IN THE HIGH COURT OF SOUTH AFRICA

[EASTENR CAPE DIVISION: MAKHANDA]

CASE NO. 260/2019

In the matter between:

NATALY SAMANTHA BASSON Applicant

and

ASHLEY FRANCHWA BASSON Respondent

JUDGMENT

JOLWANA J:

[1] This matter has its genesis in divorce proceedings which culminated in a deed of settlement that was made an order of court by Kahla AJ on 12 July 2016. The said deed of settlement was drawn by the respondent himself who, incidentally, is an attorney of this Court of many years standing. The respondent who was the plaintiff in those proceedings had counsel appear on his behalf who applied for and was granted an order in terms of which the said deed of settlement was made an order of court. Of relevance for the purposes of this application is what is provided for in clause 5 thereof in which the agreement is couched as follows:

> "5.1 It is expressly recorded that the plaintiff will undertake full responsibility for the settling of the liabilities, if any, currently existing on the following immovable properties:

5.1.1 the common home being 4 Ayliff Street, Grahamstown, and

5.1.2 the undeveloped properties identified as erven 30, 40, 41, 42, 43, 44 and 45, East London, and owned by Tradespoon 27 (Pty) Ltd.

5.2 The plaintiff will, in accordance with the provisions of Section 45bis of the Deeds Registries Act, Act 47 of 1937, and within 24 (twenty-four) months of the date of the issuing of the Decree of Divorce, arrange for the substitution of the Defendant as debtor.

5.3 Upon the settling of such liabilities the Defendant undertakes to ensure transfer to any and all property rights she may have in the properties into the name of the plaintiff, or any entity nominated by him for that purpose, at which stage the properties will become his exclusively. The cost transfer(s) will be borne by the plaintiff."

[2] It is the non-compliance with the above provisions or terms of the deed by settlement which had been made an order of court that resulted in the institution of contempt of court proceedings. I do not intend to elaborate more on the factual matrix that was considered by the court in the contempt of court proceedings in which both parties were represented by highly experienced senior counsel. The court, after considering all the facts and evidential material before it, made the following conclusion:

> "The respondent has not adduced evidence which creates any doubt that he acted willfully and mala fides. The circumstances leading to the respondent's inability to substitute the applicant and thus comply with the court order, was not a priority. This is so particularly in respect of the matrimonial home. It cannot be said that the applicant has purged his contempt by making partial payments. His settlement of the arrears in respect of the home loan only after the institution of these proceedings does not assist him in purging the contempt. The respondent had the opportunity to make more payments and comply with the court order had he not diverted his funds to other expenses, most of which were self-created and self-serving. This reinforces the notion that at the heart of this matter is the need to ensure that court orders are complied with. This necessitates that the relief that this court grants, should talk not only to the criminal aspects of the matter and thus seek only to punish the

respondent but must also serve to compel the respondent to comply with the court order within the terms and parameters set by the court."

[3] The court thereupon found the respondent in contempt of the court order dated 12 July 2016. He was sentenced to six months imprisonment wholly suspended for two years on condition that he purged his contempt within 90 days. In the event of the respondent's failure to comply with its order by purging his contempt of the court order dated 12 July 2016, the applicant was authorized to approach this Court on the same papers duly amplified as may be necessary calling upon the respondent to show cause why he should not be committed to prison.

[4] The respondent applied for leave to appeal which was dismissed with costs. He then applied to the Supreme Court of Appeal for special leave to appeal in terms of section 16 (1) (a) (i) of the Superior Courts Act 10 of 2013. The Supreme Court of Appeal dismissed the application for special leave to appeal with costs on the grounds that there was no reasonable prospect of success in an appeal and that there was no other compelling reason why an appeal should be heard. The respondent lodged an application with the President of the Supreme Court of Appeal for the reconsideration of the dismissal of his application for special leave to appeal in terms of section 17 (2) (f) of the Superior Courts Act 10 of 2013. That application also suffered the same fate and was dismissed with costs for the reason that no exceptional circumstances warranting the reconsideration or variation of the decision refusing the application for leave to appeal had been established by the respondent. Undeterred, the respondent applied to the Constitutional Court for leave to appeal. That Court refused with costs, the respondent's application for leave to appeal to it on the basis that the matter did not engage its jurisdiction.

[5] The respondent had by then exhausted all possible avenues within the South African legal framework which he invoked in order to avoid having to purge his contempt of the court order of Kahla AJ dating back as far as 12 July 2016. Most importantly, he made all the unmeritorious and dilatory applications for leave to appeal in order to avoid being compelled to do that which he personally undertook to do in terms of the deed of settlement. He had ample opportunity to purge his contempt but failed to do so. It is now incumbent upon this Court to consider if it should commit the respondent to prison for his failure to comply with the court order of Mfenyana AJ dated 15 January 2020. That order gave the respondent 90 days within which to purge his contempt for which it had found him guilty and if he complied, his six months imprisonment order would remain suspended for two years.

[6] The matter is now back in this Court for the reason that the respondent has still not purged his contempt nor has he done anything meaningful to comply with the order of Mfenyana AJ. The applicant has expressed herself in her founding affidavit as follows regarding the impact the said non-compliance has on her personal life:

> "18. As I am suffering severe financial prejudice as a result of the respondent's failure to release me from the bond on the property, and as my credit worthiness is already tarnished, as a result of the respondent's actions, my attorney addressed a letter to my attorneys of record in Bloemfontein enclosing the order on the merits, and a copy of the letter is attached hereto marked annexure "A10". The finalization of the application for leave to appeal has been prevented by the respondent himself by failing to furnish the Supreme Court of Appeal with the order on the merits. This is a most unsatisfactory state of affairs especially as I am suffering financial prejudice on a daily basis."

[7] There are many other expressions of exasperation by the applicant at the continued disregard of the court order by the respondent who appears to have used his skill as an experienced legal professional by resorting to every trick in the book,

regardless of merit, to avoid having to comply. The endless applications for leave to appeal in which the respondent appears to have had no regard to the merits thereof all the way to the Constitutional Court all of which suffered the same easily predictable fate of being dismissed with costs are but one such case in point. In asking for the respondent's committal to prison for six months in terms of the order of Mfenyana AJ dated 15 January 2020 as well as the order for the respondent to pay costs on an attorney and client scale, the applicant makes the above averments, not for the first time in her founding affidavit but it appears, to emphasize two issues. The first one is that the court order of Kahla AJ dated 12 July 2016 has still not been complied with more than five years after the order was made and more than two years after the order of Mfenyana AJ was made on 15 January 2020. In terms of the court order dated 15 January 2020, the respondent was found guilty of the crime of civil contempt for his mala fide and willful non-compliance with Kahla AJ's order dated 12 July 2016. He was also sentenced to six months imprisonment wholly suspended for two years on condition that he purged his contempt within 90 days from the 15 January 2020 which he had not done as at the date of the hearing of this application.

[8] Courts must naturally be very indignant about willful non-compliance with their own orders for reasons that need no elaboration. Besides the court's natural indignation with mala fide, willful and clearly craftily calculated non-compliance with its own orders, which the applicant brings to the attention of this Court, the applicant also clearly expresses the impact the non-compliance has had on her. In this regard the applicant further expresses her exasperation and the prejudice she suffers because of at the respondent's continued disregard for and his failure to obey court orders as follows:

"32. I emphasize that the deed of settlement which was made an order of court was drafted by the respondent and the order was granted at his behest so that he was able to take possession of the family home, however, was required to release me from the bond of the property within two years of the order of Court.

33. The respondent's failure to comply with Kahla AJ's court order, and now his failure to pay SA Home Loans is an ongoing situation, which has caused me extreme financial hardship and tarnished my credit worthiness, and good name."

[9] The respondent's answer to the case made by the applicant largely consists of deliberate attempts at making the applicant appear as either bad or unreasonable. He again introduces an issue of a deed of sale that he wanted the applicant to sign in terms of which the property was being sold to one of his entities which she did not sign. This deed of sale is made to appear to be a genuine attempt by the respondent to release the applicant from the bond. Besides the many other problems with the deed of sale which the applicant alludes to, the respondent does not deal cogently with the fact that the deed of settlement never made the release of the applicant subject to the sale of the property.

[10] The other problem is the fact that according to the applicant the deed of sale was just a ruse, yet another attempt at feigning compliance as that entity was struggling to pay monthly rentals for its premises. In any event the issue of the deed of sale had been put to bed by Mfenyana AJ and it was firmly rejected as a justification for the respondent's failure to comply with the court order dated 12 July 2016. The respondent also patronizingly refers to the applicant as *"a mere pawn in a greater scheme of conspiracy involving the applicant's legal team, consisting of the applicant's attorney, Mr Brin Brody, Adv Izak Smuts SC and Adv Gavin Brown, and other members of the Grahamstown legal fraternity to have me convicted of contempt of court so that I may be disbarred."* I will deal with this issue later herein when I deal with the application to strike out and the recusal application.

[11] After carefully considering all the papers in this matter and hearing counsel for the applicant and the respondent who appeared in person it became clear that the respondent had neither a factual nor legal basis for his continued non-compliance with the court order of Kahla AJ. He had already been convicted and sentenced in respect of the contempt of court and despite the sentence imposed having been suspended subject to him purging his contempt within 90 days he had still not done so more than two years later as at the date of the hearing of this application. It became clear that committing the respondent to a suitably lengthy period of imprisonment would be a natural consequence if he continued with his unjustified contempt. I therefore considered it necessary for the parties to make submissions for purposes of assisting the court on what circumstances should be taken into account before an order for the respondent's committal to prison was made.

[12] Whilst the submissions were still to be made within the set time frames I decided to give the respondent one last opportunity to purge his contempt even though he had already squandered the opportunity given to him by Mfenyana AJ when the learned acting Judge made a coercive order with a suspended sentence. There is always a tension between the court having to vindicate its authority by ensuring that court orders are complied with and the need to give a contemnor an opportunity to avoid imprisonment by complying with the original order. If at the delivery of this judgment the respondent would still not have purged his contempt, his imprisonment was a certain reality subject to the considerations of the submission still to be made regarding his possible imprisonment. It is pertinent that I re-emphasize the purposes of contempt of court proceedings as explained by Khampepe ADCJ in *Zuma*[1]. She said:

[1] Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma & Others 2021 (5) SA 327 (CC) at para 47.

> "I should start by explaining how the purposes of contempt of court proceedings should be understood. As helpfully set out by the minority in *Fakie*, there is a distinction between coercive and punitive orders, which differences are "marked and important". A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed. Conversely, the following are the characteristics of a punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order, the sentence is unsuspended, it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others."

[13] I am of the view that courts should generally be extremely loathe to commit a person to imprisonment for a contempt of court order. This of course, unless there is no longer any hope of the contemnor purging his contempt. In consideration of all the above and the legal position artitulated in many cases up to *Zuma* I issued an order giving the respondent 15 days to comply with the order of Kahla AJ dated 12 July 2016. I also ordered him to thereafter make submissions on an appropriate sentence within 30 days. The applicant was directed to file her own submissions on an appropriate sentence within 7 days thereafter. Pending all those processes the judgment was reserved.

[14] The respondent's compliance affidavit has since been filed. It appears therefrom that between the 9 March 2022 and the 14 March 2022 the respondent paid an amount of R547 750.00 being the amount owed to SA Home Loans in terms of their bond cancellation figures. It appears from the affidavits filed by both parties that SA Home Loans has consequently instructed its attorneys to cancel the bond and endorse the title deed in terms of section *45bis* (1) (b) of the Deeds Registries Act. The above facts appear to be largely common cause. This obviously goes a

long way in terms of compliance with the order of Kahla AJ dated 12 July 2016, albeit belatedly.

[15] The question of a costs order that was granted and which remain outstanding as the applicant points out in her affidavit is not, in my view, such as to lead to contempt of court or committal to prison. Costs orders are granted for and against litigants daily in our courts. The non-payment of such costs should not ordinarily lead to the relevant party being found to be in contempt of court. This is so because costs are recoverable through the normal way of execution against property and this does not require the cooperation of the party who was ordered to pay costs. It appears from the respondent's affidavit that in fact that process is already underway. The applicant's submission that because the costs that the respondent was ordered to pay by Mfenyana AJ have still not be paid and therefore the respondent has not purged his contempt is unsustainable. I do not understand our jurisprudence to be that as a general rule a costs order is to be treated in the same way as the main orders of court. Besides the other considerations, costs orders have a very effective remedy of execution against property. Even where execution fails for whatever reason, I do not see our courts which hold the constitutional right to liberty very highly being generally prepared to commit someone to prison for civil contempt for failing to pay costs as ordered by the court.

[16] The respondent's submissions on an appropriate sentence include the fact that as at the date of such submissions he had substantially complied with the court order issued by Kahla AJ on 12 July 2016 in that the debt owed to SA Home Loans has been paid in full. SA Home Loans had instructed its attorneys to attend to the cancellation of the bond and to endorse the title deed of the property in terms of section 45bis (1) (b) of the Deeds Registries Act 47 of 1937. I am prepared to

accept that the contempt has largely been purged. To the extent that the process of releasing the applicant from liability under the bond that is in the process of being cancelled has not yet been completed or that the removal of the applicant as a 50% owner of the property is not yet finalized, it is evidently already underway. Whatever else remains outstanding, if anything, I do not think that it is something on the basis of which the respondent can be said to have still failed to purge his contempt while the process of full compliance is still underway.

[17] The purging of contempt is very important in any contempt of court proceedings. For that matter, contempt of court proceedings are largely about ensuring that court orders are complied with than sending the contemnor to prison even after compliance. That this is the case was clearly articulated by Nkabinde J in *Pheko II*[2] in which the court stated the legal position as follows:

> "The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.
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> Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord."

[2] Pheko and Others v Ekurhuleni City Metropolitan Municipality (No.2) 2015 (5) SA 600 (CC) paras 1-2

[18] The respondent has further submitted that in terms of the Parenting Plan between himself and the applicant he is required to contribute towards the costs of education in respect of their daughter who is currently studying towards a degree in accounting at Stellenbosch University. Therefore, if he were to be given a custodial sentence, the consequence of that would be that he will not be able to contribute towards the educational needs of their daughter. He is fifty years old with no disciplinary infractions for almost 25 years. He is the father of two adult children who are working towards becoming chartered accountants. Lastly, a fine would also not be appropriate, he submits, because he has already been ordered to pay costs in the sum of R215 000.00 which have been taxed and remain outstanding and that there might be further taxations that are pending.

[19] Taking all the submissions made by both parties into account and the clear evidence of compliance to a significant extent and the tangible steps to fully comply which the respondent has taken; I am of the view that the sentence imposed by Mfenyana AJ in terms of the court order dated 15 January 2020 must remain suspended. This, in my view, strikes an appropriate balance between the vindication of the authority of the courts and the respect for and protection of the right to liberty as enshrined in the Constitution. However, the said suspension must be for a longer period as the respondent's actions or behaviour which led to these proceedings suggests that he is prepared to ignore court orders for self-serving reasons as Mfenyana AJ found. He is even prepared to raise spurious defenses and issues like the recusal of the applicant's legal team in order to avoid complying with court orders.

[20] The last issues that I turn now to deal with are the application to strike out and the recusal application. The application to strike out concerns certain averments

made in the respondent's answering affidavit. Because of their unpalatable nature, I do not intend repeating those averments in this judgment. Suffice it to say that they are deeply offensive and are very degrading of the applicant's legal team and a few other members of the legal profession referred to therein. They are nothing more than racial stereotypes and innuendos with no factual basis whatsoever. This is apart from the fact that they are irrelevant and a misguided attempt at diversion from the real issues that arise in this matter. It is unfortunate and very disappointing that in some instances, thankfully, very few such instances, litigation has reached such lows that at times there is a direct attack on the integrity and dignity of fellow colleagues by opposing legal representatives. It is worse that this matter appears to have been used to vent all sorts of personal prejudices and invectives by the respondent against the applicant's legal team and some other members of the Grahamstown legal fraternity.

[21] There was even a misguided attempt to remove the applicant's legal representatives from representing her through an unprecedented application for their "recusal". In other words, one litigant applying to court for the removal of another litigant's legal representatives of choice from representing him or her. This is a very myopic understanding of the concept of recusal and a complete disregard for the whole constitutional framework and our jurisprudence on legal representation and the right of access to courts. It is not only disrespectful to the applicant's legal team but also demeaning to the applicant who is accused of being part of a conspiracy by the applicant's legal team and others against the respondent in order to have him "disbarred". The less said about this issue the better save to point out that a proper case has been made to strike out all offensive, irrelevant and vexatious material in the respondent's answering affidavit against the applicant's legal representatives and

other legal professionals who have been directly and indirectly maligned even though some of them are not even acting for the applicant. The recusal application has no merit nor legal basis whatsoever.

[22] The relevant paragraphs in the respondent's answering affidavit are as listed in the applicant's notice of application to strike out. They are paragraphs 5, 25, 48, 52.1.1, 52.1.8, 52.1.9, 52.2.2, 52.3.3, 52.4, 52.5, 59.1, 59.2.2, 59.7, 59.7, 59.11, 59.12, 60.5, 65.2, 68, 69 and 70. All these paragraphs, properly considered, have no place in an answering affidavit. Some are very demeaning and are a personal attack on the esteem and dignity of the affected legal professionals and the respondent's fellow colleagues. Litigation should never descend into a duel between the legal practitioners who represent the opposing sides. Even when submissions are made in court, conventionally, respect for fellow colleagues must always be maintained so that the court is not diverted from its adjudication of the issues between the litigants. Disrespect for a legal representative of another litigant in and during court proceedings is actually a form of dishonourable and unworthy conduct which is unbecoming of an officer of the court. Some of the issues raised in these paragraphs are not even relevant to the issues between the parties and appear to have been informed by the respondent's conspiracy theories which are without any factual basis. The application to strike out must therefore succeed and the application for the recusal of the applicant's legal representatives must fail.

[23] In the result the following order shall issue:

1. The respondent is sentenced to 6 months imprisonment wholly suspended for five years on condition that the respondent is not found guilty of the crime of civil contempt of court committed during the period of suspension.

2. Paragraphs 5, 25, 48, 52.1.1, 52.1.8, 52.1.9, 52.2.2, 52.3.3, 52.4, 52.5, 59.1, 59.2.2, 59.7, 59.7, 59.11, 59.12, 60.5, 65.2, 68, 69 and 70 of the respondent's answering affidavit are struck out.

3. The respondent's application for the recusal of the applicant's legal representatives is dismissed.

4. The respondent is ordered to pay costs of this application including costs in respect of the application to strike out and the recusal application on an attorney and client scale such costs to include costs occasioned by the employment of two counsel where so employed.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the applicant : I.J. SMUTS SC with G. BROWN

Instructed by : WHEELDON RUSHMERE & COLE INC.

GRAHAMSTOWN

Counsel for the respondent: In person

Respondent's attorneys : MGANGATHO ATTORNEYS

GRAHAMSTOWN

Date heard : 24 February 2022

Date delivered : 07 June 2022