

SOUTH AFRICA / JUDGMENT

R.G.T v M.S.D (64290/14) [2015] ZAGPPHC 314 (20 March 2015)

[2015] ZAGPPHC 314**COURT**

North Gauteng High Court, Pretoria

BEFORE

P.M. Mabuse

CASE / FILE NUMBER

64290/14

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NUMBER: 64290/14****DATE:**

20 March 2015

R[...]

G[...]

T[...].-----Applicant

V

M[...]

S[...]

D[...].-----Respondent

JUDGMENT

MABUSE J:

- [1] This is an application in which the applicant, Mr. R[...] G[...] T[...], an adult Mechanical Technician of 25 Strydom Street, Birchleigh North, Kempton Park and employed as described above at Weir Minerals Africa, seeks against the respondent, an adult female who resides at 212 K[...] cnr P[..] K[...] and J[...] R[...] Streets, Pretoria and employed as a Business Analyst at Nedbank, Sandton:
- (1) an order in terms of which the respondent is found to be in contempt of a court order issued on 30 September 2013 by Kempton Park Regional Court;
- (2) an order in terms of which the respondent is committed to imprisonment for contempt of the court order in 1 supra for a period
- of 30 days or such other period as this Court may deem fit;
- (3) in the alternative, the applicant seeks an order in terms of which the order referred to in two above is suspended for a period of five years on condition that the respondent, during that period of five years, complies with the court order referred to in 1 supra, within fourteen days of this order;
- (4) an order authorising him, the applicant, in the event of the respondent failing to comply with the said court order, to approach

the Court on the same papers, some implemented as may be necessary, to seek an order in terms of which the respondent is committed to prison.

- [2] The affidavit of the applicant is used in support of the application. The purpose of the said affidavit is to place before the Court facts on the basis of which the applicant contends that the respondent has defied the Court order of 30 September 2013.

Suffice to point out that this application is opposed by the respondent who, to that end, has delivered an answering affidavit.

In the said answering affidavit, the respondent has set out fully the grounds upon which she resists this application. Before turning to such grounds, it is only apposite that I turn to the facts that are salient to the present application. I do so hereunder.

- [3] The applicant and the respondent were married to each other in 2011. From the said marriage a child, M[...] N[...] T[...], a minor was born on [...] 2011. In the year 2013, two years after the parties had concluded their aforementioned marriage, the applicant instituted a divorce action against the respondent on the ground that the parties' marriage had irretrievably broken down. For the purposes of this application, it is not necessary to refer to the grounds of divorce.

- [4] On 30 September 2013, an order of divorce incorporating a settlement agreement was granted by the Regional Court at Kempton Park. The said order of divorce is annexed to the founding affidavit as Annexure 'RGT1'. According to the said annexure, the parties herein to the said divorce action, signed the settlement agreement in the presence of their witnesses on 10 September 2013. The validity of the said agreement is not in dispute.
- [5] The said settlement agreement was confirmed by the Court by agreement between the parties. It dealt with a number of issues which included issues that related specifically to the parties' minor child. It is important at this stage to point out that once a settlement agreement between the parties is confirmed by a Court it ceases to be a settlement agreement between the parties and becomes an order of Court. Accordingly compliance with such a court order can be enforced through contempt of Court, in this regard see *Dadel Vlak Boerdery v Greyling and Another* [2007] JOL 19050 at paragraph 9.
- [6] Paragraph 4 of the settlement agreement dealt with parental rights and responsibilities. It provides that the plaintiff is awarded the following responsibility and rights in respect of the minor child namely:
- “4
- (i) Every alternative weekend from Friday at 07h00 until Sunday at 15h00 when the child is seven years old.
- (ii) Long and short school holidays to be shared equally between the parties.
- (iv) Christmas to be rotated between the parties.”
- [7] The applicant contends that at the beginning of June 2014 school holidays it was his turn to spend the long school holidays with the child. He contacted the respondent by telephone and enquired from her when he could come and fetch the parties' minor child. The respondent refused him contact with the child. The respondent acted in defiance of the court order. When his attempts to exercise his rights arising from the court order failed, the applicant contacted his current attorneys and sought assistance in that regard from them. His attorneys obliged. On 11 July 2014 they wrote a letter to the respondent and demanded that she grant the applicant contact with the minor child within 48 hours from receipt of the letter and warned that if she refused to do so they would approach the court with an application for an order declaring her to be in contempt. A copy of the said letter and proof of its transmission to the respondent have been attached to the applicant's founding affidavit as Annexures 'RGT2 and RGT4'. The applicant was never able to have contact with his child during those long school holidays.
- [8] I now turn to the reasons why the respondent refused the applicant contact with the parties' minor child. In the first place, the respondent does not deny that the applicant contacted her during 2014 in order to make proper arrangements to have the child with him. Secondly the respondent admits in paragraph 6 of the answering affidavit that she received the letter from the applicant's attorneys. She admits that she did not respond to it because she had no

obligation to allow the applicant to have contact with the minor child for the June 2014 long school holiday because the child was not yet seven years of age as ordered by the Court.

Paragraph 4 of her answering affidavit contains her principal reasons why she refused to let the applicant have contact with the minor child. In it she stated as follows:

“The right of contact with the minor child was amended as follows in paragraph 4(c) to (v) of the settlement agreement;

Every alternative weekend from Friday at 07h00 UNTIL Sunday 15h00. When the child is seven years old, this portion was inserted by both parties agreed and signed to it.”

[9] There are several other issues that the applicant raised in his founding affidavit and to which the respondent responded. In view of the fact that the only issue before the Court is the respondent’s reason for refusing the applicant access to the child I do not deem it necessary to be detained by such other issues. In view, it is only appropriate to consider whether the respondent has valid reasons to refuse the applicant access to the minor child when he tries to exercise his right emanating from the Court order.

[10] The issue involved in this matter is the question of interpretation of the settlement agreement. In paragraph 6 supra I set out the relevant clauses of the settlement agreement. These clauses of the settlement agreement are clear and quite distinct. Clause 4(c)(1) deals with the applicant’s visitation rights during weekends. It has nothing to do with long holidays. In it the parties have agreed that this visitation right shall only be exercised when the child is seven years old. On the other hand, and which is of paramount importance, is clause 4(c)(ii). The contents of this sub-clause are unambiguous and as clear as crystal. This do not have anything to do with alternative weekends in particular with the age of the child. This sub-clause has nothing to do with weekends and everything to do with long holidays. Counsel for the respondent submitted a somewhat skewed interpretation of claims 4(ii) of the Court order. In this order, if the applicant may not have access to the child on weekends until this child was 7 years old then he may not for the same reasons have the child for long and short holidays. If this was the intention of the parties they would certainly have amended clause 4(ii) of the

Court Order. He conceded that as that clause had not been amended it may not be read into the Court Order that the applicant

would only have the child when it is 7 years old. His submission has, in my view, no merit and the Court does not accept

it. The respondent has refused the applicant’s rights of access to the child on a completely wrong ground.

- [11] Even before the applicant could have recourse to the Court to see his own child it is humanly incomprehensible why one parent would refuse the other parent rights of access to their own child. In my view, and here I am not laying any general principle, a parent should encourage frequent contact between their children as parents. Parents should not stand in the way of such contact by being unnecessarily dogmatic. Courts will never allow parents to use children as pawns where it notices such conduct.
- [12] In this instant case, there was just no justification to refuse the applicant access to the child.
- [13] In his heads of argument, counsel for the applicant referred me to the authority of *Du Plessis vs Du Plessis* 1972(4) S A 216 (O) at page 220 A-D. In this paragraph the Court quoted with approval the following passage from *Van Biljon v Van Biljon* 1960(1) PH4 F28 (O):
- “A review of the authorities leads me to the conclusion that the onus is on the applicant to show the disobedience of the Court’s order, but once that is proved, the respondent must show that such disobedience is not wilful.”*

The duty therefore rests on the applicant to satisfy the Court that:

1. there is a court order; and
2. the respondent has failed to comply with such court order.

It is not required of the applicant to satisfy the Court that the respondent willingly failed to comply with the Court order. In *Fakie N.O. vs CCII Systems (Pty) Ltd* 2006(4) SA 326 (SCA) at paragraph 42(3) the Court has this to say about the duties of the applicant in civil contempt proceedings:

“In particular the applicant must prove the requisites of contempt (the order); service or a notice; non-compliance; and wilfulness (mala fides) beyond reasonable doubt.”

The duty then rests on the respondent to satisfy the Court on the balance of probabilities that it did not intentionally fail to comply with the Court order (“cum animo calumniandi”). See also *Du Plessis vs Du Plessis* 1972(4) SA 216 (O) at page 220 D where the Court stated as follows:

“Waar bewys word dat ‘n persoon willens en wetens ‘n hofbevel nie nagekom het nie, moet hy op ‘n oorlig van waarskynlikhede

bewys dat hy nie die opset (cum animo calumniandi) gehandel het nie.”

In *Fakie N.O. vs CCII Systems (Pty) Ltd* 2006(4) SA 326 (SCA) at paragraph 42(4) the Court puts it as follows:

“But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears 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.”

In Davis vs Davis 1947(3) SA 111 (WLD) page 113 Dowling AJ cited with approval the following passage from Jacobs vs Jacobs

- (1911) T. S. 768 at page 770 where Bristowe had this to say. This was a matter in which the Court had to consider whether failure to pay maintenance as ordered by the Court had been contempt of Court:

“Mr. Tindall says the petition ought to state some ground on which the Court can hold that there had been a contempt of Court - that is, an intentional disobedience of the Court’s order. By the fact that the order is not obeyed is itself prima facie evidence of wilful disobedience, and if the respondent wishes to show that he had not the means to obey the order, and could not pay the sum directed, it is for him to prove that allegation.”

- [14] Has the respondent discharged the onus on the balance of probabilities? The respondent did not plead innocence. She did not state that she did not disobey the Court order deliberately. The issue whether or not she had the necessary intention has to be determined on the basis of the conduct in the matter. The respondent signed the settlement agreement and thereby indicated unequivocally that she understood its contents and undertook to abide by it. She should have understood the settlement agreement before she signed it. On this basis the Court is entitled to infer that while she was aware of the clauses of the settlement agreement, she intentionally disobeyed the Court order. Secondly after she received a call from the applicant she should not have answered before she read the clauses of the settlement agreement. If she had any doubt about whether or not the applicant had any right to have the child for a long weekend at this stage she should have there and then verified this from a copy of the settlement agreement in her possession. She did not plead that she did not have a copy of the settlement agreement in her possession. It is not the case that she did not have a copy of the settlement agreement. It was for her to verify the clauses of the terms of the settlement agreement and establish whether she was right in her decision to refuse the applicant access to the parties’ minor child. In my view her failure to do so demonstrates a conduct. Thirdly she could still have referred the letter from the applicant’s attorneys to her own attorneys and sought clarification or advice from either the applicant’s attorneys or her own attorneys. I have already pointed out that the two clauses that deal with the applicant’s rights of access to the minor child are distinct. There is, in my view, no way that one could confuse one clause with the other. Failure by the respondent to seek clarity on this and on the letter from the applicant’s attorneys demonstrates her unpreparedness to comply with the Court order. It is a demonstration of her intention not to comply with the Court order. I am satisfied that the respondent has not raised any justifiable excuse in refusing to let the applicant have the parties’ minor child.
- [15] As correctly pointed out by Counsel for the applicant s 165(1-5) of the Constitution of the Republic of South Africa Act 105 of 1996 rests the judicial authority of the state in Court. It enjoins other Organs of State to assist and protect the Courts. It gives everyone the right to have legal disputes resolved by Courts or other mechanism. The authority of State v. Mmabolo (ETV and Others intervening) 2001(3) SA 409 CC at paras 16-20 sets out an erudite

opposition of the authorities and powers and positions of the Courts in countries that believe in the Rule of Law.

[16] Finally, it is important that the provision of s 28(2) of the Constitution and s 35 of the Children's Act 38 of 2005 be drawn to the attention of the respondent. S 28(2) provides as follows:

"A child's best interests are of paramount importance in every matter concerning the child."

S 35 of the Children's Act 38 of 2008 provides as follows:

"1. Any person having care or custody of a child who, contrary to an order of any court or to a parental responsibilities and rights

agreement that has taken effect as contemplated in s 22(4), refuses another person who has access to that child or who holds parental

responsibilities and rights in respect of that child in terms of that order or agreement exercise such access or such responsibilities and rights or who prevents that person from exercising such access or such responsibilities and rights is guilty of an offence liable on conviction to a fine or to imprisonment for a period not exceeding one year.

2.

- (a) A person having care or custody of a child whereby another person has access to that child or holds parental responsibilities and rights in respect of that child in terms of an order of any court or a parental and rights agreement as contemplated in subsection (1) must upon change in his or her residential address forthwith in writing notify such other person of such change.
- (b) A person who fails to comply with paragraph (a) is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding one year."

The respondent's aforementioned disobedience must, in the circumstances of this particular case, be regarded as wilful or

intentional and should be treated as a contempt.

[17] In conclusion:

- (1) The respondent is hereby committed for a period of 30 days;
- (2) The order of committal is suspended for a period of 5 years on condition that the respondent complies during the period of suspension with the order of the Court granted by Regional Court Kempton Park on 30 September 2013.
- (3) The respondent is hereby ordered to pay the costs of this application.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv. B.D. Lekokotla

Instructed by: Maliseha Attorneys

Counsel for the respondents: Adv. M Khathutshelo

Instructed by: Nthambeleni Attorneys

Date Heard: 19 March 2015

Date of Judgment: 20 March 2015

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