

SOUTH AFRICA / JUDGMENT

B.A.C v K.L.F.C (5059/09) [2010] ZAWCHC 120 (18 May 2010)

[2010] ZAWCHC 120

COURT

Western Cape High Court, Cape Town

BEFORE

Zondi

CASE / FILE NUMBER

5059/09

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 5059/09

In the matter between

B A C Applicant

and

K L F C Respondent

JUDGMENT

DELIVERED ON 18 MAY 2010

ZONDI, J Introduction

[1] On 17 April 2009 the applicant brought an urgent application against the respondent in which she sought the following relief:

an order declaring the respondent to be in contempt of an order made by this Court on 04 March 2004 under case number 3722/03;

committal of the respondent to jail for a period and on terms and conditions to be determined by the Court alternatively ordering the

respondent to pay a fine in an amount and on terms and conditions to be determined by the Court.

3. suspending committal and/or fine subject to the payment by the respondent of an amount R53 828-07 for arrear maintenance within

seven days from the date of the Order.

The respondent appeared in person and opposed the application on various grounds. Ms Badenhorst appeared for the applicant.

Factual

Background

- [2] The applicant and the respondent ("the parties") were divorced from each other by order of this Court on 04 March 2004, under case number 3722/03.
- [3] In terms of the parties' consent paper, the terms of which were incorporated in the divorce order, the respondent was ordered inter alia to pay the applicant personal maintenance in an amount of R11 000-00 per month.
- [4] The maintenance payable by the respondent was to be increased by the Consumer Price Index ("CPI") or by 10%, whichever is the lesser amount, on each anniversary date of the granting of the divorce order.
- [5] The applicant alleges that since their divorce the respondent has repeatedly failed to effect payment of the maintenance as increased by the CPI.

She avers that since 01 March 2005 and despite demand the respondent has refused and/or failed to pay the arrears relating to annual CPI increase due on the monthly maintenance.

- [6] The applicant points out that for the period between April 2005 and March 2006 the respondent should have paid R136 620-00 but paid R132 000-00. The arrears for the relevant period amount to R4 620-00.
- [7] The applicant further points out that for the period between April 2006 and March 2007 the respondent's total payments amounted to R135 432-00 instead of R140 581-92. The respondent thus shortpaid by R5149-92.
- [8] For the period from April 2007 to March 2008 the respondent paid R135 432-00 instead of R147 470-00. The arrear maintenance for the relevant period amounted to R12 038-40. During the period from April 2008 to February 2009 the respondent paid R116 274-00 when he should have paid R148 293-73. The respondent underpaid the applicant for the relevant period by R32 019-75.
- [9] The applicant alleges that the respondent is aware of the Court order and the obligations it imposes upon him. She points out that on 23 February 2009 she sent an email to the respondent requesting him to adjust the maintenance. The respondent simply ignored the applicant's email.

- [10] The applicant further avers that on 19 December 2008 her attorneys of record caused a warrant of execution to be issued against the respondent's movable property. The warrant of execution was served on the respondent on 13 January 2009.
- [11] The respondent informed the Sheriff that he had no disposable assets with which to satisfy the writ or part thereof.
- [12] The applicant alleges that the respondent is a medical practitioner and is also a member and/or director of three companies and that he has sufficient income from which to meet his maintenance obligations.
- [13] The applicant submits that the respondent, by failing to pay the increased maintenance amount due to her, is in wilful and mala fide contempt of an order of Court.
- [14] The respondent admits that he is aware of the Court order and the obligations it imposes upon him. He concedes that he has not been paying the CPI increases on the applicant's personal maintenance but advances various reasons for his default.
- [15] Firstly, the respondent pleads poverty. He alleges that he derives his income from his medical practice which he says has not been doing well since his relocation from KwaZulu - Natal to Cape Town after the divorce.
- [16] In this regard he has referred to the SARS Income Tax Assessments for the period between 2003 and 2009. In 2003 tax year his income is indicated as
- R166 430 00. In 2004 his income was R91 440-00. The 2005 tax assessment indicates his income as R93 452-00. In 2006 his income fell to R18 000-00 and he had no income in 2007 according to his income tax assessment. In 2008 he had an income of R146 700-00.
- [17] He says he has no other source of income. He states that he has not received an income from Cunicsar Vintners CC in which he has an interest. He alleges that Cunicsar Vintners CC has been trading at a loss. He has ceased to be a director of Crons Properties (Pty) Ltd.
- [18] The respondent further alleges that the applicant is aware of his ailing financial situation. He says on 02 July 2008 he wrote to the applicant advising her of his financial predicament and appealed for her understanding. Furthermore he unsuccessfully brought an application for a variation of the maintenance amount at the Wynberg Magistrates Court on 04 October 2004.
- [19] Secondly, the respondent contends that the applicant maintenance should be reduced as she is now employed. He avers that the

maintenance amount was fixed on the basis that the applicant was unemployable at the time of the Court order.

Legal Principles

- [20] The purpose of civil contempt of Court is to provide an alternative sanction against the defaulter who refuses to comply with an order of Court. He may be committed to jail or be ordered to order to pay a fine. The punitive coercion is intended to assist the complainant to enforce his or her remedy. (*Dezuis v Dezuis* 2006)
- (6) SA 395 (T) in paragraph 8).
- [21] Contempt of court means the deliberate intentional disobedience of an order granted by a Court of competent jurisdiction (*Consolidated Fish Distributors (Pty) Ltd v Zive and Others* 1968)
- (2) SA 517 (C) at 522C).
- [22] In *Fakie No. v CCII Systems* [2006] ZASCA 52; 2006
- (4) SA 326 (SCA) at paragraph 9 Cameron JA held that the test for contempt of Court is whether the breach was committed "deliberately and mala fide".
- [23] In paragraph 9 he pointed out that "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 (through unreasonableness could evidence lack of good faith)".
- [24] In paragraph 10 of the judgment Cameron JA went on to hold:
- "[10] These requirements - that the refusal to obey should be both wilful and mala fide , and that unreasonable non-compliance, provided it is bona fide , does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation.
- They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."
- [25] The standard of proof to be applied in contempt of Court proceedings is whether the defaulter is contempt beyond reasonable doubt.
- [26] Thus in an application for committal the applicant needs to show firstly, that an order was granted against the respondent, secondly, that the respondent was either served with the order or was informed of the grant of the order against him and could have no reasonable grounds for disbelieving the information and thirdly, that the respondent has either disobeyed it or has neglected to comply with it.

[27] Once these facts are established, in the absence of evidence raising a reasonable doubt as to whether the respondent acted wilfully and mala fide, all the requisites of the offence will have been established (Fakie No. supra at paragraph 23). In other words in order to avoid conviction the respondent need only lead evidence that establishes a reasonable

doubt.

[28] With this legal background I now turn to the facts of the instant case and the defences raised by the respondent.

[29] It is common cause that in terms of the divorce order the respondent was inter alia ordered to pay maintenance to the applicant and that the maintenance

was subject to a CPI related annual increase. The respondent admits knowledge of the Court order and the obligations it imposed upon him. It is also common cause that the respondent has disobeyed the Court order in that he has failed to pay the arrears relating to the annual CPI increases. [30] On the facts which are common cause I am satisfied that the applicant has established a neglect on the part of the respondent to comply with the Court order. [31] The next question is whether the respondent's disobedience or neglect is deliberate and intentional. This question is critical

because once knowledge of the order by the respondent, its service and its non-compliance by the respondent are established, in the absence of evidence raising a reasonable doubt as to whether the respondent acted wilfully and mala fide, all the requisites of the offence will have been established. [32] It is not the applicant's case that the respondent has neglected to comply with the terms of the Court order in its entirety. Her case is that the respondent has failed to pay the CPI linked increased portions of the maintenance amount and the total arrear amount is R53 827-07. [33] In response to the applicant's claim the respondent raises at least two defences. Firstly, he alleges that the applicant is now gainfully employed and that his maintenance obligations to the applicant should be reduced. [34] The respondent's defence is misplaced and has no merit on two grounds. Firstly, he may not bring an application for a variation of the maintenance order in the contempt proceedings. The purpose of these proceedings is to establish whether the respondent complies with an order of Court. The present proceedings are not intended to serve as a platform to establish whether the existing maintenance order should be varied. [35] Secondly, the respondent's defence is not competent having regard to the provisions of paragraph 5.2 of the Court order. In terms of paragraph 5.2 the respondent is precluded from approaching the Court for a reduction in his maintenance obligations to the applicant on the ground that the applicant is earning an income unless he can prove that such gross income exceeds R10 000-00 per month. The respondent has provided no evidence regarding the monthly income allegedly earned by the applicant. He has failed to establish the necessary threshold to bring himself out of operation of the provisions of paragraph 5.2 of the Court order. The respondent's first contention is accordingly dismissed. [36] The second defence of the respondent is based on poverty. He alleges that his financial situation has deteriorated to such an extent that he is now unable to pay CPI related annual increases. It is for this reason that during

October 2004 he unsuccessfully applied for reduction of the maintenance amount at the Wynberg Magistrates Court. [37] The respondent forwarded a letter to the applicant on 02 July 2008 enclosing a copy of his latest Income Tax Assessment confirming the precarious position of his finances. He went on to state as follows: "I draw a sum of money out of my practise every month, just enough to cover your maintenance. Some months there is not enough money for even that draw. I live on a day to day basis by a series of loan accounts". [38] The respondent alleges that his medical practice ("the practice") is the only source of his income. He says Cunicsar

Vintners CC, in which he has an interest, has not generated an income for him as it has been trading at a loss. In response to this averment the applicant states that she has no actual knowledge of the financial state of the respondent's company. In the

circumstances I will accept the respondent's version that he has not derived an income from Cunicsar Vintners CC. (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984

(3) SA 623 (A) at 634 - 635) [39] Furthermore the respondent states that he has ceased to be a director of Crons Properties (Pty) Ltd, a company which the

applicant alleges provides a source from which the respondent derives an additional income. This averment is not disputed by the applicant. In her replying affidavit the applicant admits that she is aware that this company was liquidated during the course of last year. [40] The respondent alleges that the turn-over of his medical practice has been severely affected by changes that occurred over the last two years at the Claremont Medical Village where it is located. [41] The respondent points out that the majority of the practice turn-over was derived from emergency referrals from Claremont

Hospital's Emergency Unit. He says his practice has not had an emergency referral from the Claremont Hospital for more than two

years. The respondent further avers that when the practice took premises at the Claremont Medical Village in 2006 it was the only Plastic and Reconstructive Surgeon practice located in the building. He says since 2006 there are now four additional plastic surgeons in the same building with whom he has to compete and this has caused a huge dent in his income. [42] On these facts I am satisfied that the respondent has succeeded to show that his non-compliance with the Court order is not wilful and mala fide. My finding is based on two grounds. First, it is clear from the maintenance schedule (exh "BC4") prepared by the applicant

that up until the bringing of these proceedings the respondent had consistently paid the capital amount portion of the maintenance. His non-compliance is in respect of paying the CPI related annual increases. It is apparent from exhibit "BC4" that since April 2006 the respondent has consistently paid R11 286-00 per month. Between March 2004 and March 2006 he consistently paid R11 000-00 per month. [43] In my view in the contempt proceedings it is appropriate for the Court to have regard to the extent to which the respondent has complied with an order of Court in determining whether his non-compliance is wilful and mala fide. (*Southey v Southey* (1907) 21

EDC 133 at 137) and in the present matter I have to take into account the extent of the respondent's partial compliance with the Court order. [44] Secondly, it is clear from the respondent's explanation that he cites a change in his financial circumstances as a primary reason for his inability to pay the annual increase as required by the Court order. He alleges that his financial situation has changed considerably and his income is far less than what he used to earn at the time of the Court order. In support of these averments the respondent has annexed to his answering affidavit income tax assessments for the period between 2003 and 2008. His annual income in 2003 was R166 430-00. In 2004 and 2005 his income was. about R93 000-00. Thereafter it dramatically went down in 2006 and 2007 and picked up to R147 700-00 in 2008. [45] There is no doubt in my mind that someone, who through a bona fide lack of means, defaults on payments in terms of a Court order cannot, for that reason alone, be found to be in contempt of Court and be penalised therefor. [46] Although the respondent's explanation for non-compliance may appear unreasonable it nevertheless lacks the elements of wilfulness and mala fide to justify a finding of contempt. Viewed objectively the explanation for non-compliance raises a reasonable doubt as to whether he acted wilfully and mala fide in failing to pay the CPI related annual increase. [47] In the circumstances, I am not satisfied that the applicant has proved beyond reasonable doubt that the respondent's disobedience of the Court order is wilful and mala fide and that the application for contempt of Court should fail. [48] I now turn to consider the question of costs. The respondent appears in person in this matter and in the circumstances there will be no order as to costs. The Order [49] The application is dismissed with no order as to costs. ZONDI D H

was subject to a CPI related annual increase. The respondent admits knowledge of the Court order and the obligations it imposed upon him. It is also common cause that the respondent has disobeyed the Court order in that he has failed to pay the arrears relating to the annual CPI increases.

[30] On the facts which are common cause I am satisfied that the applicant has established a neglect on the part of the respondent to comply with the Court order.

[31] The next question is whether the respondent's disobedience or neglect is deliberate and intentional. This question is critical

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[42] On these facts I am satisfied that the respondent has succeeded to show that his non-compliance with the Court order is not wilful and mala fide. My finding is based on two grounds. First, it is clear from the maintenance schedule (exh "BC4") prepared by the applicant

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[43] In my view in the contempt proceedings it is appropriate for the Court to have regard to the extent to which the respondent has complied with an order of Court in determining whether his non-compliance is wilful and mala fide. (*Southey v Southey* (1907) 21 EDC 133 at 137) and in the present matter I have to take into account the extent of the respondent's partial compliance with the Court order.

[44] Secondly, it is clear from the respondent's explanation that he cites a change in his financial circumstances as a primary reason for his inability to pay the annual increase as required by the Court order. He alleges that his financial situation has changed considerably and his income is far less than what he used to earn at the time of the Court order. In support of these averments the respondent has annexed to his answering affidavit income tax assessments for the period between 2003 and 2008. His annual income in 2003 was R166 430-00. In 2004 and 2005 his income was. about R93 000-00. Thereafter it dramatically went

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- [45] There is no doubt in my mind that someone, who through a bona fide lack of means, defaults on payments in terms of a Court order cannot, for that reason alone, be found to be in contempt of Court and be penalised therefor.
- [46] Although the respondent's explanation for non-compliance may appear unreasonable it nevertheless lacks the elements of wilfulness and mala fide to justify a finding of contempt. Viewed objectively the explanation for non-compliance raises a reasonable doubt as to whether he acted wilfully and mala fide in failing to pay the CPI related annual increase.
- [47] In the circumstances, I am not satisfied that the applicant has proved beyond reasonable doubt that the respondent's disobedience of the Court order is wilful and mala fide and that the application for contempt of Court should fail.
- [48] I now turn to consider the question of costs. The respondent appears in person in this matter and in the circumstances there will be no order as to costs.

The Order

- [49] The application is dismissed with no order as to costs.

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