

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 3142/2007

CYRIL KHANYILE

Applicant

And

CATHERINE ZEE MASUKU

Respondent

Coram

S.B. MAPHALALA - J

For the Applicant

MR. S. MDLADLA

For the Respondent

MR. Z. SHABANGU

JUDGMENT

19th December 2008

[1] The Applicant has filed an application under a Certificate of Urgency for an order in the following terms:

1.1. Directing and compelling the Respondent to comply with prayers 1.1 and 1.2 of the consent order by the above Honourable Court.

1.2. That the Respondent be hereby ordered to purge her contempt failing which she be placed in custody for contempt of court.

1.3. That prayer 1.3 of the order referred to herein above be hereby varied, to read, to wit;

"The Applicant be granted unsupervised access and after three (3) months the Social Welfare Department to give a report on whether or not Applicant should be granted permanent access to the children".

1.4. That prayer 3 operates forthwith as an interim order pending the finalization of all prayers.

1.5. That the Respondent pays costs of the application on an attorney/client scale.

1.6. Further and/or alternative relief.

[2] It is common cause between the parties that the Applicant has never been allowed access from 6.00pm Friday to 6.00pm Sunday. It is also common cause that the children were not

allowed to visit during the last holidays.

[3] The Respondent contends that the Applicant is misrepresenting the court order. On the other hand Applicant contends that the order *ex facie* is self-explanatory and does not need interpretation. It is further contended for the Applicant that the rules of interpretation are clear and should apply in this instance.

[4] I must further mention that Respondent has also filed a counter-claim.

[5] The Applicant furthermore contends that where the court has made a consent order it becomes *functus officio*. In this regard the court was referred to the case of *Ex parte Willis and Willis 1947 (4) S.A. 740* where the following was expressed:

"One having uttered a definite judgment is thereupon *functus officio* so that he cannot thereafter alter, supplement, amend or correct the judgment, except where through some mistakes the order did not express the true intention and decision of court or where it was ambiguous or where through an oversight, the court had omitted to include in its order something which was accessory to the principal".

[6] The Applicant contends that where there is nothing before the court to justify it in concluding that the order made did not

express clearly the intention and decision of the court, and as there was no omission to include anything accessory to the principal and there is nothing ambiguous about the order of court, the order should be complied with.

[7] On the other hand the Respondent contended that the circumstances of the present case cannot justify a finding that there has been intentional, willful and *mala fide* disobedience or non compliance with a court order. The Respondent *bona fide* followed the court order to the letter, as per the intention of the parties when entering into the agreement. This aspect has not been disputed by the Applicant whose replying affidavit is a merely a bare denial.

[8] It appears to me on the arguments of the parties that the Respondent's contentions are correct. Ordinarily, if a judgment is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, qualify or supplement it. But if any uncertainty in meaning emerges, the extrinsic circumstances surrounding or leading up to the court's grant of the judgment or order may be investigated and taken into account to clarify it. (see *Firestone S.A. (Pty) Ltd vs Gentriruco AG 1977 (4) S.A. 705 (A) at 715 F - 1*).

[9] It appears to me on the facts that such uncertainty has indeed arisen *in casu* regarding the manner in which supervision should be exercised in giving effect to the court order. I further agree with the Respondents that the case of *Ex parte Willis (supra)* is distinguishable from the present case in that in the former, the parties entering into an agreement that was made an order of court, thereafter approached the court with a view to change substantively that which the court had ordered.

[10] They applied that substantive parts of the agreement be deleted and substituted with new provisions. The court refused the application stating that it was *functus officio* and could not substantively change the court order in the absence of anything before it suggesting that the original order was not the one intended by the parties. *In casu* the case of *Willis* would apply in so far as the Applicant seeks to vary the consent order. In that respect the court is *functus officio* and cannot substantively vary the order and thereby change its meaning from that which was intended by the parties when entering into the consent order. (See *Herbstein Van Winsen* at page 689).

[11] On the facts of the case I cannot come to any finding that there has been intentional, willful and *mala fide* disobedience or non compliance with a court order. It appears to me that the Respondent *bona fide* followed the consent order.

[12] Finally, on the counter application the parties recorded a consent order in that regard and therefore this is no longer an issue for decision by the court.

[13] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA

PRINCIPAL JUDGE