HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A57/2024

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 16 OCTOBER 2024

SIGNATURE

In the matter between:

D[...] B[...] N[...] Appellant

and

L[...] P[...] C[...] Respondent

Summary: *Contempt of court – the court of first instance declared the appellant to have been in contempt of an existing court order which had determined that the primary place of residence of two minor children to be with the respondent. That order was made pursuant to a decree of divorce of the parties which had included a deed of settlement. Some time later, the parties, by way of an addendum to the settlement agreement, agreed with each other that the primary residence temporarily be changed to that of the appellant, the children's father. When the mother sought to reverse the terms of the addendum, the father protested in respect of the one minor child who had already been enrolled in a school in Polokwane, while no placement had been obtained by the mother for placement in a school in Gauteng. A draft order was thereafter made an order of court without proper*

consideration of the father's answering affidavit regarding the absence of mens rea. There was no proof beyond reasonable doubt that the father had been in contempt of court. Appeal therefore upheld and order of the court a quo amended accordingly.

ORDER

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1. The appeal is upheld, with costs.

2. The order of the court a quo granted on 17 January 2022 is amended by the deletion of paragraphs 2 and 3 thereof.

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J U D G M E N T

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The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected at the conclusion thereof. The other two judges agreed with the judgment and the order, and it is handed down electronically by circulation to the parties' legal representatives by email and uploading it to the electronic file of this matter on Caselines. The date of the order is deemed to be 16 October 2024.

DAVIS, J

Introduction

[1] The appellant is the father of two minor children. He and his then wife, the respondent, got divorced on 21 October 2019. A deed of settlement was incorporated in the decree of divorce. In terms hereof, the parties had agreed that the primary place of residence of the two minor children would be with the respondent, who resides in Gauteng.

[2] On 22 June 2021 the parties, by way of a written addendum, agreed that, at least temporarily while the respondent was in financial dire straits, the primary

residence of the children would be with their father, the appellant, who resides in Limpopo.

[3] When the respondent some time later sought the return of the two children to Gauteng in 2023, the father objected in respect of the younger child for whom he had already secured placement in a school in Polokwane.

[4] After hearing an urgent application, Nyathi J ordered the return of the younger child and, by way of endorsement of a draft order, found the appellant in contempt of court and in breach of section 35 of the Childrens Act 38 of 2005.

[5] The appellant only appealed the latter portions of the order and not the remainder, which dealt with the return of the child and costs.

[6] The respondent had failed to deliver heads of argument or to instruct a legal practitioner to appear on her behalf at the hearing of the appeal, despite personal service of the notice of set-down. The appeal was, therefore, not, at the hearing thereof, opposed by the respondent by way of argument.

[7] Due to the fact that the matter deals with issues relating to the care of minors as well as the fact that the litigation was spurred by rather substantive acrimony between the parties, as also evidenced by the judgment of the court a quo, it remains necessary to explain in this judgment why the appeal should succeed.

The law regarding contempt of court

[8] It is by now settled law that, even in a civil matter such as this, the test for finding a person in contempt of court is certainty beyond a reasonable doubt that the person in question had, with knowledge of the court order, acted contemptuously in respect thereof.[1]

[1] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) (*Fakie*) and *Pheko v Ekhurhuleni Municipality* 2015 (5) SA 600 (CC) (*Fakie*).

[9] Once it has been shown that a person has knowledge of a court order and that his actions are not in compliance with such an order, willfulness will ordinarily be inferred.[2]

[10] Once the above has been established, the evidential burden to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and mala fide rests on the person who acted contrary to a court order.[3]

[11] A bona fide belief that a court order had ceased to operate has been held to be a complete answer to a charge of contempt of court.[4]

[12] Subject to the above principles, it is further trite that undertakings given by parties (such as those included in a settlement agreement) may also be enforced by contempt of court proceedings, once they have been incorporated in a court order.[5]

The appellant's answer in the court a quo

[13] The appellant stated in his answering affidavit that the addendum agreement reached between the two parties had not only been implemented but honoured, with the children residing with him and with the mother exercising her rights of contact in accordance with what the parties had agreed. This occurred during the remainder of 2021 and the first half of 2022. The terms of the court order had therefore inter partes, been amended.

[14] The appellant further states that both children spent the school holidays in September and October 2022 with the respondent. After the school holidays, the respondent only returned the one child to again reside with the appellant.

[15] At the end of that year, to the knowledge of the respondent, the appellant enrolled the child at a school in Polokwane for 2023.

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[2] Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th Ed, 2009, Chapter 38 at VI and *Secretary, Judicial Commission of inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327(CC).
[3] *Fakie* at 344 and *Clement v Clement* 1961 (3) SA 861 (T).
[4] *MacSand CC v Macassar Land Claim Committee* [2005] 2 All SA 469 (SCA) at 477
[5] *York Timbers Ltd v Minister of Water Affairs & Forestry* 2003 (4) SA 477 (TPD) at 500

[16] When the respondent then sent an email on 9 December 2022, expressing her interest to collect the child on 9 January 2023, the appellant protested and proposed that the child remain in Polokwane for the 2023 academic year. He expressed firm sentiments that this would be in the child's best interest.

[17] The respondent failed to respond to the appellant's answering email and failed to secure enrollment of the child in a school in Gauteng.

[18] After traversing some detail of the prior arrangements between the parties, the appellant answered the accusation of contempt of court lodged against him as follows: "*I further did not fail, refuse and/or neglect to comply with the court order. It is worth noting that it is the [respondent] who placed primary residence of the children in my care …. as per the addendum …. It is therefore my submission that I am not in violation of the court order, rather I am in compliance with same as we have maintained an open discussion with regards to the transition of the children back to Pretoria where they will reside with her. I am not in willful contempt as expressed by the [respondent], it is my intention that both children reside with [her] in Pretoria. However, same may only be done when we have secured a school [for the child] in Pretoria. I communicated with the [respondent] and she failed, refused and/or neglected to provide the particulars of the school she intended to enroll [the children] …*".[6]

[19] In addition, the above sentiments and intentions were repeated in the answering affidavit with the express aim to have the two children united in Pretoria, either in 2024 or when the second child was also properly enrolled in a school in Pretoria.

[20] Despite the above, the respondent persisted in her application in the court a quo claiming in her replying affidavit that the initial order was the only relevant fact and that the addendum should carry no weight as it had not been made an order of court.

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[6] Paras 15.4, 15.8 and 15.9 of the Answering Affidavit.

The judgment in the court a quo

[21] The learned judge only dealt with the last-mentioned issue referred to above in the following terms: "*It is desirous for the parties that one is bound by a settlement agreement. Should circumstances change, they should approach the courts for an official variation, but that should not muddy the waters, yes, I am not here to judge the validity or invalidity of the so-called addendum. It would have been a much more obvious situation if all had ended well and the parties had readjusted their lives, such that this application would not have been necessary*".

[22] After dealing with issues of good faith between divorced spouses and the fact that the school term had already started by the time the urgent application came before the court a quo, our learned brother concluded as follows: "*This is a situation where the court will have to look for a decision which is in the best interest of all concerned, that is both the applicant, the respondent and the child, and the court is only able to revert to the two [versions] that it has. Were this not a matter that affects a child, I would easily have been tempted to declare absolution from the instance, but it will not serve the child, it will just prolong the pain that is lurking around the very same child and the court will have failed the child. Having said that, I therefore reach a point where this matter needs to be resolved. For now the order that is sought by the applicant is attached under Caselines, file 05 and I make that draft an order of court*".

[23] Despite the fact that the issue of contempt of court had not received attention in the judgment other than that already mentioned, the draft order, in addition to ordering the immediate return of the child to the care of the respondent, also contained the following:

> "*2. That the respondent is in contempt of the Court Order of the above Honourable Court dated 21 October 2019.*
>
> *3. The respondent's conduct is in Contravention of section 35 of the Children's Act 38 of 2005*".

Evaluation

[24] In my view, it is clear on the evidence that the appellant had believed that the addendum agreement reached between the parties in good faith rendered his non-compliance with their original agreement justifiable, despite the fact that the addendum had not been made an order of this court.

[25] In addition, the contents of the answering affidavit make it clear that the appellant never intended to be contemptuous of this court but sought to act in the best interest of the child.

[26] On the evidence, it rather appears that the respondent was the one not acting in good faith. She ignored her own conduct in having agreed to the addendum and did not respond to legitimate questions by her co-parent about the schooling of the child.

[27] I am of the view that the appellant had discharged the evidentiary burden on him and that it had not been proven beyond reasonable doubt that he had been in contempt of court. Section 35 of the Children's Act makes it an offence for a person to prevent access to a child contrary to a court order. It is clear that this section is inapplicable to the circumstances of this case and in any event, the appellant lacked the necessary mens rea to have been found guilty of any offence contemplated by this section.

Conclusion

[28] It follows that the appeal must succeed and that the order of the court a quo must be corrected to reflect this success. I also, particularly in view of the respondent's own conduct, find no reason why costs should not follow the event. I also take into account that such an event might result in some "balancing" of the costs order previously obtained by the respondent, which would put disputing erstwhile spouses and parents of minor children closer to being an equal footing costs-wise.

Order

[29] In the result, I propose that the order of this full court should be as follows:

1. The appeal is upheld, with costs.

2. The order of the court a quo granted on 17 January 2022 is amended by the deletion of paragraphs 2 and 3 thereof.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria
I agree

M P N MBONGWE
Judge of the High Court
Gauteng Division, Pretoria

I agree

N G M MAZIBUKO
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 08 October 2024
Judgment delivered: 16 October 2024

APPEARANCES:

For the Appellant:	Prof/Adv J L H Letsoalo
Attorney for the Appellant:	Ndou RG Attorneys, Polokwane c/o MN Moabi Attorneys, Pretoria.
For the Respondent:	No appearance