

SOUTH AFRICA / JUDGMENT

L.M (born W) v L.M (850/2022) [2024] ZAFSHC 269; [2024] 4 All SA 854 (FB) (29 August 2024) [2024] ZAFSHC 269

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

850/2022

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 850/2022

In the matter between: L[...] M[...] (born W[...]) Applicant and L[...] M[...] Respondent In Re: L[...] M[...] (born W[...]) Plaintiff and L[...] M[...] Defendant

CORAM:

VAN ZYL, J

HEARD ON: 29 FEBRUARY 2024

DELIVERED ON: 29 AUGUST 2024

[1] This is a contempt of court application in which the following relief is being sought in terms of the notice of motion:

“1. That the respondent be found and declared to be in contempt of the order granted by his Lordship the Honourable Justice JP Daffue on 1 June 2023;

2. That the respondent be committed to imprisonment for a period of 30 days, or such sentence as this Court considers appropriate;
3. In the alternative to prayer 2 above:
 - 3.1 That the respondent be committed to imprisonment for a period of 30 days, which committal shall be suspended for a period of one year, on condition that the respondent complies with the order granted by his Lordship the Honourable Justice JP Daffue on 1 June 2023 within 14 days from date of service of this order on the respondent's attorney of record;
 - 3.2 That should the respondent fail to comply with this order within 14 days as aforesaid, that the applicant be allowed to approach the Registrar of this Court to issue a warrant for the respondent's committal, on the same papers duly supplemented as necessary;
4. That the respondent be ordered to pay the costs of this application on a scale as between attorney and client;"

Background:

- [2] There is a long litigious background between the parties. Although it is necessary to highlight some aspects thereof, I do not intend to set out all the details thereof.
- [3] The parties were previously married to each other and was divorced in this court on 26 May 2022 in terms of which divorce order a deed of settlement concluded between the parties was also made an order of court. In terms of the deed of settlement the parties agreed that their respective accrual claims in terms of the Matrimonial Properties Act, 88 of 1984 ("the Act"), will be adjudicated on the following basis:

"10.1 Each party shall, within thirty (30) days from the date of granting of this order deliver its sworn statement containing full particulars of their estates as contemplated by section 7 of the Matrimonial Properties Act, 88 of 1984.

10.2 Together with the delivery of their sworn statements contemplated by subparagraph 10.1 supra, the parties shall file, by way of discovery, their discovery affidavits and also provide documentary proof in respect of the assets and liabilities so disclosed.

10.3 The Uniform Rules of Court regulating discovery, further particulars for purposes of trial and pre-trial procedures in terms of Rule 37 shall also apply."

- [4] The plaintiff complied with the aforesaid clause 10 and on 30 June 2022 delivered an affidavit in terms of section 7 of the Act together with her discovery affidavit and annexures thereto.
- [5] The respondent failed to deliver the requisite affidavit in terms of section 7 of the Act and also failed to deliver a discovery affidavit and annexures thereto.

- [6] The applicant consequently issued an application on 17 August 2022 to compel the respondent's compliance and delivery of the necessary affidavits ("the first application to compel"). This application was issued after numerous demands to comply with the delivery of the necessary affidavits, were ignored by the respondent.
- [7] The first application to compel was to be heard on 8 September 2022. On 31 August 2022 the respondent delivered the affidavits. The first application to compel was consequently withdrawn with the respondent to pay the costs thereof.
- [8] According to the applicant, upon a perusal of the documentation attached to the respondent's affidavits, it became apparent that the documents that were provided were in fact incomplete as only selected pages were provided. Letters of demand were subsequently addressed to the respondent's attorney of record, but to no avail.
- [9] On 7 December 2022 the applicant served a notice in terms of rule 35(6) calling upon the respondent to produce and make the documents referred to in the respondent's discovery affidavit available for inspection within five days of receipt of the notice. On the same date a notice in terms of Rule 35(3) was also served upon the respondent's attorney of record.
- [10] According to the applicant those notices were not duly complied with.
- [11] The applicant consequently filed a second application to compel on 24 March 2023, in terms whereof the following relief was sought:
- "1. That the respondent be compelled to deliver a response to the applicant's notice in terms of Rule 35(3), dated 6 December 2022, that complies with the rules of this Court within 10 (ten) days from date of service of a copy of the order so granted on the respondent's attorney of record;*
2. That the respondent be compelled to respond to the applicant's notice in terms of Rule 35(6), dated 6 December 2022, (by providing complete copies of the documents disclosed in the defendant's discovery affidavit dated 29 August 2022) in a manner that complies with the rules of this Court, within 10 (ten) days from date of service of a copy of the order so granted on the respondent's attorney of record;
3. The respondent be ordered to pay the costs of this application on the scale as between attorney and own client;"
- [12] The second application to compel was opposed by the respondent and the matter was enrolled for hearing before Daffue, J on 1 June 2023. On that day an order was granted by agreement between the parties in settlement of the application to compel the respondent to comply with the Rule 35(3) and Rule 35(6) notices delivered by the applicant. It is this order that forms the subject matter of the present application ("the Order").
- [13] I deem it apposite to repeat the contents of the Order herein:

"IT IS ORDERED BY AGREEMENT THAT:

1. The respondent shall furnish the applicant with complete copies of the documents referenced as items 2.1 to 8 in the respondent's discovery affidavit dated 29 August 2022 on or before 23 June 2023;
 2. The respondent shall furnish the applicant with copies of the documents specified in paragraphs 1, 2.1 to 2.2, 3.1.1, 5.1 to 5.2, 6, 10.2 and 10.5 to 10.7 specified in the applicant's Rule 35(3) notice (dated 6 December 2022) that are in his possession and which he may not validly object to produce on or before 23 June 2023.
 3. In the event that the respondent is unable or object to furnish any of the documents contemplated in paragraph 2 above, the respondent must deliver an affidavit on or before 23 June 2023 stating under oath:
 - 3.1 The reasons why he is unable to furnish the applicant with the documents. If the asserted reason is that such documents are not in the respondent's possession, he must state their whereabouts if known to him; and/or
 - 3.2 In the event that the respondent objects to providing any document in question, the basis why the respondent asserts that he may validly object to furnishing such document.
 4. The costs of the application are reserved for later determination."
- [14] It is the applicant's case that the respondent failed to duly and properly comply with the Order in circumstances where it constitutes contempt of court and hence the present application.

Application to strike:

- [15] The applicant filed a notice indicating that she will immediately prior to the hearing of the main application, request an order striking out, with costs, portions of the respondent's affidavit as being scandalous, vexatious and/or irrelevant. I do not intend repeating the contents of the entire notice to strike at this stage. From a reading thereof it in fact appears that the objections against the relevant portions of the respondent's answering affidavit are that the allegations are scandalous in respect of the applicant due to their defamatory nature and moreover irrelevant to the adjudication of the merits of the application.

Legal principles:

- [16] Rule 6(15) determines as follows:

"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted."

- [17] In *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) at para [28] the meaning of the terms “scandalous”, “vexatious” and “irrelevant” has been stated to be the following:

“[28] 'Scandalous' allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a 'vexatious' matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and 'irrelevant' allegations do not apply to the matter at hand and do not contribute one way or the other to a decision of that matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation.”

- [18] At paragraph [30] of the aforesaid judgment, the court stated, with reference to the offending allegations, as follows:

“Courts should not lightly allow vitriolic statements of this kind to form part of the record or as evidence. And courts should never be seen to be condoning this kind of inappropriate behaviour embarked upon under the guise of robustness. ...”

- [19] In the matter of *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at paras [22] and [23] the Supreme Court of Appeal confirmed that if the allegations complained of do not apply to the matter at hand or they do not contribute to the determination of the matter either way, the allegations are irrelevant. In that matter, allegations that were purportedly relevant to show motivation for actions taken were deemed to be irrelevant as it had nothing to do with the causes of action concerned or the merits thereof.

- [20] In *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm HC) at 567 the court stated that scandalous or irrelevant matter may be defamatory to the other party and the retention of such matter will therefore be prejudicial to such party.

Arguments and application of the legal principles on the present facts:

- [21] Ms Donnelly, on behalf of the applicant, submitted that the allegations referred to in the notice to strike have no bearing on the crisp issue which falls to be adjudicated upon, namely, whether the respondent complied with the Order. Ms Donnelly submitted that the said allegations are defamatory in nature and have been made with the sole intention to lower the esteem of the applicant in the eyes of the court. Ms Donnelly further submitted that the allegations made by the respondent pertain to facts which occurred prior to the facts relevant to the present subject matter and are therefore, inter alia, irrelevant.
- [22] Mr Bester, on behalf of the respondent, submitted that the court should consider the conduct of the applicant during the history of this matter and the only way to get a full picture of her conduct, is to consider her behaviour since she had deserted the communal home and removed the documents described.

- [23] I have duly considered the portions of the respondent's affidavit which the applicant seeks to be struck. They contain numerous allegations that are objectively defamatory of the applicant and has no bearing on the cause of action. These allegations are consequently not only by their very nature scandalous and vexatious, but they are also irrelevant.
- [24] I am satisfied that the said allegations are scandalous, vexatious and/or irrelevant and that the retention of those allegations will be prejudicial to the applicant. My conclusion, however, includes a restriction to paragraph 5 of the notice to strike and with the exclusion of paragraph 7 of the applicant's notice to strike.
- [25] The following portions of the respondent's affidavit are consequently struck:
1. Paragraphs B and C in their entirety;
 2. Paragraph 3.2 in its entirety;
 3. Paragraph 4.2 in its entirety;
 4. Paragraph 6.4 from and including the words "before she ..." until "... without notice".
 5. Paragraph 6.5 from and including the words "I submit ..." until "... any merit".
 6. Paragraph 7.4 in its entirety;
 7. Paragraphs 7.7 and 7.8 in their entirety;
 8. Paragraph 8.4 from and including the words "I submit ..." to "... malicious applications".
 9. Paragraph 8.7 from and including the words "... also taking into account ..." to "... demanding from me".
 10. Paragraph 9.9 in its entirety.
- [26] I will make an order in this regard at the end of the judgment, although the main application is to be adjudicated without the aforesaid portions of the respondent's answering affidavit.

Contempt of court:

- [27] The requirements to be satisfied to hold a party in contempt of court are well known and were re-confirmed by the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018
- (1) SA 1 (CC) at para [73]:
1. The existence of a court order.
 2. Service or knowledge of the court order.
 3. Non-compliance with the terms of the order.
 4. The non-compliance must be wilful and mala fide.

- [28] The requirements have to be proven by an applicant beyond reasonable doubt. See *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para [42]. See also *Tasima (Pty) Ltd v Department of Transport* [2016] 1 ALL SA 465 (SCA)
- [29] As soon as the first three elements for contempt of court exist, a presumption exists that contempt has been established and mala fides and wilfulness are presumed, unless the respondent is able to lead evidence sufficient to create reasonable doubt as to its existence. Should the respondent be unsuccessful in discharging the evidential burden, contempt has been established. See *Matjhabeng Municipality, supra*, at para [63]. See also *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) at para [36].
- [30] The Constitutional Court confirmed in *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* [2008] ZACC 8; 2008
- (9) BCLR 865 (CC) that “... at the very least that there should be strict compliance with court orders”.
- [31] In *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* 2022 (5) SA 373 the Supreme Court of Appeal reiterated that the principles applicable to the interpretation of a court order are as follows:
- [26] The now well-established test on the interpretation of court orders is this:
- 'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'
- [27] The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made. For as was said in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*, 'context is everything'.
- [28] A fairly recent illustration of the linguistic, contextual and purposive approach to the interpretation of a judgment or order is to be found in *Elan Boulevard v Fnyn Investments*, in which it was said that '(a)n order is merely the executive part of the judgment and, to interpret it, it is necessary to read the order in the context of the judgment as a whole' ...” (My emphasis)
- [32] In the present matter, the terms of the Order are clear and unequivocal and I do not understand the respondent to allege the contrary.
- [33] Considering that the order was granted by agreement between the parties, the existence of the Order is common cause between the parties. The respondent is aware of the Order and its contents.

[34] The first crisp issue which consequently needs to be adjudicated upon, is whether the respondent has complied with the terms of the Order.

[35] After the granting of the Order on 1 June 2023, an e-mail was addressed to Mr Conradie by Mr Bester, dated 22 June 2023, in terms of which the respondent's discovery affidavit deposed to in alleged compliance with the Order was provided to Mr Conradie. The said affidavit is attached to the founding affidavit as annexure "FA11". In the affidavit the respondent, inter alia, stated the following:

"2.

The Court has ordered that I discover the below documents, which I do herewith under the heading Discovered Documents. Any documents which are not discovered, for whatever reason, are separately addressed in this affidavit. I submit this affidavit in conjunction with my previous discovery affidavit and include all relevant documents, to the conclusion of the matter.

3.

...

4.

The following documents are discovered as per the Discovered Documents listing numbers. Where full documents are not discovered, it is because these documents are classified and may not become public knowledge." (My emphasis)

The respondent then listed 15 items, most of which include short "explanations" in respect of the relevant documents.

The respondent then concluded as follows:

"I declare that the discovered documents include all assets and liabilities of my personal and Mackos Plumbing, my only operational

company.

I have nothing else to declare."

[36] Certain documents were also transmitted to Mr Conradie. According to the applicant, upon a perusal of the documentation it became clear that, yet again, the respondent had failed to provide all the necessary documentation as he was obliged to do.

[37] I have to state that already on face value of the aforesaid affidavit, it is evident that the respondent did not comply with the Order, inter alia, in that he did not discover full documents as determined by the Order and he did not discover all the documents described in the Order.

[38] Consequently, on 30 August 2023, the applicant's attorney of record, Mr Conradie, addressed a letter to the respondent's

attorney of record in which he then already expressly and in detail recorded in what ways the respondent had failed to comply with the Order. A copy of the said letter is attached to the founding affidavit as annexure “FA17”.

[39] In the founding affidavit deposed to by the applicant, the applicant dealt with the documents received from the respondent’s attorney of record in response to the Order and at paragraphs 52 to 123 thereof, the applicant again expressly and in detail recorded in what ways the respondent had failed to comply with the Order. The said founding affidavit was deposed to on 14 November 2023. The applicant further states as follows in the founding affidavit:

“126. The respondent was furthermore called upon, in terms of FA17 to comply with the provisions of the Order within 14 days from date thereof, failing which it was recorded that application would be made for an order finding the respondent in contempt of Court.

127. No response was received to FA17 and consequently a further letter dated 27 September 2023 was addressed to Mr Bester, a true copy of which is attached hereto and marked “FA18”.

128. To date hereof no response has been received whatsoever.”

[40] In the answering affidavit filed in the present application the respondent, inter alia, averred as follows:

“5.3 The applicant’s allegation that I have breached the court order is totally devoid of truth...

6.1 I deny that the court order was breached or ignored in any way. I have complied fully and to the best of my abilities and am convinced that all documents and information have been discovered to calculate the accrual.

6.3 I confirm, as I have done previously, that I have complied with the order in full detail and deny that I have breached any term of the court order.

6.6 ...I have nothing more to discover.

7.3 I have fully complied where I possibly could and with every term of the court order and my attorney was provided with every available document, which he had then couriered to the applicant’s attorney.

7.6 I have discovered all relevant information to the applicant and stated under oath that I have nothing further to discover.

8.5 Even from the applicant’s own version, it is evident that all relevant documents were discovered.

8.7 I respectfully submit that all relevant documents were discovered to enable the court to calculate the accrual and that I have nothing more to discover....

9.2 The Order was supplied to me by my attorney and I have gone to great lengths to obtain all the relevant documents to discover to the applicant.

9.5 I am advised that the Rules states that if I do not have a document, I should state so under oath. I have complied to this several times, although I believe that all relevant documents were discovered.” (My emphasis)

[41] As correctly submitted by Ms Donnelly, it appears that the respondent asserts, inter alia, that not all the documents forming the subject matter of the Order are relevant; alternatively, the applicant should be satisfied with what the respondent deems to be “sufficient compliance” to enable the court to calculate the accrual.

[42] In addition, in so far as the respondent attempts to allege that he provided explanations under oath in respect of the documents that he does not have and/or the documents which he alleges “are classified and may not become public knowledge”, the respondent may be well advised to take a proper look at the whole of Rule 35. In *Erasmus: Superior Court Practice*, D.E. van Loggerenberg, at RS 22, 2023, D1 Rule 35-17, the learned author, inter alia, states as follows with reference to applicable authority:

“The discovery affidavit must indicate the existence of documents in respect of which objection to discovery is raised and the grounds on which the objection is based must be stated sufficiently clearly for the court, if necessary, to decide whether the documents are in fact privileged from production. This does not mean that such a detailed description of the documents is required as will render the privilege nugatory.” (My emphasis)

[43] The respondent’s contention that he complied with the Order is clearly contradicted by the indisputable facts placed before court in the founding affidavit, which facts the respondent failed to contradict or even grapple with in his answering affidavit. He relies on bald unsubstantiated denials.

[44] The fact that the respondent attempts to rely on the impossibility of providing some of the documentation stated in the Order, begs the question why then the respondent had expressly agreed to the terms of the Order and undertaken to provide the documents specified therein.

[45] I have to agree with the following submissions made by the applicant in the replying affidavit:

“37.3 This court has already ordered the delivery of the documentation that is relevant.

37.4 The Order manifestly clearly directs the delivery of specified documentation and not that which the respondent is of the opinion is relevant to the proceedings.

37.5 The respondent’s adopted stance in the paragraphs under reply and failure to grapple with the allegations in founding is however, prove positive that the respondent opines that he may elect which portions of the Order with which to comply.

37.6 This is confirmation of the wilful non-compliance with the order.”

- [46] It is not for the respondent to question the relevance of the documentation stated in the Order, as the final determination of the required and relevant documentation had already been made by Daffue, J by means of the Order.
- [47] The respondent, in effect, states in the answering affidavit that he has failed to comply with the express terms of the Order by stating that all “relevant” documents have been provided. This non-compliance is furthermore confirmed to be wilful as the respondent in fact expresses the opinion that the documents which remain outstanding, are not relevant.
- [48] In the circumstances I agree with the submission of Ms Donnelly that the respondent failed to discharge the evidentiary burden that rested on him to show an absence of wilfulness and mala fides in not complying with the Order, moreover so since the respondent has, in effect, confirmed under oath that he has no intention whatsoever to comply with the express, unequivocal and unambiguous terms of the Order.
- [49] To my mind, the applicant is therefore in principle entitled to succeed with the application.

The sanction:

- [50] The following was stated in MT v CT 2016 (4) SA 193 (WCC) at para [52] with regard to a finding of contempt of court:

“[52] It has been repeatedly said that, aside from preserving the dignity and moral authority of the institution of justice,

the purpose of finding a party to be in contempt is to ensure compliance with the order previously ignored. Most often the

sanction will contain a punitive element (which is suspended either wholly or in part) on condition that the order is complied with.”

- [51] The applicant is seeking, as main relief, an order that the respondent be committed to imprisonment for a period of 30 days. Considering the recalcitrant conduct of the respondent, I do consider a sanction of imprisonment as appropriate, but on the basis that it be suspended on condition that the respondent complies with the Order, as suggested in the applicant`s alternative relief in the notice of motion.

- [52] I also consider a period of 3 weeks` imprisonment as appropriate in the circumstances. In this regard I am mindful of the fact that the respondent has, on his version, at least one operational company and it may be to the fatal detriment of the

business of that company should the respondent be removed from the business for a whole month, which in turn will be to the detriment of the applicant and the minor children.

- [53] I am, however, not willing to grant an order in terms whereof the Registrar will be entitled to issue a warrant without judicial oversight. The applicant will have to approach court again, if necessary.

Costs:

[54] It is usual in contempt proceedings for the committal of a defendant or the imposition of a fine that the defaulting respondent be ordered to pay the applicant's costs on an attorney and client scale, although the court's discretion is retained. In this regard the following was stated in *Senatla Trading Enterprise 26 CC v Bloem Water* [2014] JOL 31880 (FB) at para [8]:

"[8] The general rule that the costs follow the event implies that a defaulting respondent shall usually be ordered to pay the costs of the proceedings for committal (Singer's Estate v Kotze 1960 (2) SA 304 (C) at 308H). The court will usually order the respondent to pay the applicant's costs as between attorney and client (Martin v French Hairdressing Saloons Ltd 1950 (4) SA 325 (W) at 330H; Hardy Ventures CC v Tshwane Metropolitan Municipality 2004 (1) SA 199 (T) at 204).

The Court nevertheless retains a discretion."

[55] The conduct of the respondent and his attitude towards the court in the history of this discovery dispute are deplorable and highly contemptuous. In exercising my discretion, I have no doubt that this matter justifies an order of attorney and client costs against the respondent.

[56] I have not been requested to adjudicate the reserved costs of 1 June 2023 and those costs therefore remain reserved as previously ordered.

Order:

[57] The following order is made:

1. The following portions of the respondent's affidavit are struck out:
 - 1.1. Paragraphs B and C in their entirety;
 - 1.2. Paragraph 3.2 in its entirety;
 - 1.3. Paragraph 4.2 in its entirety;
 - 1.4. Paragraph 6.4 from and including the words "before she ..." until "... without notice".
 - 1.5. Paragraph 6.5 from and including the words "I submit ..." until "... any merit".
 - 1.6. Paragraph 7.4 in its entirety;
 - 1.7. Paragraphs 7.7 and 7.8 in their entirety;
 - 1.8. Paragraph 8.4 from and including the words "I submit ..." to "... malicious applications".
 - 1.9. Paragraph 8.7 from and including the words "... also taking into account ..." to "... demanding from me".
 - 1.10. Paragraph 9.9 in its entirety.

2. The respondent is found and declared to be in contempt of the court order granted by Daffue, J on 1 June 2023.
3. The respondent is committed to imprisonment for a period of three (3) weeks, which committal is suspended for a period of one (1) year, on condition that the respondent complies with the court order granted by Daffue, J on 1 June 2023 within thirty (30) days from date of service of this order on the respondent's attorney of record.
4. Should the respondent fail to comply with this order within thirty
- (30) days as aforesaid, the applicant is allowed to approach court on the same papers, duly supplemented as necessary, for appropriate relief.
5. The respondent is ordered to pay the costs of this application on a scale as between attorney and client, including the costs of the application to strike..

C. VAN ZYL, J

On behalf of Applicant: Adv J Donnelly-Bornman Instructed by: Hendre Conradie Inc. (Rossouws Attorneys) BLOEMFONTEIN Reference: (SCH379/0003-T2 (JHB/AB) On behalf of Respondent: Mr S Bester Instructed by: Steve Bester Attorneys C/o Lovius Block BLOEMFONTEIN Reference: E02462*OVS/lv/S115/22

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