REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO. 15732/07

In the matter between :

HEPBURN, JOHN DONALD
APPLICANT — Applicant

And

MILLER, JACQUELINE SIMONE
RESPONDENT

JUDGMENT

VAN ROOYEN AJ

[1] This is an application to declare the respondent in contempt of a court order concerning the joint custody which the parties have in regard to their daughter "D".

[2] The parties were divorced on the 14th April 2004. In terms of the settlement which was made an order o court, the respondent was awarded custody with reasonable rights of access to the applicant. According to the applicant he

enjoyed access far in excess to the court order up to September 2004. Towards the end of August, according to the applicant, the respondent's willingness to accommodate him changed. This was around the time when respondent commenced with a relationship with a Mr Miller, to whom she is presently married. According to applicant the fact that he had not been informed as to the hospitalization (for a tonsillectomy) of D as well as therapy, an application for joint custody was filed. A new settlement was reached and joint custody was awarded to the parties on the 3rdNovember 2006. The Court order, based on the settlement, inter alia, provides that "the parties, as joint custodians, shall make decisions relating, inter alia to D's education (including her sporting and extra-mural requirements), religious upbringing, medical care, contractual and financial matters jointly." The order, which includes details as to access, concludes as follows: "The parties will provide and share with each other all information regarding D's education, health and well-being and shall do all that is reasonable to minimise conflict and co-operate with each other in the best interest of D". Access was detailed in the order and as to telephonic contact, the following was agreed and ordered:

" In addition to the abovementioned access, both parties shall have reasonable telephonic access to D at all times whilst D is with the other party." The following was added: "all the access periods referred to above shall be subject to D's educational, extramural, religious and social commitments." A Ms Shulman, a clinical psychologist, was appointed as mediator in case of disputes. It appears from the documentation that by the time when this application was filed, Ms Shulman was no longer available to act as mediator, since she understood that applicant had lost trust in her. This was denied by the applicant. I need not dwell on this aspect further for purposes of this application.

[3] The application centres on two alleged omissions to abide by the court order:

Firstly that applicant did not have reasonable telephonic access to D since he did not have the landline number of the respondent and that, in so far as her mobile phone was concerned, she did not have a facility for voice mail and, in any case, did not return his calls, which must have been recorded under "missed calls" on her mobile phone. The respondent answered that the applicant phoned at times of the day when D was having her nap or when they were having dinner. Access to D, when she was with the applicant, was also not acceptable: applicant also did not always answer his mobile phone. To this the applicant replied that he, at least, called back and thus responded to her missed calls.

Secondly that respondent had made arrangements for D to attend a remedial school whilst respondent knew nothing thereof. He was, in fact, involved in getting her into an ordinary preliminary primary school and had been successful in doing his. The respondent knew about this and nevertheless obtained a position in a remedial school. Respondent concedes that "having regard to the applicant's overwhelmingly negative attitude in the past to remedial schooling, I, however, also knew that I had to gather certain of the information on my own and present it to (applicant) in the format in which I did in an attempt to avoid

the usual backlash and frustration which would have transpired by virtue of the fact that I had the audacity to disagree with the applicant's views."

Evaluation

[4] Ms *Smith*, who argued the case for the respondent *inlimine*that the application by the applicant was premature. He should first of all have approached the case manager or mediator to resolve the impasse. do not agree. If the respondent had been in contempt mediation would not have removed the contempt, although it could, of course, limit or exclude further contraventions.

[5] In so far as civil contempt of Court is concerned, it has now been settled that the standard of proof is that the applicant must prove his or her case beyond a reasonable doubt. See *Fakie NO v CCll Systems (Pty) Ltd 2006 (1) SA 326 (SCA)*[1]Cameron JA writing for the majority stated as follows at para [22] and [23]:

> Once the prosecution has established (i) E the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and mala fide, the offence will be established beyond reasonable doubt: The accused is entitled to remain silent, but does not exercise the choice without consequence.

It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt. (footnotes omitted)

[6] It is common cause that a court order with its amendment exists and that the respondent is aware of the court orders, which were based on settlements between the parties in both cases. What is in dispute is whether the court order, as amended, was breached. I should mention that although Ms *Fisher*argued that the tonsillectomy without the knowledge of the applicant also amounted to

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1 Thereby the approach initiated in South Africa by Pickering J in *Uncedo Taxi Service Association v Maninjwa and Others* 1998(3) SA 417(E) was given its, with respect, Constitutionally justified support. Also see *Deyzel v Deyzel* (2) [2006] JOL 17111(T). The approach in *Fakie* was applied by the TPD Full Bench (Ngoepe JP, Pretorius J and Snijman AJ) in *Jeejbhay v Minister of Home Affairs & Another* 2007(4) SA 294(T)

contempt, the tonsillectomy took place before joint custody was awarded. The first order merely mentions that for purposes of the payment of a hospital account the applicant must give his permission beforehand. This does not relate to consent for the operation as such. There is also no duty on a custodian to inform the non-custodian parent of an operation. Although I find it surprising that the respondent did not inform the applicant, the absence of notice to him did not amount to a breach of the first order. Now that joint custody has been awarded, the position has, however, changed dramatically, as would appear from the terms of the amended order set out above.

[7] In so far as the telephone access is concerned, Ms *Smith* argued that the accusation that the respondent had substantially shut out the applicant from telephonic access, was too vague. The respondent has to know what charge she must meet. I agree. Section 35(3)(a) of the Constitution of the Republic of South Africa provides that "every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it". There is no reason why this fundamental principle should not also apply in civil contempt proceedings. Although there is reference to June 2007 in the applicant's affidavit, this is simply too vague to give rise to an evidential onus. Although it is true that the respondent has answered that the calls were made at inopportune times of the day, she was not placed in a position that she could directly answer the accusation as to a specific day. This does not mean that the respondent is absolved from the responsibility to answer calls. In the light of this judgment, she should take steps to ensure that her voice-mail is activated, that the applicant obtains her landline number for urgent calls and that she indeed answers her phone at reasonable times. To simply say that calls interfere with times when D takes a nap or when they have dinner, is not a good excuse. I would say that on weekdays 16:00 to 18:30 is a reasonable time for calls. In other words, if the applicant were to have detailed the omissions of the respondent in this regard, I would have held the respondent in contempt also in this respect.

[8] Finally, there is the question of the choice of schools. It is clear from the respondent's answer that she was secretive about her attempts to register D at the remedial school. Her attempted justification that she knew that the applicant was against such a school, is no excuse. He should, as argued aptly by Ms *Fisher*, as a joint custodian have played open cards with the applicant. He was entitled to the information in terms of the amended order. The respondent does not deny that she undertook the inquiry about the remedial school on her own.

[9] It is, accordingly, clear to me that the respondent was in breach of the following clause of the second court order: ""The parties will provide and share with each other all information regarding D's education, health and well-being and shall do all that is reasonable to minimise conflict and co-operate with each other in the best interest of D".

[10] The next question is, however, whether the respondent was wilful and *mala fide*in her conduct. The respondent has an evidential burden to place material

before the Court which creates a reasonable doubt as to whether this was the case.

[11] In *Moaki v Reckitt and Colman*[2] it was held that the requirement of "malice" in unlawful arrest cases should be understood as *dolus*. There is no reason why this interpretation should not also apply to contempt of court. In fact, since knowledge of unlawfulness has been acknowledged to be an essential ingredient of *dolus,*[3] *mala fides* has lost its role as an element separate from *dolus.* It could, however, in its form as *motive*, provide material from which intention may be inferred. *Mala fides* may also, in certain circumstances constitute unlawfulness,[4] but the unlawfulness in the case of the omission[5] to abide by a Court order lies in the said omission and I do not foresee a case where *mala fides* will play a role in establishing unlawfulness in contempt cases. Motive will, however, usually play a role when sanction is considered.

[12] In so far as *dolus* concerned, it has long been recognized that where a person deliberately closes his or her eyes[6] for what the law requires, *dolus* in the form of at least *dolus eventualis*[7] will be found to have existed. In S v De Blom[8]

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2 1968(3) SA 98(A) 103-106; *Prinsloo v Newman* 1975(1) SA 481(A) at 492; *Ochse v King William's Town Municipality* 1990(2) SA 855(E) at 857 and 859; Neethling, Potgieter en Visser *Deliktereg (vierde uitgawe)* 379; as to malicious prosecution see *Heyns v Venter* 2004(2) SA 200(T).

3 *S v De Blom* 1977(3) SA 513(A).

4 See *S v I and Another* 1976 (1) SA 781 (RA) at 787D – H.

5 Of course, the respondent might be able to prove objective impossibility or necessity as defences and thereby negate the unlawfulness as alleged by the applicant.

6 See *Frankel Max Pollak Vinderine v Stanton NO* 2000(1) SA 425(W) at 443-441.

7 As to how *dolus eventualis* is inferred, see *S v Beukes* 1988(1) SA 511(A) at 522C where Van Heerden JA says the following: "`n Hof maak dus `n afleiding aangaande `n beskuldigde se gemoed uit die feite wat daarop dui dat dit, objektief gesien, *redelik moontlik* was dat die gevolg sou intree. Indien so `n moontlikheid nie bestaan nie, word eenvoudig aanvaar dat die dader nie die gevolg in sy bewussyn opgeneem het nie. Indien wel, word in die reël uit die blote feit dat hy handelend opgetree het, afgelei dat hy die gevolg op die koop toe geneem het." Also see *S v Lungile and Another* 1999(2) SACR 597(SCA) at par [17] per Olivier JA and *Frankel Max Pollak Vinderine v Stanton NO 1996(3) SA 355(A).*

8 1977(3) SA 513(A). Rumpff CJ states as follows at 532 :"In 'n saak soos die onderhawige moet aanvaar word dat wanneer die Staat getuienis voorgelê het dat die verbode handeling begaan is, 'n afleiding gedoen kan word, na gelang van omstandighede, dat die beskuldigde willens en wetens (d.w.s. ook met onregmatigheidsbewussyn) die handeling begaan het. Indien die beskuldigde op 'n verweer wil steun, soos in die onderhawige geval, dat sy nie geweet het dat daar handeling onregmatig was nie, kan haar verweer slaag indien van die getuienis as geheel afgelei kan word dat daar 'n redelike moontlikheid bestaan dat sy nie geweet het dat haar handeling onregmatig was nie;… Sou daar op die getuienis as geheel, d.w.s. insluitende die getuienis dat die handeling gepleeg is, 'n

it was held that once the act has been proved an inference may be drawn, depending on the circumstances, that the act was done intentionally, with knowledge of unlawfulness. If the accused wishes to rely on a defence it would succeed if a reasonable possibility exists, on the evidence as a whole, that the accused did not know that his act was unlawful. Of course, *De Blom's* case dealt with a criminal trial where the accused may be able to sufficiently counter the State's case by way of cross-examination. In motion proceedings he or she would have to file an answer, unless the applicant has not proved what it is required to prove in its founding affidavit.[9]

[13] On the facts of the present matter, I am satisfied that the applicant has proved beyond a reasonable doubt that the respondent has acted in intentional breach of the court order in respect of the education of D. The respondent knew that the applicant was wary of remedial schools and with full knowledge of this problem which she says he has, she unilaterally took steps to prepare D for the remedial school. She must have known that she was in breach of the Court order and, accordingly, in line with what Van Heerden JA said in *S vBeukes,* [10] find that she at least foresaw the possibility that she was in breach of the court order and nevertheless made arrangements without consulting the applicant.

[14] As to sanction I impose a fine of R20 000 which is suspended for five years subject to the condition that respondent is not found by a Court to have again been in contempt of any condition of the court order, as amended, during such five years.

[15] No order is made as to costs.

JCW VAN ROOYEN 19 December 2007

ACTING JUDGE OF THE HIGH COURT

For the Applicant Ms DC Fisher instructed by Philip Silver Sweidan Inc, Johannesburg

For the Respondent Ms DM Smith instructed by Kevin Cross & Affiliates, Johannesburg

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redelike twyfel bestaan of daar wel *mens rea*, in die sin soos hierbo beskryf, by die beskuldigde bestaan het, sou die Staat sy saak nie sonder redelike twyfel bewys het nie."

9 See *S v Singo* 2002 (4) SA 858(CC) where it was held that the accused only had an evidential onus in such (criminal) proceedings of contempt.

10 *Supra.*