

SOUTH AFRICA / JUDGMENT

S.P v M.P (DIV109/2013) [2017] ZANWHC 39 (22 June 2017)

[2017] ZANWHC 39

COURT

North West High Court, Mafikeng

BEFORE

A.M. Kgoele

CASE / FILE NUMBER

DIV109/2013

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IN

THE NORTH WEST HIGH COURT

MAHIKENG

DIV109/2013

In

the matter between:

S.
P. Applicant
and
M.
P. Respondent
CIVIL
MATTER
DATE
OF HEARING: 02 FEBRUARY 2017
DATE
OF JUDGMENT: 22 JUNE 2017
FOR
THE APPLICANT: Mr D.C KRUGER
FOR
THE RESPONDENT: Adv P SMIT

JUDGMENT

KGOELE J:

1. This is an application in terms of which the applicant seeks an order that the respondent be declared in Contempt of the Court Order granted under the abovementioned case number in this Court on 24 October 2013. The Order was granted in terms of a Rule 43 application which was instituted by the applicant.
2. The respondent had in terms of this order agreed to pay R10 000-00 per month towards the applicant's interim maintenance pending finalisation of their Divorce action. It is common cause between the parties that the respondent did not effect payment for the months of August 2015, February 2016 and April 2016. He is therefore in arrears in the amount of thirty thousand rands (R30 000.00).
3. The applicant's case is that she through her attorney made the respondent's attorney aware of the fact that the respondent is failing to comply with the provisions of the Court Order. The applicant further contends that the respondent had through its attorneys of record manifested in writing his intention to disobey the Court Order. Applicant made reference to the following remarks in respondent's letter dated 24 August 2015 as proof of this:-

"Paragraph 1" "Skrywer hiervan behou R10 000-00 vir onderhoud aan u klient op Trust en wens skrywer te bevestig dat enige Minagtingsaansoek ten sterkte geopponeer sal word"

AND

"Paragraph 3;- " U klient versuim om elektrisiteit te betaal vir die besighede wat sy bedryf vanaf my klient ser perseel, namens wie ek ook optree, en todat ek bewyse van betaling vir bogenoemde spesifieke bedrae ontvang het, sal skrywer hiervan die gelde op Trustrekening hou"

4. The applicant submitted that she has proved beyond reasonable doubt that the respondent has disobeyed the Court Order alternatively, neglected to comply with it. The applicant further submitted that the respondent's attorney has no right in law to retain the maintenance monies due to her on his Trust Account and to qualify same as a right of retention over an alleged debt due by the

applicant in respect of Eskom electricity charges.

5. The applicant argued further that it is clear from the respondent's aforementioned conduct that he has the necessary financial means to pay maintenance as per the terms of the Court Order but he is wilfully refusing to do so. The respondent only threatened to bring an application for variation of the Court Order and to date the said application is not before this Court.

6. The respondent's Counsel submitted as a reply to the case of the applicant that there are disputes of facts in this application on material issues, which the applicant foresaw but opted to approach this Court on motion proceedings. According to the respondent's Counsel, the reasons for his default essentially boils down to the Supreme Poultry's cancellation of the production agreement in terms of which he had grown and delivered broiler chickens to the said Company. This business constituted his main source of income and the backbone of his commercial farming activities.
7. According to the respondent's Counsel this was preceded by the recent demise of the local poultry production industry in South Africa generally with several contractors Companies (eg. Supreme Poultry) closing their doors for not being profitable following Government's decision to import chickens from abroad to satisfy the bulk demand of the public as a more economically viable solution. As soon as he realised he's predicament and as far back as August 2015 and February 2016, he instructed his attorney

to plead with the applicant's attorney for the applicant to consider accepting a lesser/reduced amount of the monthly maintenance. This was due to a significant and material change in his financial capability.

8. The respondent's Counsel further submitted that the respondent indicated in the letter he wrote that he will have to bring an application in terms of Uniform Rule 43(6) for variation of the order in question, and that he was only able to pay the amounts

of R5000-00 and R4000-00 respectively for the time being . Applicant summarily rejected these proposals and confirmed that any such variation application will be opposed.

9. Later on, so says the respondent's Counsel, respondent became factually financially unable to sustain the monthly payment of R10 000- 00 and he attached several bank statements indicating the decline in his income and confirming his inability to

meet the Court's order. All this, according to respondent's Counsel, together with the cancellation letter were brought to the attention of the applicant's attorney by and through a letter dated 21 April 2016.

10. The respondent's Counsel dwelled extensively in the law relating to how to deal with disputes of facts in a motion proceeding, which law is trite and need not be re-emphasized.
11. In reply the applicant's Counsel argued that it is not in dispute and on the version of the respondent that the respondent stated that his main source of income is derived from his chicken business known as T&S Kuikens. But that some of the bank statement attached by the respondent in support of his defence do not reveal that they are the bank statements of his chicken business

known as T&S Kuikens, but appears to be those of his personal bank account. According to him, the "cancellation letter"

also referred to by the respondent and marked Annexure “MMP6”, does not carry any evidential value as the said letter is addressed to Mr Hugo Pienaar and not the respondent.

12. To these arguments the respondent’s Counsel urged the Court not to consider the letter of cancellation in isolation. He maintained that the letter although not addressed to the respondent, serves to illustrate the total implosion of the locally grown/produce

in 2015 to import competing product at a lower costs which caused the demise of the respondent’s business.

13. To put it differently, the respondent’s Counsel argued, this aspect of the respondent’s case alone introduces sufficient doubt which qualifies the requisite intent, wilfulness and mala fides on the part of the respondent. All of this evinces the failure by the applicant to meet or rid the burden of proof in the circumstances.

14. The law in as far as granting of an order of committal for contempt are trite and are :-

- Proof that an order was granted against the respondent;
- Proof of service of such order on the respondent or proof that the respondent has been informed of the grant of the order against him or her and that he or she can have no reasonable ground for disbelieving that information;
- Proof that the respondent has either disobeyed the order or neglected to comply with it; and
- Proof that the disobedience of the order by the respondent or his or her neglect to comply with it was due to wilfulness and mala fides.

15. In *Fakie NO v CCII System (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006), the Supreme Court of Appeal by majority of 3:2 fully authoritatively discussed inter alia the issue of onus and comprehensively set out what the current approach is supposed to be in these sort of applications and the procedural way in which disputes in such applications is to be treated. At paragraph[23]-[24] p.338 Cameron JA said the following about the proving and disproving of the element of wilfulness (own emphasis):

“[23] It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused’s

state of mind or motive: Once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to dis prove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.

- [24] There can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor’s committal to prison as punishment for non-compliance.”

16. At paragraph [42] p.344 of the same decision, the current legal position in respect of the civil contempt procedure was summarised as follows:

“Firstly, that the procedure is a valuable mechanism for securing compliance with court orders and that it survives constitutional scrutiny;

Secondly, that the respondent in such proceedings was not really an accused person but that he was entitled to analogous protections as are appropriate to a respondent in motion proceedings; Thirdly, that the applicant in such proceedings was required to prove the requisites of contempt (the order, service or notice, non-compliance; wilfulness and mala fides) beyond reasonable doubt; Fourthly, that once the applicant has proved the first three requisites, the respondent bears evidentiary burden in regard to wilfulness and mala fides should the respondent fail to advance evidence that establish a reasonable doubt as to whether his non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt; Fifthly, that a declaratory and other appropriate remedies, remain available to a civil applicant on proof on a balance of probabilities.”

17. In paragraphs[9]-[10] of the same judgment it was remarked:

“Even refusal to comply that is objectively unreasonable may be bona fide though unreasonableness may evidence lack of good faith. Unreasonable non-compliance, provided it is bona fide, does not constitute contempt. The requirements 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.....”

18. Dealing with bona fide disputes of fact on material issues the same Court remarked as follows in paragraph [56] of the same judgment:

“Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent version can be rejected in motion proceedings only if it is ‘fictitious’ or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence”.

19. What thus falls to be determined is whether applicant proved beyond reasonable doubt, and not on a mere balance of probabilities, and on the papers as they stand, that respondent’s failure was intentional, wilfully deliberate and motivated by mala fides, without any of these elements capable of being subject to some reasonable doubt. Should all this be positively answered, and only

then, respondent would be in contempt of Court ex facie curiae.

Failure to pay in August 2015

20. It is clear that in as far as the payment of August 2015 is concerned, the applicant has proved beyond reasonable doubt that the respondent has disobeyed the Court Order or alternatively, neglected to comply with it wilfully and mala fide. I fully agree with the applicant Counsel's submission that the respondent has through its attorneys of record in writing manifested his intention

to disobey the Court order.

21. The reasons given by the respondent in that letter for withholding the said amount, deliberately so, is in my view, telling above all. This is so because, the maintenance money was to be paid pursuant to a Court order. The attorney of record of the respondent

knows very well /should have known about this fact, and further that it cannot be held on Trust and even so for the reasons advanced. I cannot avoid to conclude that this was wilful and mala fide on the part of the respondent and his attorney of record and indicates a mere refusal to pay. There is no right in law to retain the maintenance due in the Trust account and to qualify same as a right

of retention over an alleged debt.

22. It is furthermore clear that there is no real genuine dispute of fact as far as the failure to pay during this period is concerned. This Court can without doubt make a decision on this issue on the facts as stated by the respondent, together with those that the applicant avers and the respondent does not deny. The respondent does not deny the fact that they withheld the R10 00-00, but says

this letter should not be considered in isolation because it was immediately followed by another letter wherein respondent indicated

that the reasons for the fact that payment could not be readily effected was because his financial position had changed.

23. It is quite surprising how the financial position of the respondent drastically changed overnight. I am saying this because the letter which indicated that they are withholding the money is dated 24 August 2015. The one they are placing much reliance on wherein they were requesting whether the applicant is amenable to a reduced amount of R5000-00 per month seeing that respondent's

financial position has changed is dated 25 August 2015. These are two days in succession. Of importance is the fact that the two letters do not tally and do not support each other. The submission that the letter of the 24th should not be read in isolation is devoid of merit and instead add woes to the respondent's case.

Failure to pay in February 2016 and April 2016

24. In as far as these periods are concerned, this Court need to determine also whether the version of the respondent that he is unable to comply with the Court order, which the applicant denies, constitutes a real and bona fide dispute of fact on a material issue

in the circumstances of this matter.

25. As indicated by the applicant's Counsel a perusal of the bank statements attached reveals that some appears to be his personal account and/or does not reflect that it is for the business of T&S Kuikens. As far as the letter of cancellation is concerned, it too does not reflect that it was written to the respondent. In his answering affidavit respondent explained in details the demise of the local poultry production industry in South Africa which contributed to his business to decline. He had also attached letters dating from February 2016 wherein he indicated his problems and asking the applicant to accept a lower amount of R4000-00 per month. The applicant rejected this offer. This was followed by another one in April 2016 wherein applicant indicated that he cannot at all make any payment as he does not have an income.
26. The applicant's reply to this is simply a bare denial and she indicated further that she does not believe the respondent. She, on the same breath confirms that poultry product was the respondent's main source of income.
27. Both parties in this matter, particularly on the two period in questions, are aware that there is a dispute about the reasons and justifications for the admitted failure to comply timeously with the order in question. Practise has shown that a robust approach is needed in dealing with dispute of fact which are on the papers in a motion proceedings. But the limit remains that, however robust a Court may be inclined to be, a respondent's version can be rejected only if it is "fictitious" or is

so far-fetched and clearly untenable that it can confidently be rejected on papers alone and further that ,it is clearly unworthy of credence.

28. In my view, the respondent's version and explanation during these two periods is not demonstrably fictitious or un-creditworthy. It is clear that at the time he tried to inform the applicant of his situation the applicant did not co-operate as she rejected the offer. This is supported by the trend of correspondence I have referred to above. This aspect of the respondent's case

alone introduces some form of doubt which disqualifies the requisite intent, wilfulness and mala fides on the part of the respondent

during those periods.

29. Although the bank statements and the cancellation letter certainly appear to be having some gaps and insufficiencies in them as I have indicated above, I do not think that the assertions in his affidavit to the effect that the poultry industry had collapsed can be rejected as fictitious. In other words, the respondent's version cannot be legitimately be "robusted"

away. In addition, the applicant has offered no answer or any contrary averments except a bare denial as far as the collapse of the poultry industry is concerned. The respondent's version stands unchallenged when the "accepted approach" which deal with the dispute of fact is followed.

30. To this end I can no better than quote the following remarks from the case of *Dezius V Dezius* 2006 (6) SA 395 (CPD) where it was said:-

"In cases of this nature, a respondent who can advance credible evidence which establishes that he did not deliberately disobey the Court order that his non-compliance was due to genuine lack of means on the grounds of poverty would have shown that his conduct was bona fide. The respondent's version must create some reasonable doubt as regards the alleged wilful default and mala fides attributed to the respondent by the applicant. The respondent would not be held in contempt of Court in such circumstances".

Point in Limine

31. At the beginning of the hearing of the arguments both parties agreed that a Point in Limine raised by the respondent be argued first. I proceeded to hear same and also granted a ruling that the Point in Limine is dismissed, hence the merits of the application were proceeded with.
32. The Point in Limine raised by the applicant was to the effect that prayer 2 and 3 seems to be mutually destructive and are therefore incompetent to be granted. Special emphasis was made to prayer 2, which according to the respondent Counsel's submissions meant: "that the respondent must pay in order to go to jail" because of the manner in which the said condition is phrased. He indicated that the words used therein which are "on condition that....." instead of "conditional upon....." make this prayer to be legally incompetent to be granted on its own. What aggravates the issue is that when it is read with prayer 3, a confusion is created as they are mutually destructive.
33. The applicant's legal representative Mr Kruger replied by saying that prayers 2 does not have a problem at all that is why they never brought an application to amend it. It is capable of being granted by this Court. Further that if it was such a problem

as described by the applicant, then the respondent ought to have used the procedure as provided by Rule 30 of the Uniform Rules of Court, which they chose not to.

34. In my view, the issues raised by the respondent are technical in nature. Although prayer 2 is not written in such precision as far as the English language is concerned, the rest of the whole paragraph can still be determined to the effect that the applicant prays for the committal of the respondent only if and when he does not comply with the Court Order within 30 days of the service

of this Court Order on the respondent. The Point in Limine was dismissed based on these reasons.

35. Consequently the following order is granted:

1. The respondent is declared to be in contempt of paragraph 1 of the order granted under the above-mentioned case number of this Court dated 24 October 2013 in the matter of rule 43 application of S. P. v M. P. and in so far as it relates to the period of August 2015 is concerned;
2. The respondent is committed to prison for a period of 30 days, which order of committal is suspended for a period of 1 year on condition that the respondent pays the sum of R10 000-00 in respect of the arrears of maintenance for the period August 2015 within 30 days of the serve of this order on the respondent;
3. The respondent is to pay the said amount by electronic transfer to the applicants account no: [...] ABSA,MAFIKENG;
4. In as far as the contempt application is concerned for the period February 2016 and April 2016 is concerned the application is dismissed / refused;
5. The Point in Limine raised by the respondent is dismissed;
6. Each party is ordered to pay his own costs.

A. M. KGOELE

JUDGE OF THE HIGH-COURT

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