

SOUTH AFRICA / JUDGMENT

B.V v L.V (9934/2018) [2018] ZAWCHC 118 (17 September 2018) [2018] ZAWCHC 118

COURT

Western Cape High Court, Cape Town

BEFORE

MacWilliam

CASE / FILE NUMBER

9934/2018

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 9934/2018

(Main application case number: 874/2018)

In the matter between:

B V Applicant

(Identity number: [...])

and

L V Respondent

J U D G M E N T

MACWILLIAM AJ:

- [1] The Applicant applies for his ex-wife and the mother of his two children to be committed to jail for contempt of court, alternatively to have the jail sentence suspended on condition that the Respondent complies with four paragraphs of a court order which was granted on 18 April 2018 (“the Court Order”).

[2] In Founding Affidavit, the Applicant alleged that the Respondent had not complied with the following four paragraphs of the Court Order which had been made by consent on 18 April 2018:

[a] “1.1.1 L [i.e. the Respondent] shall have supervised contact with I and B (‘the Children’) as follows:

...

1.1.1.6 L shall approach Table View Social Services or a similar organisation for assistance with regard to the appointment of a registered social worker (or a designated and appropriately qualified appointed professional for this purpose) to provide for the services of supervising and observing L’s contact. Alternatively in the event that the parties agree to the appointment of a private social worker or professional for this purpose, the costs for supervising and observing L’s contact with the children shall be borne by L and the appointed social worker or professional will invoice, and receive payment from, L directly for such costs.”

[b] “2.2 L shall attend to Dr Conrad Czech, a forensic psychiatrist, for one assessment and will schedule an appointment with Dr Conrad Czech within 10 days of this order being granted and endeavour to complete the assessment within 4 weeks of this order being granted.”

[c] “4. L will have blood tests done within 4 weeks.”

[d] “5. ‘The Respondent [i.e. L] will file her assessment and her blood test results, with the court and the Family Advocate, as soon as the reports are available.”

[3] The Respondent filed an opposing affidavit and stated, inter alia, that she was representing herself as she was unemployed and unable to afford legal representation.

[4] At the last minute, an attorney was appointed by her and Heads of Argument were filed by Adv JAB Nel who appeared on her behalf.

[5] In her Opposing Affidavit, the Respondent stated that she had no financial means to pay for the psychiatrist referred to in paragraph 2.2 of the Court Order. She said that he had informed her that his total bill would be approximately R30 000,00, which she could not afford to pay.

[6] Insofar as paragraph 1.1.1.6 of the Court Order is concerned, she stated that no social worker was prepared to supervise her access on Saturdays or Sundays and that she did not have the financial resources to pay for a private social worker or other qualified professional.

[7] In his Replying Affidavit, the Applicant does not dispute that the Respondent was unemployed. There are also no facts put up which

suggest that the Respondent could afford to pay the fees of the social workers or the psychiatrist.

- [8] The Applicant's reply was simply that if the Respondent had difficulty regarding finances, "she should approach Valkenberg State Hospital for assistance". However, he does not substantiate that Valkenberg State Hospital would, in circumstances such as this, provide the requisite

assistance and in any event paragraph 2.2 of the Court Order which he seeks to enforce makes no mention of Valkenberg.

- [9] Insofar as paragraphs 4 and 5 of the Court Order are concerned, the Respondent stated that she has had blood tests done and had filed the report at court, but there is no proof that this has been done. At the hearing a document purporting to be the results of the blood tests were handed up by the Respondent's counsel, but the Applicant was not able to ascertain the authenticity of this document in the limited time available to him. However I am not able to find that the Respondent has intentionally breached the court order and/or acted mala fides in this respect.

- [10] In *Fakie N.O. v CCII Assistance (Pty) Limited* [1] the Supreme Court of Appeal definitively laid down the following principles in relation to Contempt of Court applications such as this one:

[a] "The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and male 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";[2]

[b] "... the refusal to obey should be both wilful and mala fide, and ... unreasonable non-compliance, provided it is bona fide, does not constitute contempt ...";[3]

[c] a person should only be jailed "in the absence of reasonable doubt";[4]

[d] "... once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt".[5]

- [11] In this matter the Respondent has filed an affidavit in which she denies that her conduct was in wilful disobedience of the Court Order or mala fides. In essence she explains that she has not been able to afford the costs of the psychiatrist and social worker in question and no genuine dispute has been raised in this regard by the Applicant.

- [12] Even more troubling is the fact that it was stated in the Applicant's Heads of Argument, without the appropriate affidavits being filed, that the parties had agreed to the appointment of a facilitator, as a result of which agreement was reached that the Respondent could relocate with the two minor children to Lydenberg.

- [13] This agreement was not placed before the Court, but it was indicated in the Respondent's Heads of Argument that a facilitation order had indeed been made.
- [14] In any event, during the argument the parties agreed that I could have regard to the fact that pursuant to a facilitation agreement a directive had been made on the 13 July 2018, as a result of which the Applicant and the two minor children had moved to Lydenburg.
- [15] In these circumstances, the Applicant has simply not made out a case that I should order that paragraph 1.1.1.6 of the Court Order must be complied with, as it would be quite pointless to approach the Table View Social Services, in circumstances where the children are no longer here and one would have thought that the facilitation agreement must itself have superceded this paragraph.
- [16] Furthermore, the fact that the Respondent states that she cannot afford to pay the psychiatrist's fee, which allegation has not been shown to be false, negates mala fides on her part in relation to the order sought to enforce paragraph 2.2 of the Court Order.
- [17] The fact that the blood test report may not have been filed at court, is not sufficient to justify the grant of an order for contempt of court in these proceedings.
- [18] The present application is a most unfortunate one. It seems plain that the Respondent is experiencing personal problems. There seems to be no doubt that she requires psychological, psychiatric or other assistance. It is not in dispute that she has a close bond with her children and that her children she want to have a meaningful relationship with her. Overall the money expended in this litigation would have been far better spent by advancing the best interests of the children rather than this litigation
- [19] The fact that the Respondent apparently cooperated in relation to the conclusion of the facilitation agreement pursuant to which the Applicant and the minor children were able to relocate to Lydenberg, is a further indication that contempt proceedings were not appropriate.
- [20] What is before me is an application to declare that the Respondent is to be in contempt of a court order.
- [21] The Applicant has failed to discharge the onus resting upon it to succeed in this application. Accordingly the application is dismissed with costs.

MACWILLIAM AJ

Date of Hearing: 12 September 2018

Date of Judgment: 17 September 2018

APPEARANCES

For the Appellant: Adv. JAB Nel

Instructed by: Geldenhuys Jonker Inc., Langebaan

For the Respondent: Adv. A Titus

Instructed by: BBP LAW Inc., Lansdowne

[1] 2006 (4) SA 326 (SCA)

[2] At para [9] at 333C

[3] At para [10] at 333D-E

[4] At para [20] at 337I; para

[29] at 340E-F and para [42(c)] at 344I

[5] At para [42(d)] at 344J-345A

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