

SOUTH AFRICA / JUDGMENT

M.C.P v C.H.P (352/2019) [2019] ZANCHC 60 (20 December 2019) [2019] ZANCHC 60

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane

CASE / FILE NUMBER

352/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,
NORTHERN
CAPE DIVISION, KIMBERLEY

Not

reportable

Case

No: 352/2019

In

the matter between:

MCP
APPLICANT
And
CHP
RESPONDENT

Heard:

22 November 2019

Delivered:

20 December 2019

JUDGMENT

PHATSHOANE AJP

- [1] Ms MCP and Mr CHP, the applicant and the respondent, were married to each other out of community of property subject to the accrual system. The marriage was dissolved by a decree of divorce issued out of this Court on 10 October 2018, which incorporated a Deed of Settlement. The kernel of what is in issue is whether there has been proper compliance with Clause 2.2 of the Deed of Settlement which essentially stipulates that both parties shall within 60 days from the date of the divorce furnish to each other, in accordance with the provisions of s 7 of the Matrimonial Property Act, 88 of 1984 (“the MPA”), a list of their assets; liabilities and the accrual of benefits to their respective estate.
- [2] Ms MCP requires that the accrual benefits to the estate be determined to enable her to maintain herself which she contends cannot be achieved because Mr CHP did not comply with the divorce order, in particular the aforesaid clause of the deed. Consequently, she seeks a declarator that Mr CHP be held to be in contempt of the divorce order and committed to a 30day term of imprisonment or such period as the Court may deem appropriate, wholly suspended for a period of one year on certain conditions.
- [3] On 14 January 2019 Ms MCP’s attorneys caused a letter to be delivered to Mr CHP requesting the information as set out in clause 2.2 of the Deed of Settlement on or before 21 January 2019. They placed him on terms that the Court would be approach for an appropriate relief in the event he failed to adhere to the order.
- [4] Following the launching of this application Mr CHP’s attorneys dispatched a letter on 25 April 2019 to Ms MCP’s attorneys and attached a copy of Mr CHP’s financial statements for the fiscal year ending on 28 February
2018. The correspondence sets out the list of his assets, and liabilities. In addition certain calculations were made to show the value of his estate at the date of divorce and the determination of the accrual benefits. On 26 April 2019 Ms MCP’s attorneys replied, *inter alia*, that the information provided was not sufficient; and that, in any event, they were already in possession of the said financial statements. They demanded, amongst others, a list of each of Mr CHP’s assets and liabilities as at the date of divorce; their description and registration details; policy numbers and their schedule, investments, the number of livestock and where they were kept.

- [5] Mr CHP says that he provided the information he had by means of a letter dated 03 June 2019. This communicate sets out five immovable properties and their municipal valuation; it lists two businesses and their estimated value; certificates of five vehicles which he says Ms MCP was free to obtain their values. Furthermore, Ms MCP's attorneys were informed that Mr CHP would submit to them his investment portfolio and certificates in respect of his policies.
- [6] Ms MCP was not satisfied with the response. In a letter dated 04 June 2019, directed to Mr CHP's attorneys, she questioned the municipal, as opposed to the market, valuation of the properties which were dated 13 March 2003 whereas the divorce only took place on 10 October 2018. She requested full particulars of the immovable and movable assets; the valuations of the vehicles and further information as previously requested but not forthcoming.
- [7] Ms MCP insists that the documents provided by Mr CHP were incomplete and presented in a way that made it impossible for her to calculate the value of the portion of her accrual. She holds the view that the financial statements provided are a restatement of the calculations done by Mr CHP's auditors and does not reflect the true value of his assets and liabilities.
- [8] In her replying affidavit Ms MCP itemised the assets which were not disclosed by Mr CHP. For instance, three farms situated in the district of Gordonia, livestock, a tavern which was partially completed on the date of the divorce, and some movable properties. She avers that Mr CHP is the owner of a farm also situated in the district of Gordonia which he bought in the name of his father. She explained that Mr CHP did not provide her with the updated market related valuation in respect of his assets nor did he give her consent to obtain information regarding his policies. She also sought copies of Mr CHP's father's financial statements to verify whether they reflected a loan Mr CHP made to him. Furthermore, she intimates that Mr CHP operates various bank accounts but he did not provide the details thereof including the updated bank statements. At para 16. 4 of her replying affidavit she states:

"16.4 To date hereof, the respondent has not provided me with the following information as requested by my attorney (Annexure CHP4 to the answering affidavit):

16.4.1 market related valuations of the immovable properties;

16.4.2 the information and market related valuation of the immovable property allegedly donated to the respondent, and proof of the donation;

16.4.3 the correct and market related valuation of the businesses, the assets and stock of Lochmaree and Kleinmier;

16.4.4 the reasons for closing down the business at Rietfontein and Loubos;

16.4.5 the complete list and valuations of his vehicles and movable assess;

16.4.6 the complete list of his cattle and where the cattle are kept; and

16.4.7 a list of respondent's liabilities."

[9] Mr CHP submits that he adequately complied with the order, therefore, there was no need for Ms MCP to persist with the application. He has nothing to hide from her. He says in accordance with paras 3.1 and 3.2 of the Deed of Settlement Ms MCP may appoint a forensic auditor to verify all the information provided. He is willing to give her and her appointed auditor complete access to his financial records, his properties, and the premises of any legal entity in which he holds an interest; access to records held by his financiers, auditors, suppliers, financial advisors and or his marketers. He intimates that on 16 May 2019 an invitation was extended to Ms MCP's attorneys to act in terms of the said paras 3.1 and 3.2 of the Deed of Settlement. They failed to do so. For completeness paras 3.1 and 3.2 of the deed stipulates:

"3.1 Elke party sal geregtig wees op volle toegang tot die ander party en enige regsentiteit waarin enige van die partye 'n belang het se persele en eiendomme wat besit of gehuur word, finansiële rekords en inligting wat verband hou met hulle onderskeie boedels vir doeleindes om die inligting soos uiteengesit in paragraaf 2.2 hierbo te verifieer wat insluit, maar nie beperk is tot, inligting of rekords in besit van die partye se onderskeie bankiers, ouditeure, verskaffers, finansiële adviseurs en bemarkers vir 'n tydperk wat nie korter is nie as 5 jaar. Vir doeleindes hiervan sal enige party ook gerigtig wees om forensiese ouditeure aan te stel.

3.2 Vir doeleindes van toegang soos uiteengesit in paragraaf 3.1 hierbo, sal die party mekaar redelike vooraf kennis gee van die bedoeling om toegang uit te oefen, deur kennisgewing aan die party se prokureur en/of forensiese ouditeur."

[10] It suffices to mention that Ms MCP takes no issue in appointing an auditor but says that the auditor will not be able to verify the information without full details thereof being provided.

[11] Mr Olivier, for Mr CHP, argued that all things considered Mr CHP is not in contempt of the Court order; he acted bona fide when providing the information; and that a reasonable doubt exists as to Mr CHP's wilfulness and mala fide to comply with the Court order. In any event, he contended, that the application was ill conceived. At the very least, so it was argued, Ms MCP ought to have filed an application to compel Mr CHP to produce the information sought.

[12] Mr CHP is fully aware of his obligations in terms of clause 2.2 of the deed of settlement. The list of assets and liabilities he furnished are clearly not sufficient for purposes of determining the accrual. In a situation such as the present, the duty of a husband (alternatively a wife or same-sex partner, as the case may be) is to be full, frank and clear with the disclosure he or she makes.[1] The obligated party is also enjoined to show which assets ought to be excluded for purposes of determining the accrual and provide

reasons.[2] Needless to say, not every Court order warrants committal for contempt of Court in civil proceedings.[3] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*[4] the Constitutional Court stated that:

'[54].... The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamuses, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest.'

[13] In this case I am unpersuaded that the want of adequate compliance with the Court order of 10 October 2018 warrants being visited upon by civil contempt proceeding and committal to a term of imprisonment. This is so because there had been compliance albeit insufficient. But the issues do not end here because the accrual cannot be determined due to the insufficiency of the information at hand.

[14] Ms MCP says that her intention is not to prejudice Mr CHP but to compel him to comply with the order so as to finalise the outstanding aspects of the divorce. Section 7 of the MPA requires of a party to provide full particulars of the value of his/her estate. In *ST v CT*[5] the SCA pronounced as follows on a duty of disclosure:

"[33] Section 7 of the MPA sets out the duty which a spouse has to make full disclosure of relevant information when requested to do so by the other spouse. It reads as follows:

'7 Obligation to furnish particulars of value of estate

When it is necessary to determine the accrual of the estate of a spouse or deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate.'

[34] In *MB v DB Lopes J* cautioned as follows:

'... (L)itigation is not a game where parties are able to play their cards close to their chest in order to obtain a technical advantage to the prejudice of the other party. This is even more so in matrimonial matters where the lives of the parties have been inextricably bound together ...'

[35] The duty to make full and frank disclosure in these types of case has also occupied the attention of the English courts. The applicable legislation contains similar requirements of financial disclosure as ours. In *Livesey (formerly Jenkins) v Jenkins*, Lord Brandon declared, with reference to this duty, that '... unless the parties make full disclosure of all material facts, the court cannot lawfully or properly exercise [its] discretion'. That case concerned ancillary orders for financial provision and property adjustment after divorce and the duty to make full disclosure. And, in a more recent case on the same subject, Lord Sumption

stated that '(t)he proper exercise of these powers calls for a considerable measure of candour by the parties in disclosing their financial affairs . . . !. In that case the husband's conduct was said to have been characterised by 'persistent obstruction, obfuscation and deceit and a contumelious refusal to comply with rules of court and specific orders'. Mostyn J was right when, with reference to the duty of disclosure, he said that '(n)on-disclosure is a bane which strikes at the very integrity of the adjudicative process'.

[36] This court has cautioned that s 7 of the MPA places a clear duty on a spouse to furnish full particulars when called upon to do so. The following dictum of Gorven AJA is apposite:

'[39] The attitude of many divorce parties, particularly in relation to money claims where they control the money, can be characterised as catch me if you can. These parties set themselves up as immovable objects in the hope that they will wear down the other party. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge and generally delay and obfuscate in the hope that they will not be caught and have to disgorge what is in law due to the other party.

[40] The conduct of the trial on the accrual claim appears to have been run by the appellant on a catch me if you can basis. He clearly failed to comply with the provisions of s 7 of the Act. He delayed providing what were obviously relevant documents until the last minute and then did not discover them. He declined to provide any documents concerning the financial position of Full House Taverns. He did not provide documents which could be used to trace assets derived from the excluded assets." [footnotes omitted]

[15] Mr CHP acknowledges that for Ms MCP to gain access to the information beyond what he had already provided would require some effort on her part and she would have to incur costs. He goes on to state:

"I submit that by demanding that I supply the information as requested by way of annexures "CHP2" and "CHP4", the applicant [Ms MCP] is attempting to circumvent the above by attempting to burden me with all the costs and efforts."

[16] It is particularly undesirable that in proceedings of this nature parties should bit about the bush when they have information at their disposal to bring an end to prolonged litigation. Surely the information sought by Ms MCP resides within Mr CHP's knowledge and domain. I fail to see why Ms MCP should be put to the trouble of incurring costs through collating information which she requires for purposes of calculating her legitimate portion of the accrual when Mr CHP can and must voluntarily share it. The upshot hereof is that Mr CHP should be compelled disclose the information required.

[17] Even though the contempt application ought not to succeed at this stage Mr CHP should be deprived of his costs because he could have avoided this litigation by simply providing the information sought by Ms MCP. In the premises I make the following order:

Order

1. The application for contempt of Court brought by Ms MCP is dismissed with no order as to costs.
2. Mr CHP, the respondent, is to disclose and/or provide Ms MCP, with the following:
 - 2.1 Information sought in the correspondence attached as Annexures “CHP2” and “CHP4” to his answering affidavit.
 - 2.2 Information sought in a letter dated 19 June 2019 as reflected on page 104 of the record which should include but not limited to:
 - 2.1.1 the market related valuations of his immovable properties;
 - 2.1.2 the market related valuation of the immovable property allegedly donated to him and proof of the donation;
 - 2.1.3 the market related valuation of his businesses including the assets and stock held in Lochmaree and Kleinmier;
 - 2.1.4 the reasons for closing down the business at Rietfontein and Loubos;
 - 2.1.5 the complete list and valuation of his vehicles and all his movable assets;
 - 2.1.6 the complete list of his livestock and where this is kept; and
 - 2.1.7 a list of his liabilities.

MV Phatshoane AJP

APPEARANCES:

FOR THE APPLICANT: Adv A. Stanton

Instructed by Engelsman Magabane Inc.

FOR THE RESPONDENT : Adv A.D. Olivier

Instructed by Elliot Maris Wilmans & Hay

[1] See MB v DB 2013 (6) SA 86 (KZD) where the dictum in the English decision of J v J

[1955] P 215 at 227 was referred to with approval.

[2] ST v CT 2018 (5) SA 479 (SCA) at 493G-H para 39

[3] 2018

(1) SA 1 (CC) at 21 para 54

[4] 2018

(1) SA 1 (CC) at 21 para 54

[5] 2018 (5) SA 479 (SCA) at 491G-493A paras 33-36

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