

IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 62586/2011

14/6/2013

In the matter between:

LUKAS MAHLASELA MAKHUBELA

APPLICANT

and

LYNETTE MORETLO MOLEFI

FIRST RESPONDENT

THE MINISTER OF POLICE

SECOND RESPONDENT

THE STATION COMMANDER,  
MIDRAND POLICE STATION

THIRD RESPONDENT

THE MINISTER OF CORRECTIONAL SERVICES

FOURTH RESPONDENT

STRIJDOM AJ

DATE OF JUDGMENT:

14 JUNE 2013

COUNSEL FOR APPLICANT:

D MTSWENI

COUNSEL FOR FIRST RESPONDENT:

T COLYN

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JUDGMENT

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**INTRODUCTION:**

1. The Applicant brought an application against, *inter alia*, the First Respondent, for contempt of a court order granted on 28 November 2011 and subsequent imprisonment, in the event that the First Respondent does not, within 7 (seven) days pay an amount of R1 million into the Applicant's bond account and within 14 (fourteen) days remove the Applicant's name from the Title Deed of the immovable property of which they were joint owners.
2. The Applicant also requests the Court to make an Order whereby the Registrar is authorised to issue a Writ of Execution in the sum of R1 million against the immovable property in the event that the First Respondent fails to adhere to the conditions set out hereinabove.
3. Applicant also requests the Court to make an order that the First Respondent shall be liable for the reasonable costs of the transfer and the removal of the Applicant's name from the Title Deed in respect of the immovable property and that the First Respondent be ordered to pay the costs of the Application on an attorney and client scale.
4. The First Respondent filed a counter-application whereby the First Respondent seeks an Order in the following terms:

- 4.1. That the settlement agreement be amended to make provision for the division of the Applicant's pension fund;
- 4.2. Declaring the Applicant to be in contempt of the court order and to pay an amount of R235,273.10 in respect of arrear maintenance within 7 (seven) days from the date of the order being made;
- 4.3. That the Applicant be committed to prison and that same be suspended for 21 (twenty one) days and that the Applicant be ordered to pay the costs of the Application on an attorney and client scale.

**THE APPLICATION FOR CONTEMPT OF COURT AGAINST FIRST RESPONDENT:**

5. This Application is against First Respondent for contempt of a court order granted on 28 November 2011 in terms of which an amount of R1 million must be paid by the First Respondent into the Applicant's bank account.
6. In **Jayiha v MEC for Welfare Eastern Cape 2004 (2) SA611 (SCA)** it was held that:

*“Save for an order for the maintenance of one whom the judgment debtor was liable to maintain, a money judgment was not enforced by contempt proceedings but by execution.*

7. It follows that on this ground alone the application by the Applicant to make an order against the First Respondent for contempt of court should be dismissed.
8. However, there is a further application by the Applicant where an order is seek and whereby the Registrar is authorised to issue a Writ of Execution in the sum of R1 million against the immovable property in the event the First Respondent fails to adhere to the conditions of the court order.
9. I am convinced by the Applicant that the First Respondent was aware of the contents of the settlement agreement and the subsequent court order and that the First Respondent fails to comply with the aforesaid court order.

**THE COUNTER-APPLICATION BY THE RESPONDENT:**

10. In respect of contempt of court an applicant has to prove that:
  - 10.1. There is a court order;
  - 10.2. The First Respondent knows about the existence of the order; and

10.3. The First Respondent has not complied with the order.

11. It has been held that: *"the test for when disobedience of a court order constitutes contempt has come to be stated as whether the breach was committed deliberately or male fide."*

**See: Fake NO v CC II Systems (Pty )Ltd 2006 (4) SA 326  
(SCA) at 333**

12. The First Respondent indicates that due to the fact that the Applicant is not paying maintenance towards the two minor children, she struggles financially and does not want to overextend herself by obtaining a bond.
13. She further contends that the Applicant only paid R10,000.00 regarding arrear maintenance and that the Applicant is indebted to her the sum of R235,273.10 arrear maintenance.
14. I must agree with counsel for the Applicant that the First Respondent has failed to take this court into her confidence and to explain how the amount of arrear maintenance was calculated.
15. It is clear from the Applicant's Replying Affidavit and annexures marked MKR4 (A-G) that the following payments were made towards maintenance of the minor children:

15.1.	28/04/2012	R3,000.00
15.2.	22/06/2012	R60,000.00
15.3.	05/07/2012	R10,000.00
15.4.	03/08/2012	R10,000.00
15.5.	04/09/2013	R10,000.00
15.6.	03/10/2012	R10,000.00

16. In the Answering Affidavit the First Respondent states the following:

Par 9.4 – *“I furthermore confirm that since then no maintenance was paid, so the months of June, July, August, September and October are in arrears which adds to another R40,000.00.”*

Par 9.5 - *“I confirm that as mentioned here above only an amount of R10,000.00 was paid after the sheriff contacted the Applicant in this matter.”*

17. I am not convinced that on the evidence placed before me, the Applicant is in arrears with the payment of maintenance towards the two minor children.
18. The First Respondent contradicts herself in her Answering Affidavit to allege that the Applicant has blatantly disregarded his obligation as a father to pay maintenance for their children since their divorce. This is contrary to the proof of payments made by the Applicant towards the maintenance of the minor children.
19. I concluded that after considering the evidence contained in the papers, the Application by the First Respondent to make an order against the Applicant for contempt of court must be dismissed.

**THE FIRST RESPONDENT'S APPLICATION FOR VARIATION OF THE SETTLEMENT AGREEMENT AND/OR COURT ORDER:**

20. An order of court could only be set aside under Rule 42, Rule 31 (2) (b) on appeal or on common law grounds. The inherent jurisdiction of the High Courts does not include the right to interfere with the principle of finality of judgments, other than in the circumstances specifically provided for in the rules or the common law.

21. In terms of Rule 31 (2) (b) a defendant may within twenty days after he or she has knowledge of such judgement apply to court upon notice to the plaintiff to set aside such judgment and the court may upon good cause shown set aside the default judgment on such terms as to it seems meet.
22. In my view this Application cannot be entertained under Rule 31 (2) (b). There is no condonation application for the late application and Rule 31 (2) (b) refers to default judgments.
23. In terms of Rule 42 (1) the Court may in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

*“(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.*

*(b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.*

*(c) An order or judgment granted as a result of a mistake common to the parties.”*



24. It is not clear to the Court under which Rule the Application was brought. The trend by the Courts over the years is not to give a more extended application to the Rule to include all kinds of mistakes or irregularities.
25. The Rule should be construed to mean that once one of the grounds are established the rescission of the judgment should be granted. In my view not one of the grounds provided for in Rule 42 were established by the First Respondent. The judgment was not erroneously sought or erroneously granted. There was no ambiguity, error or omission in the judgment. The settlement agreement was made an Order of Court. The judgment was also not granted as a result of a mistake common to the parties. This occurs where both parties are of one mind and share the same mistake.
26. Where the First Respondent by mistake or her legal advisors abandons relief to which she is/or may be entitled, the Court has no power to recall or amend the order it has in consequence deliberately made, in the absence of fraud of the other party in the cause of the proceedings.

**See: De Wet v Western Bank Ltd 1977 (2) SA 1033**

27. The basis upon which the First Respondent contends the settlement agreement falls to be varied is because, there was an agreement between her and the Applicant that the issue relating to the pension benefits will be dealt with at a later stage.

28. The First Respondent further submitted that she was not properly represented during the divorce proceedings.

29. I am not persuaded by the abovementioned contentions. The issue relating to the pension fund was discussed with the First Respondent. In the letter dated 10 April 2012 (Annexure MM3 to the First Respondent's second answering affidavit) it was clearly stated by her erstwhile attorney Larry Chimes that the Applicant's pension fund was discussed and addressed, and was referred to in all drafts of the agreement of settlement as well as in communications with the Applicant.

30. It follows that the Court cannot entertain the application of the First Respondent and the Application is dismissed.

31. Subsequently the following Order is made:

31.1. The Applicant's Application to order that the First Respondent is in contempt of court is dismissed.

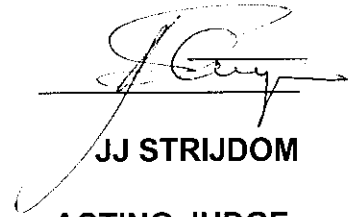
31.2. The Registrar of the Court is authorised to issue a Writ of Execution in the sum of R1 million against the immovable property situated at No 7 Milnerton Street in Kyalami Estate.

31.3. The First Respondent's counter-application to order that the Applicant is in contempt of court is dismissed.

31.4. The First Respondent's' counter-application for a variation of the settlement agreement and/or court order is dismissed.

31.5. First Respondent is ordered to pay the costs of the Applications on client and attorney scale.

SIGNED AT PRETORIA ON THIS THE 14<sup>th</sup> DAY OF JUNE 2013



Handwritten signature of JJ Strijdom in black ink, written over a horizontal line.

**JJ STRIJDOM**

**ACTING JUDGE:**

**NORTH GAUTENG HIGH COURT**