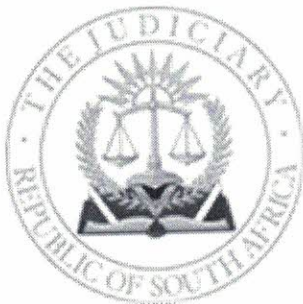


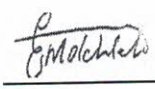
THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 79428/16

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
31 October 2018	
DATE	SIGNATURE

In the matter between:

JOHANNA MARIA MAGDALENA KILIAN

Applicant

and

MARCHAND KILIAN

Respondent

Summery: Application for contempt of court- the principle applicable restated Enforcement of a settlement agreement made the order of the court.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] The applicant, Mrs. Killian, the former wife of the respondent, Mr. Killian, seeks an order committing the respondent for contempt of the court in that he failed to comply with the order made on 21 November 2003 under case number 2991/2003.
- [2] The defendant is accused of being in contempt of the court order in that it is alleged that he has failed to purchase a two bedroom townhouse to the value of R300,000.00 for the benefit of the applicant as provided for in the divorce settlement agreement which was made the order of court by agreement between the parties.
- [3] The respondent has opposed the application. He does not however dispute his obligation in terms of the settlement agreement which, as already mentioned, was made the order of court. His defense is that in an attempt to comply with the court order he offered to purchase a two bedroom property for the applicant on the 7 and 11 December 2016 but the offers were rejected by the applicant.
- [4] The properties which the respondent offered to purchase according to him is in Durbanville area in Cape Town, the area where the applicant is currently staying. The two properties which the respondent had offered to purchase were on the market in the value of R650,000, and R675,000, respectively.
- [5] The other offers to purchase the property for the applicant was made through his attorneys on 25, November 2016, 3 February 2017, 22 February 2017, 14, March 2017 and 7 April 2017. In each of these offers the applicant's attorneys made a counter offer.

- [6] The respondent's answering affidavit was filed late and accordingly he applied for condonation. The application was not opposed. I see no reason in the interest of justice why condonation should not be granted.
- [7] It is common cause that the applicant sold the property at Wierda Park in 2003 in the amount of R720,000. He concedes that part of the proceeds from the sale were to be used to purchase the two bedroom townhouse for the applicant.
- [8] In addition to disputing having failed to purchase the townhouse, for the applicant, in contempt of the order, the respondent further contends that in terms of the settlement agreement:

“10.6.1. There is no specific date upon which I had to purchase the property for the applicant. The agreement merely states that my obligation arises after December 2009;

10.6.2 The property's market value had to be at least R 300,000.00;

10.6.3. It is not a requirement that the property should be located in a specific town or area;

10.6.4. It is a requirement that the applicant should consent or approve the purchase of the property.”

- [9] It would appear from the respondent's answering affidavit that failure to finalize the issue of the purchase of the townhouse for the applicant was due to the fact that the applicant insistent on the following requirements:

“10.13.1 The property must be acceptable to her and located in the Northern suburbs of the Western Cape.

10.13.2. The property must be in a complex where coloured or black people do not reside;

10.13.3. The property must be available between R950,000.00 and R1, 200, 000.00."

[10] The other reason for the delay in finalizing the purchase of the townhouse for the applicant according to the respondent is that the applicant is seeking to renegotiate terms different to those contained in the settlement agreement.

Legal principles-contempt of court

[11] To succeed in an application for contempt of court an applicant has to satisfy the court beyond a reasonable doubt, that:

- (a) an order was granted:
- (b) against the respondent;
- (c) the respondent was either served with the order or was informed of its contents and had knowledge of the same; and
- (d) the respondent disobeyed the order or neglected to comply with it.

[12] In the present matter there is no doubt that prerequisites (a) to (c) have been satisfied. The issue that needs determination is whether the respondent willfully or with *mala fide* disobeyed the order.

[13] The consequence of non-compliance with a court was set out by the Supreme Court of Appeal, in *Fakie NO v CCII Systems (Pty) Ltd*,¹ the Supreme Court of Appeal, per Cameron JA, as he then was in the following terms:

- (a) "It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of

¹ 2006 (4) 326 (SCA)

approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and Section 165 of the Constitution provides that "[t]he judicial authority of the Republic is vested in the courts". 5 *Matjhabeng Local Municipality v Eskom Holdings Limited*; *Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC) (*Matjhabeng*) at paras 47-8. KOLLAPEN AJ 9 authority of the courts, as well as their capacity to carry out their functions, should always be maintained'." (Footnotes omitted.)

[14] It was further said in *Fakie NO* that:

(a) "Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was willful and *mala fide*, the requisite contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove willfulness and *mala fides* on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt."

[15] In my view, the issue of whether the respondent is guilty of failing to comply with the court order turns on the interpretation of the court order. As stated earlier the order was consequent on a settlement agreement. The issue of making a settlement agreement an order of court and subsequent thereto seeking its enforcement received attention in *Eke v Parsons*,² where the court held that:

(a) "[74] If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in a language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person on whom it applies, the discretion to comply or disregard

² (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015)

it. In Lujabe Molahlehi AJ said: 'The issue that arises in a case where the settlement agreement has been made an order of [c]ourt and in the context of contempt proceedings is whether such an order is executable or enforceable. The basic principle is that for an order to be executable or enforceable its wording must be clear and unambiguous. An order that lacks clarity in its wording or is vague is incapable of enforcement. The other basic principle is that the order should as soon as it is made, be readily enforceable. In other words, the order must give finality to the dispute between the parties and not leave compliance to the discretion of the party who is expected to comply with such an order.' (Footnotes omitted.)

- [16] The court further said that, when a court considers granting an order based on the parties' settlement agreement, it must ensure that the order it issues has all the necessary features of a court order. If the order issued does not have the critical elements of an order, the court would have failed to exercise its discretion correctly. But the improper exercise of the discretion does not free parties on whom the order applies from complying with it, to the extent that they may ascertain what it requires them to do."
- [17] It is essential when parties conclude an agreement which they seek to make an order of court that they make sure that its terms are clear and precise as to what is expected of each party and more importantly in relation to the details of performance which should deal with the issues of, what, how, when. Put in another way, the terms of the agreement must be clear and unequivocal not only as to what is to be done but also as to when and how it should be done.
- [18] In my view, the terms of the settlement agreement which as indicated earlier was made an order of court lacked clarity and certainty on the critical aspects which are required to support the enforcement of the claim. In this respect on the plain

reading of the order, there is a lack of clarity as to the location where the property was to be purchased by the respondent. And more importantly, the order provided no time frame for the performance of the respondent's obligation. In other words, there was no deadline within which the respondent was expected to have purchased the property.

[19] Counsel for the applicant conceded that the order does lack clarity. His argument that the respondent ought to have performed concerning the order as soon as he was reminded of his duties does not assist the case of the applicant. The contention that the respondent ought to have performed within a reasonable period also does not assist the case of the applicant. The assertion that the respondent could have purchased a property and after that sought an order to compel the applicant to take transfer thereof cannot sustain the case of the applicant.

[20] I am also of the view that the explanation proffered by the respondent concerning his attempt at complying with the order does not create any doubt regarding willfulness or *mala fides* on his part.

[21] In light of the above, I find that the applicant has failed to make out a case for contempt of the court order.

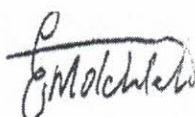
Costs

[22] Counsel for the applicant contended that costs should not be allowed to follow the result in the event the application was unsuccessful. In my view, this contention is unsustainable because at the time of instituting these proceedings the applicant was aware that the respondent was willing to comply with the court order and had in fact taken steps to achieve that objective. It should also have been clear that the

order lacks clarity in as far as its enforcement was concerned. At best the applicant should have sought variation of the order before resorting to proceedings.

Order

[23] In the premises, the applicant's application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'E Molahlehi', is written over a horizontal line.

E Molahlehi

Judge of the High Court;

Johannesburg.

Representation:

For the Applicant: Adv FC Lamprecht

Instructed by: Hefferman Attorneys

For the Respondent: Adv K Fitzroy

Instructed by: Dawie De Beer Attorneys

Heard: 08 October 2018

Delivered: 31 October 2018