



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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| (1) REPORTABLE:
(2) OF INTEREST TO OTHER
JUDGES:
(3) REVISED: |
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CASE NO. 27226 / 2020

Date: _____ **Signature:**

In the matter between:

FINK, BEVERLEY GALE (born Berkowitz)

Applicant

and

FINK, BARRY DAVID

Respondent

JUDGMENT

NASEERA ALI AJ

[1] This is an application to declare the respondent in contempt of a court order concerning the non-payment of spousal maintenance to the applicant.

[2] The parties were divorced on 28 May 2013. In terms of the settlement which was made an order of court, the respondent agreed to pay R10 000.00 maintenance towards the applicant. The aforesaid amount of spousal maintenance agreed upon between the parties was a temporary measure, subject to certain conditions: that the respondent shall pay maintenance to the applicant until such time as she re-marries or co-habits with another party on a permanent basis. Secondly, the parties and/or their legal representatives will meet with a view of determining the quantum of maintenance to be paid by the respondent to the applicant within 3 (three) weeks of the final order of divorce. Where the parties are unable to agree on the quantum of maintenance, the matter shall be referred to a dispute resolution facilitator who would be provided certain powers and who would be entitled to furnish a report setting out the quantum of maintenance payable. Should the parties fail to finalise the maintenance issue within 6 (six) months of the final order, either party will be entitled to refer the matter to the maintenance court for adjudication.

[3] The cash component of R10 000.00 per month shall apply pending agreement and/or adjudication of the maintenance issue.

[4] Both parties failed to fulfil the aforesaid conditions. The applicant claims that the respondent failed to meet to determine the quantum of maintenance, despite the applicant's requests to do so. The applicant further claims that the referral of the maintenance issue to a dispute resolution facilitator did not take place. The respondent claims that his attorney addressed a letter dated 20

June 2013 to the applicant's attorney requesting for the attorney to provide a schedule of her income and expenses. The respondent claims that nothing came of it.

[5] It is settled law that no onus of proof rests on a person accused of contempt, but a burden to adduce evidence from which an inference of absence of wilfulness or mala fides can be deduced does rest on such a person, once proof is adduced of the existence of an order, service on the person, and non-compliance.¹

[6] In contempt proceedings, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an 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 beyond reasonable doubt.²

[7] Generally as in this case, where non-compliance calls for an explanation that points away from defiance, a party might plead impossibility of performance, or the existence of an impediment inhibiting performance.³

[8] It is common cause that there is a court order and that the respondent has knowledge of the court order which was based on a settlement agreement

¹ Fakie NO c CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

² Readam SA (Pty) Ltd v BBS International Link CC and Others [2017] 5 SA 184 (GJ) at para 42

³ Id at para 10

and that the respondent is in breach thereof. What is in dispute is whether the non-compliance was wilful and mala fide on the part of the respondent.

The Respondent's Evidence

- [9] The respondent states under oath his financial position from 2012. He states that during 2012/2013, he experienced financial strain when a business deal which involved an investor defaulted with payment. The default by the said investor contributed to his financial downfall.
- [10] The respondent states that he could not afford to pay the applicant the maintenance that was due to her. In October 2014, the respondent managed to pay maintenance in an amount of R8 000.00. Maintenance payments were discontinued from November 2014.
- [11] In addition, the respondent defaulted on paying medical aid premiums for himself, the applicant and their daughter. His medical aid lapsed in 2014 due to non-payment. The respondent submits to not having cancelled the medical aid cover wilfully.
- [12] The respondent states that he has 3 (three) bank accounts with one banking institution: a Bidvest 121 -day notice account; a day- to- day account; and an account that is utilised by his daughter. The respondent states further that he does not have other bank accounts with other institutions. In 2016 he moved in with his late mother and later moved in with his friend so as to avoid paying rental. He provides evidence of bank statements pertaining to his personal

account. He concedes to having received an inheritance from his mother and attaches the Estate Late Distribution Account, claiming that the inheritance was paid to settle business related expenses. The respondent has provided proof of bank statements of his personal account from January 2014 onwards until June 2021. The bank statements reflect a low balance.

[13] The respondent further states that as his business is in serious debt, he utilises his personal account for business purposes since any money paid into the business account is seized for debt purposes. He states that the withdrawal of cash on his bank statements goes toward paying salaries, and other business-related expenses. He states that he does not draw a salary from his business as he cannot afford to do so.

[14] He further states that he has been accepting loans from his family and friends and that in order to lessen his expenses he has decided to live with his friend. He states that his brother transfers money into his account every month.

[15] The applicant refers to the respondent's bank statements when it reflected a positive balance in the sense that the respondent could well afford paying the maintenance amount. The applicant avers that the respondent chose to make cash withdrawals rather than pay maintenance. The applicant did not see any of the respondent's personal payments going through this account. The applicant states that the respondent spends large amounts on eating out and money spent on consuming alcohol. The applicant further avers that monies from the respondent's bank account is being transferred to Australia.

[16] The respondent's response is that since his company is in serious debt he utilises his personal account for business purposes, cash withdrawals are made in order to pay salaries or business- related expenses; monies are transferred to his brother in Australia who has been assisting him financially, this is a pay-back arrangement. Due to financial difficulties, he obtained loans from family and friends. The respondent also makes payments to his daughter's account.

[17] According to the respondent, the applicant was employed for a period – during August 2016 until May 2020. This is common cause between the parties. The applicant sold the matrimonial home and kept the proceeds of the sale of the house.

[18] The question to answer is whether the respondent's conduct is wilful and mala fide.

[19] As stated by Sutherland J in *Readam supra*:

“[10] The word wilful is a dangerous one. It is a pejorative term. It embraces more than just the notion of “intentionally” but also the mantle of rebuke; ie the intention is unsavoury. In this sense the usual mantra which requires both ‘wilful’ conduct and ‘mala fide’ conduct seems to be tautologous. A negligent failure to perform can never be wilful. A mala fide failure is always wilful.”

- [20] The respondent's defence is his inability to afford the maintenance amount given his precarious financial position. The respondent pleads impossibility of performance thereby negating the unlawfulness as alleged by the applicant. The respondent, has at all times, pleaded that his conduct was not wilful and mala fide.
- [21] The respondent states that he continued paying the applicant's motor vehicle insurance. He further states that he attended to all the financial needs of their daughter. There is no indication of an intention on the part of the respondent to cease maintenance payments. Maintenance payments were discontinued when the respondent's financial position declined.
- [22] The true gravamen of this application is whether the respondent deliberately shied away from his obligations toward the court order. The answer herein lies in the circumstances that the respondent found himself in.
- [23] From the bank statements submitted by the respondent as proof of financial situation, the bank statements between November 2014 (the period when the default occurred) to November 2017, showed a low balance. However, from December 2017 and including January, March and May of 2018, and from May 2018 until June 2021, the respondent's fortune had improved. The bank statements, for the latter period had showed a relatively high balance in comparison to the former years mentioned herein, that is from November 2014 to until at least the end of November 2017.

[24] As this matter passed through 7(seven) years of non-payment, the bank statements reveal that the respondent's financial situation changed for the better. I accept that the conduct of the respondent was not wilful and mala fide during the lean years when he demonstrated that he was unable to pay maintenance. This period began from November 2014 (the date when the respondent commenced the default in his payments toward the applicant), until November 2017. From December 2017 onwards and excluding certain months in 2018, the respondent appeared to be in a position to afford the maintenance. The defence of impossibility of performance does not avail the respondent when his financial position improved.

CONCLUSION

[25] In the circumstances, the respondent has not acted in intentional breach of the court order in respect of the maintenance for the period November 2014, February 2018, April 2018, June 2018 until December 2018. The respondent's financial position, as evidenced by the bank statements improved to a large degree from January 2019 until December 2021. Even though the respondent has not attached bank statements after June 2021, I am including the months July 2021 to date of this Order, being January 2022 reflecting months as general improvement of the respondent's financial position. The respondent has provided evidence in respect of his claims toward the unaffordability aspect and has discharged part of the evidentiary burden.

[26] I have not included the applicant's payment toward a medical aid scheme for reimbursement by the respondent as applicant has failed to provide proper evidence of payment of medical aid contributions, proof of payment would have sufficed.

ORDER

[27] In the circumstances, I make the following order:

27.1 The respondent is to make payment in the amount of R410 000.00 in respect of maintenance toward the applicant for a period of 41 months, where such period includes: December 2017, January 2018, March 2018, May 2018, January to December 2019, January to December 2020 and January to January 2022.

27.2 The foresaid payment is to be made within 60 (sixty) days of the date of this Order.

27.3 The respondent is committed to prison for a period of 30 days, which committal is suspended for a period of one year on condition that the respondent complies with the order granted on 28 May 2013.

27.4 There shall be no order as to costs.

N. ALI

ACTING JUDGE OF THE HIGH COURT, JOHANNESBURG

DATE OF HEARING: 18 OCTOBER 2021

DATE OF JUDGMENT: 24 JANUARY 2022

COUNSEL FOR THE APPLICANT: F BEZUIDENHOUT
INSTRUCTED BY: YOSEF SHISHLER ATTORNEYS

COUNSEL FOR DEFENDANT: VOSLOO DE WITT
INSTRUCTED BY: McLARENS ATTORNEYS