect of the vehicle to retain possession. The upshot is that father pays an amount of about R10 000 a month towards his ability to drive the BMW and pays an amount of some R1 900 a month towards insurance on the BMW.

11 There is evidence of the potential existence of a PPS investment, in relation to which father has provided no information relating either to its continued existence or to its surrender value if any.

12 Father lists various alleged creditors and loans that he is liable for. He provides no information about why, when and how these loans were taken out and how they interact with his liability to pay in terms of the court order for the past period in excess of two years.

13 What is undisputed on the papers is that father has spent, and continues to spend, relatively speaking, considerable amounts of money on online gambling and some money on online trading. Father alleges that during the divorce process, he had occasion to engage in online gambling. The precise amounts spent on online gambling over a long period of time are not clear. As considered further below, it appears that in the period 2012 to 2015, millions were spent. What does seem clear is that in a recent five month period, an amount of some R70 000 was spent by father on online gambling and online trading. This leaves out of account a further amount of about R10 000 a month of cash withdrawals that appear to be unaccounted for.

14 Such interaction between the parties as is contained in the papers reveals an attitude on the part of father, particularly during the time when he said he was unemployed, that he was hounded by creditors and was unable to pay for the maintenance of his children (or to comply with the court order); he invited mother to take such court steps as she deemed fit as, if she did so, she would not see a cent during the period of father's lifetime.

15 In answering papers, father adopted the attitude that he was applying for a reduction in maintenance from the Maintenance Court and at first attached unsigned papers to this effect to his affidavit. He eventually brought proceedings for a reduction in maintenance seeking a reduction from the current maintenance obligations to an amount of R1 000 per month per child in total.

16 Proceedings in the Maintenance Court were heard on 3 September 2020, during the motion week when this matter was heard before me (remotely). In the Maintenance Court, the question was argued whether there was sufficient good cause for a variation of the maintenance order. These proceedings have been postponed to October 2020 with the parties ordered to file papers on 21 and 25 September respectively. During these proceedings father formally altered his position before the Maintenance Officer to allege an ability to pay, and seek a reduction to, R2 500 per month per child and one-third of the school fees – the school fees amount to some R220 000 per annum for the two children together. One-third of the school fees would therefore be an amount of some R75 000 annually, i.e. some R6 000 per month.

17 Despite adopting the attitude that he is unable to pay any of the maintenance ordered in terms of the court order, in this application, father has not revealed to the court anything about his asset position. In fact, he does not even make an allegation on oath that he has no assets or has insufficient assets to liquidate to meet the outstanding arrears. The proceedings do, however, appear to be premised on the common cause supposition that there are no substantial assets to speak of, but there is a monthly gross salary of almost R150 000.

ASSESSMENT

18 In my view, on a conspectus of the evidence before me, father's position is extraordinarily brazen. Father earns almost R150 000 a month. He insists on continuing to drive a BMW that costs him in excess of R11 000 a month. He has his employer put away in excess of R10 000 a month towards his retirement. He spends some R13 800 a month on gambling and online trading. He decides to prioritise a list of debts, the surrounding circumstances and provenance of which

he deems it fit not to disclose to the court, save for details that can be gleaned for a Trans Union report. His counsel submits that, on the authority of *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA), his prioritisation decisions, albeit perhaps unreasonable, have not been proved beyond a reasonable doubt to be in bad faith and, accordingly, he cannot be said to be in wilful default for purposes of being held liable for contempt. Fakie confirmed the application of the criminal standard of proof beyond reasonable doubt in applications for declarations and committal for civil contempt.

19 I do not believe Fakie to be authority for the proposition that a debtor may adopt the attitude in court, when faced with his undeniable failure to comply

with a money judgment, that his own decision to pay various others, in circumstances he believes he ought not and need not fully to disclose to the court, should be regarded, albeit as “unreasonable”, as not, beyond reasonable doubt, *mala fide* for the purposes of contempt.

20 Counsel for father invoked the analogy of section 31 of the Maintenance Act 99 of 1998, which deals with criminal prosecutions for failure to pay maintenance. The provision invoked is to the effect that, even

an accused who alleges an absence of means to pay maintenance is unable to invoke this as a defence if such absence of means is due either to misconduct or to an unwillingness to undertake work on his or her part. Quite how this provision by analogy should be of assistance to father in the present circumstances, is not clear to me. If a criminal defendant in such a case, who can establish an inability to pay, based on a true absence of means, is unable to escape conviction if the absence of means is due to misconduct or to an unwillingness to undertake employment, then a man who earns close to R150 000 a month and decides it is necessary to keep on driving the 2 Series BMW can hardly escape a finding of *mala fides* beyond reasonable doubt, purely because he alleges that it is more important for him to make payments of other debts, than to comply

with the court order.

21 Even if one were to ignore completely the position in relation to debts, one cannot ignore the extraordinary fact that father decides to spend almost R14 000 a month on gambling and online trading, if one looks only at what is demonstrable and undeniable on the papers.

22 What appears to me to be completely undeniable is the fact that, whatever father’s true current ability, when it comes to payment of maintenance and meeting the court order, he must at least be, to the tune of a significant amount every month, in *mala fide* contempt. This is because of his complete failure to pay anything at all, apart from one payment in August 2018, since February

2018. Even the amount of R1 000 per child per month as a total amount that he alleged he was able to afford in March 2020 (which appears on the face of it to be risible in the circumstances), and was formally used to ground his application for a reduction in maintenance, did not find its way into any bank accounts that had anything to do with compliance with the court order. The same can be said for the amount of R2 500 per month

per child and one-third of the school fees which became the fall-back position, before the Maintenance Court – in circumstances where it was not suggested that this had suddenly become possible overnight and had not been possible the day before. I agree with counsel for mother that the reasoning of Kollapen J in JD v DD 2016 JDR 0933 (GP) is apposite: if father were truly not mala fide, one would have expected him at the very least to have made payment of those amounts that he alleged he was able to pay in his application for reduced maintenance.

THE GAMBLING PROBLEM

23 A troubling aspect of this matter is the fact of father's gambling. It is important to note that it is not father's case that he is in fact unable to pay the maintenance in question, and to comply with the court order, or, at least that he is not in wilful default of the court order, because his will is fundamentally compromised by an addiction to gambling, such that he should not be held to be acting fully wilfully when spending money on online gambling that he should be spending on complying with the court order.

24 The gambling phenomenon is downplayed in father's papers – it is certainly not put forward as an excuse, or even an explanation, for his failure to comply with the court order. Mother, for her part, in supplementary papers, had recourse to a clinical and educational psychologist, to give generalised advice about father's behaviour, in an anonymous scenario sketched for the psychologist. We are told of records from the online gambling company revealing over 35 000 online bets placed between January 2012 and October 2015 (several years ago) entailing betting millions of Rands with huge financial loss. The report yielded by the expert said various things in general about gambling addictions and was obtained mainly to support relief that had been sought at a late stage for a "garnishee order", in order to intercept salary payments in relation to the substantial salary earned by father.

25 I shall deal with the notion of the "garnishee order" below.

26 In response to mother's expert opinion, father stated the following in a supplementary affidavit:

"I have not been assessed for a gambling addiction nor have I been diagnosed as an addict. The applicant's entire basis for her relief stems from an opinion of a person who has not even met me. The report and allegations stemming therefrom stand to be struck out, and I will make such application at the hearing of this matter".

27 I was faced with a rather curious situation. On the one hand, in the teeth of apparently undeniable contempt for the court order, at least in relation to significant amounts at issue in the order, there is the undeniable fact that father spends and has spent considerable amounts of money gambling. Mother appears to have adopted the attitude, perhaps somewhat tentatively, that father is a gambling addict. Prima facie, there appears to be potential support for this proposition in what I see and simply cannot ignore. For his part, however, father does not adopt the attitude that he is a gambling addict and in fact rejects this notion directly in his papers. I

must therefore take his decisions as deliberate, which would leave me with no choice but to hold him in contempt.

28 I debated this dilemma with counsel for both parties. Counsel for father was in a difficult position. It was not her client's case that he was a gambling addict, yet any support for this notion in the papers could potentially assist in a finding that there was reasonable doubt as to the wilfulness of his failure to comply with the court order. Counsel acquitted herself admirably in negotiating this difficulty.

29 The problem is that, to the extent that there is a real gambling addiction, the prospects are that a contempt finding and a committal, conditional upon any kind of significant compliance with the court order, would likely yield the ultimate outcome simply of incarceration of father and further non-compliance with the court order.

30 But, it was incumbent upon father at least to meet the court half-way if he wished to put up the defence of a gambling addiction as in any way relevant to the otherwise unavoidable conclusion of his wilful and mala fide default. I have nevertheless sought to cater for my remaining sense of disquiet in this regard in the order that I craft. I do not believe it appropriate to direct father to undergo a psychiatric evaluation. He should be free to decline to do so. But he should have the option of doing so and of having the outcome taken into account by future courts dealing with his contempt, if any. Mother should be able to respond to any such outcome too.

31 Mother sought an order committing father for contempt for a period of twelve months imprisonment. That would be a most astonishing period of committal. Furthermore, the grace period for purging the contempt was sought at seven days. That, in the circumstances, does not strike me as realistic.

32 Nevertheless, in the current circumstances I cannot avoid a finding that father is in fact in mala fide contempt of the order and ought to be held in contempt and committed for contempt, conditional upon steps taken to purge contempt, as further considered below.

33 Father's conduct to date also warrants a punitive cost award. At the last moment, a with-prejudice offer was made by father, for certain periodic payments to commence in several months' time, which elicited queries from mother as to its practicalities and import, which were ignored. Father's steadfast attitude in this application was that he could not pay any part of the order.

GARNISHEE ORDER

34 Because the notion of seeking what was called a "garnishee order" appeared at a very late stage in the papers, this was resisted fiercely by father and a postponement was sought to the extent that

this relief was persisted with. I raised the problem with counsel for mother that I was not sitting as a Maintenance Court in terms of section 28 of the Maintenance Act and, although the High Court would have the competence to direct an employer in appropriate circumstances to pay

money that would otherwise be paid to an employee as salary to a creditor, particularly in discharge of an obligation towards fulfilling a court order, this would appear to require the citation and joinder of the employer because it would be relief directed at the employer. It became common cause that such an order could not be granted unless the employer were joined and given an opportunity to respond in relation to the appropriateness of the relief sought.

35 It does seem, however, that in the present circumstances such an order would make eminent sense and ought to be obtained. I provide for this contingency in the order below.

THIS JUDGMENT, FURTHER ARREARS AND ONGOING OBLIGATIONS

36 I must stress that this judgment and order relate only to father's contempt as at the time the application was launched, and what he needs to do to avoid committal to prison for contempt. He was faced with an arrears amount of some R540,000 at the time the application was launched, which has now grown to about R750,000. He remains in ongoing contempt of an obligation to pay the equivalent of in excess of R25,000 per month pursuant to the order. His current and future maintenance obligations are, however, the subject of pending Maintenance Court proceedings in which he seeks a reduction.

37 Whatever the Maintenance Court orders in relation to ongoing obligations will be irrelevant to father's obligations to comply with the conditions set out in the order below to purge the contempt for which he would otherwise be imprisoned. The periodic minimum payments set out below are independent of any ongoing obligations father has, and will continue to have, to comply with the order of 2017, and, if such order were to be varied, to comply with his then current maintenance obligations.

38 Father should not be under the impression that, if he does what is necessary to avoid imprisonment in terms of this order, he is under no further legal obligation to comply with the ongoing obligations pursuant to the order of May 2017 that he is violating. Nor should he believe that the smaller amount of arrears he needs to clear in order to purge his current contempt, to avoid imprisonment, must in any way be regarded as an indication of the totality of his indebtedness to date. I believe it appropriate to peg the contempt for purposes of the committal order at the amount of arrears as at the time the application for contempt was launched. Given the period set for purging, there will also be mora interest continuing to accumulate on the arrears amount, even the arrears amount at issue in this order. Such interest is not compromised by this order.

39 In short, this order does not have the effect of compromising or eliminating the additional amount of arrears that accumulated since the application was launched, or any further arrears that might accumulate in future, whether of capital or of interest.

40 If further violations of ongoing and additional obligations yield a need for further contempt proceedings, so be it. Suffice it to say that father would be hard pressed, in the event of violation of the conditions to avoid imprisonment set below, to provide any justification for not complying at least with the terms of this order.

THE COUNTER-APPLICATION

41 The less said about the counter-application, the better.

42 It is clear from the papers that father lost interest in the regulation of contact with his minor children, and failed to take up appointments with the parenting co-ordinator that had been arranged in this regard. The parenting co-ordinator eventually resigned her position and a substitute was not appointed. Father took no steps at any stage to have a substitute appointed. The most remarkable thing about the counter-application for contempt is that there is no allegation, let alone corroboration, of a single demand on the part of father, that was unmet by mother, to be afforded contact with his children, that he was denied. The counter-application is a cynical tit-for-tat litigation strategy in response to mother's application for contempt. It is itself an abuse. It warrants a punitive cost order.

ORDER

43 In the circumstances I make the following order:

1. The respondent is declared to be in contempt of the order of this court dated 5 May 2017 incorporating the settlement agreement dated 27 March 2017, in particular, clauses 3.2, 3.4, 3.5, 3.6 and 3.7.
2. The respondent is to be committed to imprisonment for a period of 30 days.
3. The operation and execution of the order in 2 above are suspended for a period of one year ending 30 September 2021 on the conditions set out below:

3.1 The respondent shall, by 31 October 2020, submit a report, filed with the Registrar and delivered to the attorneys of the applicant, in which the respondent either declares himself unwilling to submit to psychiatric evaluation in relation to the potential existence of a gambling addiction, in respect of which the respondent shall not be obliged to provide any explanation, or provides a report from a psychiatrist obtained at the respondent's expense, containing an evaluation as to the extent, if any, to which the respondent suffers from a gambling addiction.

3.2 The respondent shall, by 30 September 2021, have paid to the applicant an amount of R537, 499.

3.3 The respondent shall pay, towards the payment of R537, 499, a minimum monthly amount of R30 000, commencing 1 October 2020, and considered on the 1st of every month thereafter.

4. In the event of breach of any one of the conditions set out in 3 above (failure to submit the report or declaration by 31 October 2020, failure to pay any minimum monthly amount on any given month, or failure, by 30 September 2021, to have paid the amount of R537, 499) the applicant is given leave to approach this court on the same papers, duly supplemented, seeking to have the suspension referred to in 3 above uplifted and for the court to authorise a warrant of arrest and imprisonment of the respondent forthwith, in execution of the order in 2 above.

5. The applicant is given leave, on these papers as duly supplemented, to serve upon any person or entity as the respondent's employer an application for an order directing such employer to make payment to the applicant, rather than to the respondent, of the first R30,000 per month that would otherwise be paid to the respondent by way of remuneration. In this regard:

5.1 any such application should be served on the employer and on the respondent within a period of 10 court days after uploading of this order on Case Lines;

5.2 the employer and the respondent shall be afforded in such application a period of 10 court days to oppose and answer any such application;

5.3 the applicant shall be afforded a period of five court days to submit a replying affidavit in relation to such application;

5.4 a date shall be obtained from the Registrar for such application to be enrolled on the opposed roll to the extent opposed or on the unopposed roll to the extent unopposed.

6. Nothing in this order shall detract from the continued operation and efficacy of the court order granted on 5 May 2017 and any amounts payable by the respondent in terms of such order.

7. The respondent's counter-application is dismissed.

8. The respondent is directed to pay the costs of the application, including the costs of the counter-application, on the scale as between attorney and client.

FA SNYCKERS AJ

21 September 2020

Date of Hearing: 4 September 2020

Judgment Delivered: 21 September 2020

APPEARANCES:

On Behalf of the Applicant: L Metzger

Instructed By: Clarks Attorneys

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On Behalf of the Respondents: R Blumenthal

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