

SOUTH AFRICA / JUDGMENT

T v T (3094/2013) [2014] ZAFSHC 233 (16 October 2014)

[2014] ZAFSHC 233**COURT**

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

3094/2013

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**SAFLII****Note: Certain**

**personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII**

Policy**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Case****No. 3094/2013****In**

the matter between:

M[...]

A[...] T[...]

.....Applicant

and

L[...]

S[...] T[...]

.....Respondent

CORAM:

NAIDOO, J

HEARD

ON: 18 SEPTEMBER 2014

DELIVERED

ON: 16 OCTOBER 2014

JUDGMENT

NAIDOO, J

- [1] The applicant seeks an order against the respondent for contempt of court in the following terms:

“1. Declaring the respondent to be in contempt of the Court order number 1790/2010 issued on 1 November 2011....

2. That the respondent be sentenced appropriately if convicted.
3. Respondent to pay the costs of this application.”

The applicant was represented by Mr Reinders and the respondent was represented by Mr Cronje.

- [2] The applicant and respondent were previously married to each other and were divorced in 2007, after concluding a Deed of Settlement,

which was made an order of court. The parties are both physiotherapists and had a practice in Bloemfontein. The Deed of Settlement provided, inter alia, an undertaking by the applicant to pay to the respondent 50% of her nett income for the period 1 May 2001 to date of signature of the Deed of Settlement (being 20 November 2007), in return for which the respondent agreed to pay to the applicant 50% of the nett income of their Bloemfontein practice for the same period.

- [3] The respondent failed to honour the portion of the Deed of Settlement mentioned above, with the result that the applicant instituted action in 2010 against the respondent, who defended the action and filed a counterclaim. The applicant successfully obtained an order (the court order) against the respondent on 1 November 2011 in the following terms:

“1

1.1 The defendant render a full account, supported by vouchers, of the party's Bloemfontein Physiotherapist Practise for the period 1 May 2006 to 20 November 2007.

1.2 Debatement of the account

1.3 Payment to Plaintiff of whatever amount appears to be due to the Plaintiff upon debatement of the account and leave is granted to the Plaintiff to apply to court on the same papers duly amplified, if necessary, for payment of the amount due to the Plaintiff(if any)

2. The counterclaim is dismissed.
3. Defendant to pay the costs of suit”

- [4] Both parties were legally represented in the action and the order mentioned in (3) above was obtained by agreement between the parties. The respondent failed to comply with the court order. A considerable amount of correspondence was addressed by the applicant's legal representatives to the various firms of attorneys who had represented the respondent from time to time, seeking compliance with the court order, to no avail. The applicant then launched the current application on 31 July 2013. The respondent opposed the application.
- [5] The respondent's opposing affidavit dealt extensively with the acrimonious history between the parties from the date of divorce to the time of the institution of the action against by the applicant in 2010, resulting in the court order. The applicant alleges that all of those issues were raised by the respondent in his defence of the action and were adjudicated upon in that action. In spite of an undertaking by the applicant that the papers relevant to that action would be placed before this court, that was not done, so I have not had insight into the issues that were adjudicated upon. However, the respondent did not specifically deny, at the hearing of this matter, that such issues have in fact already been adjudicated, so that the situation regarding certain issues raised by the respondent in these papers is unclear. The respondent attached to his opposing affidavit only some of the documents he was required to furnish to the applicant in compliance with the court order. A number of the documents, as listed by the accountant tasked with undertaking an assessment of the financial standing of the parties' Bloemfontein practice, have not been furnished to the applicant at all.
- [6] The respondent admits that he has not complied with the court order, and, according to my understanding, alleges that the applicant's

non-compliance with the Deed of Settlement was the reason for his non-compliance. Even if a liberal view is taken of his averments, he appears to believe that he is not obliged to comply with the court to any greater extent than furnishing the documents he already has. In addition, he makes the incorrect assertion that the court order required him to provide only vouchers to the applicant. This is clearly not the case as, is evident from 1.1 of the court order which calls for "The Defendant to render a full account, supported by vouchers...". One gains the unavoidable impression that the respondent is reluctant to furnish all the information that he was directed to do.

- [7] This court must now decide whether the respondent is guilty of contempt of court. Contempt of court has been defined as "the deliberate, intentional disobedience of an order granted by a court of competent jurisdiction" [Consolidated Fish Distributors (Pty) Ltd v Zive 1968(2) SA 517 (C)].

Both counsel referred me to the case of Fakie NO v CCII Systems (Pty) Ltd 2006(4) SA 326 (SCA), where the court summarised the position regarding contempt of court. One of the requirements enunciated by the court (See Erasmus "Superior Court Practice" B1-58G) is that the applicant, in particular, bears the onus to prove, beyond reasonable doubt, the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides). Once the applicant has proved these requisites the respondent bears an evidential burden in relation to wilfulness and

mala fides. In other words, he must provide evidence that raises a reasonable doubt as to whether his non-compliance with the court order is wilful and mala fides. Should the respondent fail to do so, contempt will have been established beyond reasonable doubt. Where the respondent has genuinely tried to comply with the court order and has failed to do so through no fault of his own, or has been unable (not unwilling) to

do so, proceedings for committal will fail. Poverty or financial insufficiency may well be regarded as factors rendering a respondent

unable to comply with the court order.

[8] As alluded to above, the respondent, by his own admission, did not comply with the court order. The applicant denies many of the averments contained in the respondent's opposing affidavit and refers the court to the pleadings under case number 1790/2010, which were not attached to these papers. Apart from alleging that she furnished the respondent with proof of her earnings, she furnishes little detail of when this was done, although she does invite the respondent to view such documents which are in the possession of her legal representative. Most of the issues raised by the respondent appear to have transpired prior to 1 November 2011, and in the face of the appellant's assertion that these issues were dealt with in case number 1790/2010, it is assumed that this is in fact the case.

[9] The one issue which appears to have come to a head after the grant of the court order, and which the respondent avers is relevant to the applicant's credibility, is that of possession of the BMW motor vehicle which, in terms of clause 2.1 of the Deed of Settlement entered into between the parties, was to be retained by the applicant. From the date of divorce, she would become liable for any amounts still owing on such vehicle. The applicant apparently denied receiving delivery of this vehicle from the respondent, yet the vehicle was found in her possession in November 2013. It also appears that the amounts still owing in respect of the vehicle were not paid. This was two years after the date of the court order. It is also clear that the court order does not make any provision for the BMW vehicle to be handed to the applicant, leaving this court to infer that she may well already have had possession of it at the time she instituted the aforementioned action against the respondent.

[10] The basis of the application before me is the respondent's failure to comply with the court order. The applicant's

credibility cannot, in any event, be determined on the papers. The court must decide the issues on the papers before it which indicate

the versions tendered by the parties. The respondent alleges that he left the lease agreement and certain medical aid accounts/records

relating to the parties' Bloemfontein practice for the applicant and also furnished her with financial statements, implying

that she ought to have been able to ascertain the financial position of the practice from those records. The applicant engaged a firm of accountants to verify the financial position of the practice, as reflected in the financial statements. The letter from and affidavit of Mr Gouws, the accountant, make it clear that considerably more than what was furnished, was required in order to verify the financial statements of that practice for the period stipulated in the Deed of Settlement. For clarity, a letter, via e-mail, dated 28 March 2013 by Mr Schalk Gouws of Newtons Chartered Accountants, lists the following information which was required to verify the financial statements:

“1. General Ledger printout for the year ended 28 February 2007 and also for the 10 months ended 31 December 2007

2. Expense vouchers for the year ended 28 February 2007 and the 10 months ended 31 December 2007
3. Fixed asset register as at 31 December 2007
4. Supporting document/proof for the Finance lease obligation on 31 December 2007 (R773 327)
5. The motor vehicles per financial statements amounted to R460 000. Are the vehicles used for the businee or private? If used for business we will need a logbook for the year ended 28/2/2007 and for the 10 months ended 31/12/2007
6. Bank reconciliations on 28/2/2007 and also on 31/12/2007
7. Copy of Mr T[...] L[...]’s tax return submitted to SARS for the year ended 28/2/2007 and also 28/2/2008
8. Copies of IRP 5’s and/or IT3’s submitted to SARS (employee costs per financial statements amounted to R130 000 and R126 000)
9. Copies od all VAT 201 forms (if the practice was registered for VAT)

The logical conclusion from the foregoing is that the applicant was not in possession of such records and the only person who could furnish those records was the respondent. While there may be some merit in the respondent’s complaint that the applicant did not fully comply with her obligations in terms of the Deed of Settlement, the real issue is that it appears that he made no real attempts to comply with the court order, which remained unsatisfied until the launch of the application before me. It was certainly expected of the respondent to ensure that he took steps to comply and if he was being thwarted by the applicant, then the logical course for him to have followed would have been to approach this court for an appropriate order against the applicant. The papers before me indicate that the applicant’s legal representatives made several unsuccessful attempts to secure the respondent’s compliance. To my mind the respondent does not adequately address this failure in his papers.

[11] Turning to the requirements for contempt as enunciated in Fakie's case above, the applicant has proved the order, service of such upon the respondent and his non-compliance with the court order. The evidentiary burden then lay with the respondent to show that such non-compliance was not wilful or mala fides. While it is clear that the relationship between the parties was extremely acrimonious and that each attempted to cause inconvenience and even distress to the other, the respondent's attitude to the court order suggests that he was and is of the view that he need not have complied with the court order, as the furnishing of a full account to the applicant amounted to a "personal audit". The respondent was legally represented all along (albeit on an "informal" basis for a short while) and the full purport of the court order would surely have been brought to his attention. He provided some of the required documents only at the stage of filing his opposing affidavit to this application, namely the documents listed in items 1, 6, 7 and 9 of the accountant's letter mentioned in [10] above. No cogent reasons or explanation are given for why he did not do so earlier. Mr Cronje, in his Heads of Argument and in his address to court referred to Fakie's case, particularly paragraphs 9, 10 and 40 of that case, where Cameron JA said in paragraph 9 that:

"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala 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. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)"

[12] The learned Judge went on to say that

"contempt does not consist in mere disobedience to a court order but in the contumacious disrespect for judicial authority that is so manifested".

In my view, the respondent's non-compliance is indeed unreasonable. In the intervening period of some three years before the launch of this application, the applicant made several attempts to obtain the respondent's compliance. His failure, in my view is indicative of a "contumacious disrespect for judicial authority" and the unreasonableness of his non-compliance is indicative of a lack of good faith.

[13] I, accordingly, make the following order:

13.1 The Respondent is found guilty of Contempt of the Court Order under case number 1790/2010 dated 1 November 2011.

13.2 The respondent is sentenced to NINETY DAYS' (90) imprisonment, which is suspended for three months on condition that he that he furnishes to the applicant the documents listed in items 2, 3, 4, 5 and 8 of the letter from Newtons Chartered Accountants (referred to in paragraph [10] of this judgment), in respect of the Bloemfontein Physiotherapy practice, namely:

2. Expense vouchers for the year ended 28 February 2007 and the 10 months ended 31 December 2007
4. Supporting document/proof for the Finance lease obligation on 31 December 2007 (R773 327)
5. Logbooks for the year ended 28 February 2007 and for the 10 months ended 31 December 2007, in respect of the motor vehicles reflected on the financial statements, if such vehicles were used for the business.
8. Copies of IRP 5's and/or IT3's submitted to SARS, to substantiate employee costs reflected in the financial statements,

which amounted to R130 000 and R126 000

13.3 The Respondent is ordered to pay the costs of this application.

S. NAIDOO, J

Counsel for Plaintiff: Adv SJ Reinders

Instructed by: McIntyre & Van Der Post

12 Barnes Street

Bloemfontein

(Mr GH Bradshaw)

Counsel for the Defendants: Adv PR Cronje

Instructed by: L & V Attorneys

4 Bermakor Park

52 Reid Street

Westdene

(Mr DM Labuschagne)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2014/233.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/t-v-t-unknown-topic-afshc-2014--6a3ea51e3b1caa9129814a7e>

Prepared on 10 October 2026 · Esheria