

# AG v DG

GAUTENG LOCAL DIVISION, JOHANNESBURG

SPILG J

31 AUGUST 2016

CASE No 24555/2016

**Spilg J:**

## **Introduction**

[1] The applicant has sued the respondent for a decree of divorce and ancillary relief. The action is defended. The applicant also initiated rule 43 proceedings for interim maintenance for herself and the two minor children born of the marriage.

[2] On 23 January 2014 an order was made determining the maintenance to be paid. The order was varied by my brother Meyer J on 13 August 2016. The order required the respondent—

- (a) to pay maintenance for the applicant and the children in an amount of R35 000 per month on the 1<sup>st</sup> of each month as from 1 September 2015. The amount was to be paid into a designated bank account of the applicant;
- (b) to pay all medical and related expenses of the applicant and the children, the respondent being obliged to retain them on his medical aid scheme;
- (c) to pay all educational and related expenses of the children including the fees of private school tuition to be paid directly to the school as and when the

amounts fall due. The school at which the children study was identified as Kings School West Rand;

(d) to pay all expenses relating to the children's extra lessons, school uniforms, school bags, books, stationary and other equipment reasonably required for their schooling;

(e) to pay all costs pertaining to the children's extramural activities inclusive of fees and required apparel.

[3] The present application is brought as one of urgency requiring the respondent to pay the arrear maintenance of R30 000 within 24 hours and to hold him in contempt of court with a further order that if he does not pay the amount then a warrant of arrest be issued for his committal by reason of his failure to adhere to the court order.

[4] The applicant represents herself, which accounts for the inelegant drafting of the notice of motion. However the respondent was represented by *Adv Garvey* who confirmed that his client understood that the application included an order for his client's committal for contempt of the court order of Meyer J and that the answering affidavit had been drawn to meet that case. Accordingly the respondent was not prejudiced by the way in which the orders sought in the notice of motion were framed.

### **Urgency**

[5] The respondent has displayed a serial failure to meet his maintenance obligations to his children. As appears later at least three court orders attest to this.

[6] A court cannot expect the mother to deplete her own financial resources and hope to recover in due course where the father is already over R300 000 in arrear with his maintenance, even on the assumption that only half that amount was for the children.<sup>1</sup> A court has determined the respondent's obligations under a rule 43 application based on its assessment of the limits of the applicant's financial capabilities; which is precisely why it ordered that the respondent pay not only maintenance for the children but for the applicant as well.

[7] In urgent applications the applicant must show that he or she will not otherwise be afforded substantial redress at a hearing in due course. See *Luna Meubel Vrvaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F.

[8] A failure to pay maintenance pursuant to a contested court case should not be viewed as a simple debtor–creditor type situation. The grant of a maintenance order arises pursuant to a court finding the existence of an ongoing duty of support and in the case of child support the duty is further buttressed by the constitutional right of a child to parental or family care and that his or her best interests are of paramount importance.<sup>2</sup>

[9] The respondent is a multi-millionaire who in July 2013 had R6million lying in a savings account, was a director or member of seven companies and lived a lavish lifestyle which indicates the kind of net worth he had, certainly at that

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<sup>1</sup> The court made a lump sum award without splitting the amount between the applicant and the children.

<sup>2</sup> Sections 28(1)(b) and (2) of the Constitution.

time. He was therefore in well-established enterprises which generated significant revenues.

[10] It is evident that Meyer J considered that the maintenance which the respondent could afford to pay would not eat into his capital or that of the entities he controlled.

[11] By contrast Meyer J found that unless the respondent paid a contribution to the applicant's personal maintenance she would not be able to adequately support herself.

[12] Accordingly on the papers before me it is apparent that, should the respondent fail to pay maintenance, the applicant has to find the shortfall by either borrowing or by depleting her own overall capital or savings. At face value, if regard is had to the previous judgments and orders in the litigation between the parties, it would mean that her net worth is being eroded or she is forced to utilise monies that would otherwise be invested into her business, resulting in her own opportunities for establishing or growing her business being stifled.

[13] The applicant contends that she had to borrow R30 000. This is disputed by reason of the relationship the respondent claims exists between the applicant and the lender. This is a red herring.

[14] A failure to pay maintenance entitles an applicant to issue a warrant of execution immediately or to enforce an order immediately through the maintenance courts. In the present case the applicant is unable to do so because either the attachments made pursuant to writs are challenged or the balance of

funds located in an account are simply withdrawn by the respondent before the next writ is served.

[15] Finally, while not all applications for arrear maintenance founded on the contempt of a court order are urgent, it becomes self-evidently urgent in this case; where the applicant's assets are being depleted, where the respondent is frustrating the ordinary enforcement of court orders resulting in the build-up of already significant arrears which include monies payable for the children's care.

### **Postponement**

[16] After the application for my recusal was refused *Adv Garvey* sought a postponement of the matter. The only ground advanced was that the respondent wished to first obtain a copy of the record, which was not yet available, to pursue an application for leave to appeal my refusal to recuse. In the interim I had afforded the respondent an opportunity to amplify his papers. He failed to avail himself of that opportunity.

[17] It is evident that the explanation for the postponement does not constitute a ground and it was refused. I considered it purely a delaying tactic.

### **The money claim**

[18] Advocate *Garvey* contended that the claim for R30 000 was in respect of monies expended after 1 July 2016 and therefore the claim is premature.

[19] This argument fails to appreciate that the claim is based on a failure to pay maintenance due on 1 July 2016 and that as a consequence the applicant

borrowed money. The receipts provided constituted evidence that she had actually expended the money borrowed in respect of the obligations that the respondent was obliged to have fulfilled in terms of Meyer J's order.

[20] In my view it was unnecessary for her to do so to support the money claim. It sufficed for her to rely on the court order of Meyer J and the failure to pay maintenance for July. The fact that the respondent had neglected his obligations to pay maintenance for a substantial period and that the ordinary process of execution was being frustrated were relevant to urgency and that part of the order relating to the contempt.

[21] The respondent had not yet brought an application to vary the order of Meyer J despite threatening to do so. Until the order is set aside it is effective in relation to the money claim.

### **Contempt proceedings**

[22] The respondent accepts that he was aware of the order of Meyer J and that he did not comply with it. It is however disputed that his non-compliance was wilful and mala fide. He contends that he does not have the money to pay.

[23] It is trite that the requirements for a contempt must be satisfied beyond a reasonable doubt if enforcement is sought by way of a criminal sanction. See generally *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) (2006] ZASCA 54) para 9.

[25] In the present case the respondent contends that he currently earns no income. He maintains, through his counsel, that he is spending all the time

contesting the court applications brought by the applicant and is therefore unable to continue in employment.

[25] The alleged decline in the respondent's income is mercurial to say the least. In July 2105 he was earning enough for Meyer J to find that he could afford the not insignificant sum of R35 000 per month plus the other expenses he was ordered to cover. It appears from the subsequent judgment of Carstensen AJ delivered on 27 June 2016 that the respondent contended that his income was reduced to R1779,71 per month<sup>3</sup>. It was claimed in those proceedings that he was living on hand-outs from his family and others.

[26] Before this court the respondent did not care to explain what transpired with his various members' interests in the seven companies, what was received if he had in fact disposed of his interest, and if little or no value was given then on what basis those who might now be registered as the members could be other than his nominees.

[27] In the matter before Carstensen AJ the learned judge found that the respondent continues to have access to large sums of money and did not deny that he had R2,7 million in his bank account.<sup>4</sup>

[28] I am satisfied on the papers before me that the respondent is deliberately concealing his assets. By reason of still being in de facto control of the various income producing entities identified, he is able to determine the salaries to be drawn while other amounts to maintain his standard of living can be drawn as loans or through other devices. An exercise of determining whether he can

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<sup>3</sup> Paragraph 26 of the judgment.

<sup>4</sup> Id para 39.

survive on R1800 odd per month in the face of at least one overseas excursion (which was admitted), on the most elementary lifestyle audit, reveals that he is, as Carstensen AJ put it in his judgment—

‘wilfully and mala fide engineering a decrease in salary, or a reduction in salary, or a termination of his employment to the extent that he is “for all intents and purposes unemployed” simply for the purpose of deliberately frustrating the court order’.<sup>5</sup>

[29] I am also satisfied beyond a reasonable doubt that the respondent is acting willfully and is mala fide.

### **Sanction**

[30] This is not the first time that the applicant has been obliged to approach the court to enforce the maintenance order.

[31] She approached the maintenance court previously and warrants of execution have been served attaching assets. In almost all cases to little avail. On almost every occasion the respondent has contested the attachment. And when an amount in respect of one writ was attached in an account, the balance of the monies standing to the credit of that account was immediately withdrawn which resulted in there being no funds in that account when the next writ was served almost immediately afterwards.

[32] The respondent complains that the applicant is utilising the High Court to enforce a maintenance order that should properly be dealt with in the maintenance court or by the issue of a warrant of execution through the

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<sup>5</sup> Id at para 28.

registrar of this court. Ordinarily that may suffice. In this case the respondent is adopting the stratagem of frustrating execution and out-litigating the applicant. She has already had to obtain a bond to cover some R600 000 in legal fees (as appears from the judgment of Carstensen AJ). The respondent has deep pockets. Instead of meeting his obligation or bringing a variation order, if his circumstances or that of the applicant has indeed changed,<sup>6</sup> the respondent has embarked on spurious applications for recusal and continues to seek leave to appeal the judgments of other courts.

[33] So far there have been the following orders granted against him: An order of Lamont J in November 2013 under a deed of settlement which provided for maintenance of R8000 per month together with school fees and a contribution to 50 % of the medical expenses; an order in January 2014 by Mayat J that the applicant retains primary residence of the children with reasonable visitation rights and which also provided for maintenance ; the order of Meyer J on 13 August referred to earlier which varied the previous maintenance orders; the order of Mailula J in May 2016 regarding the sale of property; and the order of Carstensen AJ on 23 June 2016 which inter alia authorised the sale of certain property for the purposes of utilising the proceeds in a particular manner and, more importantly for present purposes, held the respondent to be in contempt of Meyer J's order, and ordered the respondent to pay the outstanding maintenance of R321 809,31, failing which he would be committed to imprisonment for the contempt for a period of 20 days. Finally, on 13 July 2016

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<sup>6</sup> This would presumably require an examination of his actual lifestyle, an explanation of what has happened to his assets and his control over the seven companies as well as where his relatives acquired the funds which he now claims to be borrowing from them and so forth.

van der Linde J ordered the respondent to pay to the applicant R23 258 in respect of other arrear amounts

[34] There have therefore been several occasions where the applicant was obliged to come to court to enforce an order that is binding unless varied. There is no current application to vary. The divorce has dragged on since 2013 at considerable expense to the applicant and without an end in sight. Whether intended or not, one should not lose sight of the consequences of the applicant being worn down, through the sheer expensed of continued litigation, to accept a settlement that may not be fair to her or not be ultimately in the children's best interests.

[35] The respondent continues, by his conduct, to challenge the resilience of the judicial system and believes that he can undermine it through fallacious contentions which do not bear scrutiny.

[36] He has already been ordered to pay R320 000 under pain of arrest. This has not discouraged him or made him appreciate that it is necessary to respect judgments of the court unless varied through due process and not to take the law into his own hands as he is now doing.

[37] I have no difficulty in endorsing the manner in which the applicant has continued to come to this court on a regular basis for as long as the respondent continues to adopt these tactics. The court will not blink first if that is what he believes will happen. Once a right has been established an applicant is entitled to an effective remedy<sup>7</sup>. Writs have not proved successful.

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<sup>7</sup> See *Minister of the Interior and Another v Harris* 1952 (4) SA 769 (A) at 781A–B.

[38] Moreover the respondent's attitude towards his obligations to maintain his children was manifested by a failure to pay the school fees despite the threat of his children being suspended. The court will not tolerate such behaviour when exercising its responsibilities as the upper guardian of children.

[39] The respondent has already been committed by Carstensen AJ to 20 days imprisonment if he fails to comply with the order to pay some R320 000. A period of five days incarceration appears appropriate having regard to all the circumstances of this case should the respondent fail to pay the amount ordered.

### **Order**

[40] The following order is made;

1. The matter is urgent.
2. The Respondent, David Michael Goddard, is held in contempt of the court order granted on 13 August 2015 by Meyer J under case no. 2013/36148.
3. The respondent is to pay to the applicant the sum of R30 000, such payment to be made into the account of Sheriff Randburg Trust Account XXX by no later than 14h00 on Tuesday 6 September 2016. The contact details of the Sheriff Randburg XXX.
4. A warrant of arrest is to be issued forthwith committing the respondent to imprisonment for contempt of court for a period of five days.
5. The warrant of arrest is only to be executed on Wednesday 7 September 2016 if the respondent fails to pay the sum of R30 000 to the Sheriff as aforesaid by no later than 14h00 on Tuesday 6 September 2016.

*Applicant's Attorneys: Masilo Freidmont Inc, Johannesburg.*