

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: I 3754/ 2012

In the matter between:

S D K

APPLICANT

and

S T K

RESPONDENT

Neutral Citation: *S D K v S T K* (I 3754/ 2012) [2020] NAHCMD 80 (24 February 2020)

CORAM: **PRINSLOO J**

Heard: 24 January 2020

Delivered: 24 February 2020

Reasons: 6 March 2020

Flynote: Court — Abuse of court process — Court having inherent power to protect itself from abuse, especially in cases involving minor children's interest — Such protection in public interest and for preservation of rule of law — Court to draw the proverbial line in the sand if litigant conducts its case in a frivolous, vexatious, spurious and malicious manner.

Summary: The divorce proceedings in this matter were instituted in 2012, and were fiercely contested and after long and protracted history with multiple court appearances and multiple issues, the parties in this matter finalized divorce proceedings on 16 February 2017. A settlement agreement was signed by the parties on 16 February 2017, which settlement agreement was incorporated in the final order of divorce.

As time went along, issues arose regarding the settlement agreement with reference to custody and control of the minor child and the applicant instituted an application compelling the respondent to comply with the settlement agreement. The respondent opposed the application and filed a counterclaim on condition that the court makes a finding that the respondent was in default of the court order, which he denied, and that the tenor of the settlement agreement could not accommodate a situation where minor children may stay with the respondent, despite the applicant having custody.

The court did not give a ruling in the matter as it wanted to hear the view of the minor child, who was central to the argument between the parties. This was unfortunately the beginning of many postponements to the point where the court had to draw the proverbial line, allow the parties to make submissions in finality for the court to make a ruling without further postponements and delaying the matter any further.

Held that the applicant throughout played a game of cat and mouse, losing sight of the fact that stuck in the middle of this tug of war is a minor child, who has been subjected to multiple interviews with a social worker over a period of three years.

Held that in as much as the applicant is entitled to constitutional protection of her rights, she conducted herself in a frivolous, vexatious, spurious and malicious manner which in my considered view is an abuse of court processes. This court had no choice but to draw the proverbial line in the sand for the applicant and proceed to give a ruling without indulging further arguments in the matter.

Held further that having considered the background and the contractual matrix, it is clear that the parties envisioned the minor children could stay with either one of the parties. This is clear from the wording of para 2.6 which give the relevant parent where the child is **residing** the right to make the decisions affecting the child's every day care and routine.

Held further that the Court is satisfied that the applicant was reckless in the manner in which she conducted this matter. Any person has the right to change his or her mind but the applicant led the respondent down the garden path time after time by seemingly committing to a settlement just to renege on it a few days later. This court must show its displeasure in respect of how the applicant conducted this matter by granting an appropriate cost order. This court is satisfied that the matter at hand is an appropriate case where cost should be granted on a punitive scale.

ORDER

- a) The applicant's application to compel as set out in the Notice of Motion dated 4 April 2017 and the prayer contained therein is dismissed with cost (including the cost of the failed *res judicata* point).
- b) Such cost to be on a scale of attorney/client.

RULING

PRINSLOO J

[1] The matter before me has a long and protracted history with multiple court appearances and multiple issues. In sketching the background of the matter, it is important to note that the applicant and respondent were granted a final order of divorce by this court on 16 February 2017. As one can glean from the case number of this case, the divorce proceedings were instituted in 2012 and it was fiercely contested. However, during 2017, the parties managed to settle the matter with the assistance of their respective counsel. A settlement agreement was signed by the parties on 16 February 2017, which settlement agreement was incorporated in the final order of divorce.

[2] In terms of the settlement agreement, the parties agreed that the applicant (defendant in the main action) shall have custody and control over the two minor children, subject to the respondent's right to reasonable access.

[3] The agreement in the deed of settlement relating to parental rights and responsibilities is set out in paras 2.1 to 2.8 and I will only refer to those paras relevant and important to the current proceedings, ie:

'2.1 Subject to what is agreed upon in the subparagraphs herein Defendant shall have care and control of the two minor children, namely:

2.1.1 K- L K K, born 19 April 2000;

2.1.2 K K K, born on 14 February 2003. (The minor child in question)

2.2 Plaintiff, as guardian of the two minor children, shall have reasonable access to the minor children.'

And

'2.6 Decisions affecting the minor children's everyday care and routine shall be determined by the parent with whom the minor child/children are residing with at the relevant time.

2.7 The parties shall consult one another, and jointly make decisions regarding matters which are likely to significantly change the minor child's living conditions or to have an adverse effect on their wellbeing.'

The application

[4] On 5 April 2017, the applicant filed a notice of motion seeking the following relief, which I will summarize for sake of brevity:

- a) That the respondent is compelled to comply with the court order dated 16 February 2017 within 14 days from date of order.
- b) That the respondent be compelled to comply with clause 2.1 of the settlement agreement signed by both parties on 16 February 2017 and which was incorporated in the final order of divorce.
- c) That the respondent is ordered to take the minor child, K K into the applicant's custody in accordance with clause 2.1 of the settlement agreement incorporated into the court order dated 16 February 2017.
- d) Should the respondent fail and/or refuse to comply with orders 1, 2 and 3 that the applicant be allowed to approach this court for the respondent to be found in contempt of court order.

[5] The respondent opposed the relief sought by the applicant and filed in turn a conditional counterclaim which is conditional upon the court finding that the respondent was in default of the court order, which he denied, and that the tenor of the settlement agreement could not accommodate a situation where minor children¹ may stay with the respondent, despite the applicant having custody. In his conditional counter-application, the respondent prayed for relief in the following terms:

¹ As they were then. The couple's eldest daughter is currently no longer a minor as she turned 18 in 2018 already.

- a) A variation of the custody order incorporated in the court order dated 16 February 2017, to award custody of K K to the respondent;
- b) Variation of the maintenance order incorporated in the court order dated 16 February 2017, to order the respondent to pay maintenance to the applicant in respect of one minor child only, being K-L K.

[6] In support of the conditional counter application, the respondent filed a number of affidavits, including an affidavit of the minor child, K K, an affidavit of the domestic servant and an expert report of Ms Estelle Bailey, who is an educational psychologist.

[7] I heard the arguments of the parties on the main and counter application as far back as 17 August 2017 but did not give a ruling in the matter as I wanted to hear the view of the minor child, who was central to the argument between the parties. This was unfortunately the beginning of many postponements and for the sake of completeness, it is necessary to briefly consider the reasons for the delay and what ultimately gave rise to the court delivering her ruling on the arguments advanced in August 2017, without receiving any further argument on the matter.

Background and Judicial Case Management history after August 2017

[8] On 17 August 2017, the matter was adjourned to 6 October 2017 for judgment. However, on 6 October 2017, the matter was postponed until 20 October 2017 to enable the parties to file an expert report regarding the best interest of the child. As the parties could not agree on a joint expert, the matter was postponed to the period of 27 October 2017 to 17 November 2017 to allow oral evidence to be lead through Mrs Bailey on the custody and care of the minor child.

[9] On 3 November 2017, the applicant filed an objection to the evidence of Mrs Bailey and further raised an argument of *res judicata* on the issue of custody, in light of the settlement agreement of 16 February 2017. As regards the point *in limine* of *res*

judicata, an objection was raised for the court hearing oral evidence on the basis that the matter of custody is *res judicata* and that the issue cannot be revisited by this court by admitting new evidence and that said approach would violate the well-established principle of *res judicata*.

[10] The *res judicata* point was argued on 9 November 2017 and on 17 November 2017, the applicant's point in this regard was dismissed and the court ordered that the costs would stand over until final determination in the main application.² The matter was then postponed to 24 November 2017 for oral evidence of Mrs Bailey. On 24 November 2017, the respondent was ready to proceed with the matter, however, the applicant failed to attend the proceedings. Applicant apparently had car problems. The erstwhile counsel of the applicant also proceeded to withdraw as counsel of record on the same day and the matter was postponed to 7 December 2017 for a status hearing to enable the applicant to secure new counsel. For some period, the applicant however made appearances in-person but subsequently secured further legal representation on a *pro amico* basis.

[11] During one of the appearance made by the applicant, it became clear that the applicant had an issue with the report of Mrs Bailey as the applicant was of the opinion that the expert was bias. The applicant therefor requested for an independent social workers' report and indicated that she would abide by same. A social worker from the Ministry of Gender Equality and Child Welfare was then appointed through the chambers of the managing judge and after many postponements in the matter, the social workers' report drafted by the court appointed social worker, Ms Richter, was received during August 2018 and in the interim, the applicant obtained new counsel.

[12] The report from the social worker became available on 7 August 2018 and in her recommendations, she made the identical findings that Mrs Bailey made, namely that the custody and control of the minor child should be granted to the respondent.

² *S K v S K* (I 3754-2012) [2017] NAHCMD 344 (17 November 2017).

[13] The matter was then postponed until 17 September 2018 for the parties to consider the social workers report and counsel for the applicant had indicated that the applicant would not oppose the recommendation of the social worker. The parties were then directed by this court to meet and draw up a settlement agreement setting out inter alia the applicant's visitation rights in respect of the minor child, as well as the parties respective responsibilities to provide consent if and when the minor child were to travel with either party outside the borders of the country. The matter was postponed to 25 October 2018 to allow the parties to formulate the said agreement.

[14] Hereafter, the matter stalled for approximately four (4) months and the matter was postponed at the instance of the respondent due his failure to put his counsel in funds.

[15] During a chamber meeting on 18 March 2019, the court was informed by the applicant's counsel that there was apparently a change in the circumstances of the minor child and that respondent was prohibiting the minor child from visiting the applicant and that access was limited by the respondent, which allegations were denied by the respondent. As it was apparent that the possibility of settlement was no longer on the table, the court ordered that the applicant's allegations be investigated by Ms Richter, the social worker, and that a supplementary report be filed in this regard.

[16] The supplementary social worker's report was made available on 21 June 2019. In the supplementary social worker's report, Ms Richter confirmed her findings and recommendations made in her report dated 7 August 2018.

[17] The applicant was however not happy with the supplementary social worker's report and complained that it was not a true reflection of what transpired and that the interviews with the applicant and minor children were conducted telephonically. However, I must interpose here and state that Ms Richter had indicated that it was impossible to physically meet up with the applicant as she was always unavailable.

[18] During a further meeting with the respective counsel, the court then instructed that the social worker conduct personal interviews with all the parties concerned, including with K K's older sibling, K L K, and file a further supplementary report. Ms Richter was directed accordingly and she submitted the said report on 25 September 2019 wherein she concluded that her recommendations as contained in her previous two reports remain the same and that there were no substance in the allegations made by the applicant regarding the well-being of the minor child.

[19] The parties were yet again given the opportunity to consider the social worker's report and during a chamber meeting on 11 October 2019, counsel for the applicant advised that the applicant will not oppose the social worker's report but that counsel did not have any instructions to tender cost in the matter. The matter was then postponed until 25 October 2019 to obtain dates for the hearing of the arguments on costs.

[20] On 25 October 2019, the applicant's counsel advised the court that the applicant yet again changed her mind and in fact rejected the further report by the social worker and that she persisted with her allegations that the social worker was bias in favor of the respondent. As a result of the change in stance of the applicant, the court then directed that the matter be postponed for hearing on 20 January 2020 to 24 January 2020. The parties were also directed to attend the roll call hearing on 17 January 2020.

[21] On 17 January 2020, both counsel attended the roll call hearing and informed Damaseb JP that the applicant had abandoned her application to compel and that the only remaining issue between the parties was the issue of costs. The matter was postponed to 24 January 2020 to allow the parties time to attempt to settle the issue of cost amicably, failing which the argument on the issue of cost would be heard on the said date. The witnesses, including the court appointed social worker, was informed not to attend court on Monday, 20 January 2020 due to the said abandoned application.

[22] On 24 January 2020, the court was informed by the applicant's erstwhile counsel that the position has changed yet again and that she got contradictory instruction that

the issue is no longer settled and that the applicant still wanted to pursue her application to compel, notwithstanding the fact that on the preceding Friday, the court was informed that the issue of custody was resolved. The counsel then also informed the court of her intention to withdraw as counsel of record.

[23] At this point, counsel for the respondent invited the court to make a ruling based on the papers filed in the application and counter-application (including heads of arguments) and based also on the oral submissions made by the respective counsel on 16 August 2017, also taking into consideration the expert reports filed by Mrs Bailey and Ms Richter.

[24] Due to the protracted history of the matter, the court deemed it to be the appropriate cause of action to follow and the matter was postponed to 24 February 2020 for ruling on the papers as they stand.

Abuse of court process

[25] If ever I have seen an abuse of court process, then this is the case. The applicant throughout played a game of cat and mouse, losing sight of the fact that stuck in the middle of this tug of war is a minor child, who has been subjected to multiple interviews with a social worker over a period of three years.

[26] This whole matter could have been resolved as far back as 24 November 2017, had the applicant shown up at court at the scheduled hearing.

[27] From that date, the applicant on no less than three occasions indicated that she will accept and abide to the social worker's reports and that the matter is settled in essence, just to turn around at the next hearing date and renege what was placed on record previously.

[28] This got to the point where the court could not tolerate any further delays in the matter and thus enrolled the matter for a week in January 2020, to hear the evidence of the experts and the minor child and make a ruling in the matter.

[29] Yet on the Friday prior to the hearing date, the court was informed that the issue of custody is settled, only for this concession to be withdrawn four days later when the matter of costs had to be argued.

[30] In as much as the applicant is entitled to constitutional protection of her rights, she conducted herself in a frivolous, vexatious, spurious and malicious manner which in my considered view is an abuse of court processes. This court had no choice but to draw the proverbial line in the sand for the applicant and proceed to give a ruling without indulging further arguments in the matter.

The merits of the application

[31] At the heart of this matter is a settlement agreement reached between the parties at the time of their divorce and the question of whether the respondent is in default of the court order dated 16 February 2017, in particular relating to the custody of K K, the minor child in question.

Common cause facts

[32] The following appears to be common cause facts:

- a) That the minor child, K K, was residing with her father already since July 2016.
- b) That at the time of the divorce, K K's elder sibling, K L K was residing with the applicant.
- c) That a settlement agreement was reached between the parties which was incorporated in the final divorce order.
- d) That the respondent is not challenging the validity of the aforesaid agreement.

- e) That in terms of the agreement, the applicant shall have custody and control of the minor children.³

Argument on behalf of the applicant

[33] It is the case of the applicant that the sole custody of K K was awarded to her by virtue of the settlement agreement and that the respondent failed, despite numerous demands by the applicant, to comply with the order of court.

[34] It is further the applicant's case that the respondent's conduct is contemptuous and in clear violation of his obligation as set out in the binding settlement agreement and there exists no good grounds or justification for the respondent's unlawful conduct.

[35] Counsel, who was then representing the applicant, argued that the respondent was aware of the court order in question and has been and still is in default of the order and failed to place exceptional circumstances which will condone his non-compliance with the court order.

[36] Counsel maintained that the reasons advanced for the conditional counter-application is unmeritorious and merely a subterfuge hatched by the respondent to disobey the court order. Counsel argued that the respondent should have complied with the court order dated 16 February 2017 and should have brought an application for variation, if new circumstances justifies a variation thereof.

[37] The court was referred to *South African Railways and Harbours v National Bank of South Africa*⁴ wherein the court found that the law does not concern itself with the working of the minds of the parties to the contract but with the external manifestation of their minds and where it is argued that the minds of the parties did not meet, then the court must look at the acts of the parties and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of

³ Para 2.1 of the Settlement Agreement.

⁴ 1924 AD 704 at 715-716.

their agreement. In the matter in casu, the parties had an intention to agree and abide to the terms as set out therein by voluntarily signing the settlement agreement and therefore the rights and obligations ought to be implemented.

[38] Counsel argued that the issue raised by the respondent that there was a separate undertaking between the legal practitioners to the effect that K K will stay with her father and K L K with her mother has no merits. Applicant argued that in terms of the settlement agreement, she acquired sole custody and in fact, it was only on that basis that she signed the settlement agreement.

Argument on behalf of the respondent

[39] The core of the respondent's opposition to the application to compel is that he is not in default of the court order in question. The respondent confirms that he agreed to the settlement terms regarding parental rights and responsibilities but argued that it was done on the basis *inter alia* of a verbal undertaking that K K could continue to live with the respondent after the conclusion of the divorce proceedings. This undertaking was apparently made by the applicant's legal representative before the settlement agreement was signed. In fact, it is the respondent's case that that was the basis on which the respondent agreed to the settlement terms regarding custody of the minor children.

[40] Counsel for the respondent argued that these allegations are for all intents and purposes not contested. Counsel submitted that the undertaking was provided by the applicant's legal practitioner that K K can remain with the respondent and the applicant was not privy to this undertaking and therefore has no personal knowledge thereof. The applicant's denial of these allegation therefor constitutes inadmissible hearsay evidence and as such, the respondent's explanation in this regard should be accepted as it stands unchallenged. It was also pointed out that the applicant's counsel failed to file a confirmatory affidavit wherein he refuted the allegations by the respondent regarding the living arrangements of K K after the divorce.

[41] The applicant's erstwhile legal practitioner's ethical position in this regard was called into question by the respondent's counsel and in this regard, the court's attention was drawn to *Disciplinary Committee for Legal Practitioners v Lucius Murorua and Another*.⁵

[42] Counsel further argued that if the court has regard to the wording of the settlement agreement, inter alia at clause 2.6 thereof, it is clear that it supports the respondent's contention that the parties specifically structured the agreement to allow for either K K or her sister K L K to reside with the respondent whenever they so choose, notwithstanding the fact that the applicant has custody *ex lege*. This argument is specifically advanced with reference to the wording of the relevant clause 'that **either parent** with whom the children are residing at the time **to make decisions regarding their everyday care and routine**'.

[43] Counsel maintains that the wording of clause 2.6 does not lend itself to the applicant's argument that sole custody was awarded to her. Counsel further argued that were it is not within the contemplation of the parties that K K and/or K L K could reside with the applicant or the respondent whenever they choose, or that the respondent could continue to make decisions regarding K K's daily life, clause 2.6 would not have found its way into the settlement agreement. Counsel submitted that the word 'sole' custody was never a term agreed upon between the parties and the word 'sole' custody does not appear anywhere in the settlement agreement.

[44] Counsel argued that if the court considers the applicant's papers, it would be clear that the version of the applicant is a bare denial and that it is further clear that on the papers, a dispute of fact was raised and that the Plascon-Evans Rule should apply. The court was invited to look at the allegations made by the applicant, as admitted by the respondent, together with the respondent's allegations and to then apply the test and consider the construction of the settlement agreement.

⁵ 2012 (2) NR 481 (HC).

[45] Counsel submitted that on the reasoning of the Plascon-Evans Rule, the application to compel must fail.

Discussion

[46] From the papers before me, it is clear that the conditional counter-application raised by the respondent is reliant on the finding by this court that he is in contempt of the court order dated 16 February 2017.

[47] The respondent, in support of his argument that he is not in contempt of court, relies heavily on an undertaking given by the applicant's erstwhile legal practitioner that the minor child would remain with the respondent after the divorce became final. The respondent further finds support of this contention with reference to clauses 2.6 of the settlement agreement which provided that the 'decisions affecting the minor children's every day care and routine shall be determined by the parent whom the minor child is residing with at the relevant time' and in clause 2.7 that reads that 'the parties shall consult one another, and jointly make decisions regarding matters which are likely to significantly change the minor child's living conditions or to have an adverse effect on their wellbeing.'

[48] The applicant denies this position as set out by the respondent but it is important to note that there is no confirmatory affidavit filed by the applicant's erstwhile legal practitioner gainsaying the contentions of the respondent. This was not done in spite of the grave allegations made by the respondent against the applicant's erstwhile legal practitioner and therefore, this court must accept the respondent's version in this regard as true and correct.

[49] From reading the founding affidavit and the answering papers, it is abundantly clear that there is a factual dispute between the parties and counsel for the respondent

correctly argued that the Plascon-Evans Rule finds application. I agree that on that basis alone, the applicant's application should be dismissed.

[50] However, one should not lose sight that this matter also involves a minor child that is currently in limbo because of the issues between her parents and it is therefore necessary to consider this matter further.

Is the respondent in contempt of the court order?

[51] In order to determine whether the respondent was in contempt of the court order, it is important to consider the settlement agreement and the construction thereof relevant to the facts before me.

[52] In interpreting the settlement agreement, it is important to have regard to the leading judgment of *Total Namibia (Pty) Ltd v OBM Engineering And Petroleum Distributors*⁶ wherein O'Regan AJA discussed the proper approach to the interpretation of contracts as follows:⁷

'[19] For the purposes of this judgment, it is not necessary to explore fully the similarities and differences that characterise the approaches adopted in the United Kingdom and South Africa. What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.'

And

⁶ (SA 9/2013) [2015] NASC 10 (30 April 2015).

⁷ Footnotes omitted.

“[22] In *KPMG Chartered Accountants (SA) Ltd v Securefin Ltd*⁸, Harms JA suggested that the terms ‘background circumstances’ and ‘surrounding circumstances’ were ‘vague and confusing’ and that there was little merit in attempting to distinguish them. It is now clear that the South African Supreme Court of Appeal considers this approach to ‘be no longer consistent with the approach now adopted by South African courts in relation to contracts or other documents . . . “

[23] Again this approach seems to comport with our understanding of the construction of meaning, that context is an important determinant of meaning. It also makes plain that interpretation is ‘essentially one unitary exercise in which both text and context, and in the case of the construction of contracts, at least, the knowledge that the contracting parties had at the time the contract was concluded, are relevant to construing the contract. This unitary approach to interpretation should be followed in Namibia. A word of caution should be noted. In accepting that the distinction between ‘background circumstances’ and ‘surrounding circumstances’ should be abandoned, courts should remember that the construction of a contract remains, as Harms JA emphasised in the *KPMG* case, ‘a matter of law, and not of fact, and accordingly, interpretation is a matter for the court and not for witnesses’.

[24] The approach adopted here requires a court engaged upon the construction of a contract to assess the meaning, grammar and syntax of the words used, as well as to construe those words within their immediate textual context, as well as against the broader purpose and character of the document itself. Reliance on the broader context will thus not only be resorted to when the meaning of the words viewed in a narrow manner appears ambiguous. Consideration of the background and context will be an important part of all contractual interpretation.’

[53] When the directions of the Supreme Court decision in the *Total* case are applied to the facts before me, then it is clear that the court should look at the background and the context as well as the construction of the settlement agreement.

[54] The undertaking that the applicant’s counsel gave in respect of the living arrangements of K K was clearly contemplated in the wording of the settlement agreement. Para 2.6 and 2.7 would have absolutely no place in the settlement

⁸ 2009 (4) SA 399 (SCA) para 39.

agreement if the agreement was that the applicant gets sole custody of the minor children.

[55] It is also important to note that nowhere in the settlement agreement is there reference to sole custody. In fact, para 2 of the settlement agreement dealing with the Parental Rights and Responsibilities, which incorporates paras 2.6 and 2.7 does not make reference to the word custody at all. Paragraph 2.1 refers to the 'care and control' that will be vested in the applicant and guardianship that will be vested in the respondent.

[56] In terms of Children's Status Act,⁹ now repealed but applicable to the matter *in casu*, the said Act defines sole custody to mean 'the exercise of the rights, duties and powers of custody by one person, to the exclusion of all other persons.'¹⁰ If one have regards to the whole of para 2 of the settlement agreement, it is clear that there is not limitation on the respondent's parental rights and responsibilities.

[57] Having considered the background and the contractual matrix, it is clear that the parties envisioned that the minor children could stay with either one of the parties. This is clear from the wording of para 2.6 which gives the relevant parent where the children are **residing** the right to make the decisions affecting the children's every day care and routine.

[58] According to the Oxford Dictionary, 'residing' means to 'have one's permanent home in a particular place'. Residing in the current context does not refer to a weekend arrangement, it refers to a permanent arrangement. Therefore is clear that in the literal sense, the minor child/children could reside with either of their parents. This is again in line with the position of the respondent in his answering papers where he indicated that K K was free to choose where she wanted to stay and she had free access to the applicant at all times in spite of the fact that she stayed with the respondent already a few months prior to the final divorce order. There is no provision in the settlement

⁹ Act 6 of 2006.

¹⁰ Sec 1.

agreement that K K had to return to the home of the applicant upon finalization of the divorce. If the agreement was that the applicant would have sole custody, then surely such a provision would be incorporated in the settlement agreement, yet it was not.

[59] In *Zwiggelaar v Church*¹¹ Kauta AJ stated the following in respect of contempt of court in the civil context:

‘[15] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him - or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

[16] These requirements that the refusal to obey should be both willful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.

[17] These observations bear directly on the main question of principle in this matter, on which my approach to the facts it presents must depend. This is whether civil contempt can be established when reasonable doubt exist as to any of the requisites of the crime. The pre-constitutional approach to proof was that once the enforcer established that the order had been granted, and served on or brought to the respondents notice, an inference was drawn that non-compliance was wilful and mala fide, unless the non-complier established the contrary. The alleged contemnor bore the full legal burden of showing on balance of probabilities that failure to comply was not wilful and male fide.’

¹¹ (A 144/2012) [2015] NAHCMD 03 (23 January 2015).

[60] In light of the abovementioned discussion and interpretation of the settlement agreement, I cannot find that the respondent was in contempt of the court order and therefore do not deem it necessary to deal with the conditional counter-application.

[61] In conclusion, I would like to remark that since 2017 K K made her wishes known as to where she wishes to reside. This was confirmed in her confirmatory affidavit as well during her interviews with Mrs Bailey and Ms Richter. Ms Richter found that there is no evidence of emotional abuse or otherwise in respect of the minor child, yet the applicant persists with allegations that does not appear to have any merits. K K is no longer a small child. She is turning 18 years in eleven months' time and is about to finish her school career. She lives in the same town as her mother, who is a phone call away. Nothing prevents K K from moving back to her mother should she wishes to do so.

[62] What is disconcerting to me is the fact that the past three years must have left its emotional scars on this teenage girl, not because of any abuse on the part of the respondent but because of the constant battle raging around her and the combatants, the two people she probably cares for the most, namely her parents. This prolonged conflict between the parties is not and can never be in the best interest of K K and it is time that the parties realize this fact.

Costs

[63] The only remaining issue is the issue of costs. Whereas the respondent succeeded in resisting the application of the applicant, it goes without saying that cost should follow the result. However, one of the cardinal rules relating to costs is that the granting of costs lies pre-eminently within the discretion of the court.¹² As with all other cases where discretion is to be exercised, it must not be exercised capriciously or whimsically but judicially and judiciously as well.

¹² A.C. Cilliers, *Law of costs*, 3rd edition, LexisNexis, Durban, 1997 at 2-3 para 2.01.

[64] Counsel for the respondent argued that given the history of this matter and the conduct of the applicant, the court should impose cost on a punitive scale due to the manner in which the applicant conducted this matter.

[65] In deciding the appropriate cost order, the first question to consider is whether the current matter is interlocutory in nature or a substantive application and if it is interlocutory in nature, should the cost be capped in terms of Rule 32 (11).

[66] I am in agreement with counsel for the respondent that the matter in casu is not an interlocutory matter but indeed a substantive application and therefore Rule 32(11) would not apply.

[67] The next question to consider is whether the matter in casu is an appropriate case where the court should consider cost on a scale as between attorney and client as prayed for by the respondent.

[68] The learned author, AC Cilliers, *Law of costs*, states the following regarding the granting of costs on the attorney and client scale:¹³

'The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court: the court leans against awarding attorney and client costs, and will grant such costs only on "rare" occasions. It is clear that normally, the court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present.'

[69] In his further treatise on this subject, the learned author lists the following circumstances as those that may justify the court awarding costs on the punitive scale, namely, (a) instituting vexatious and frivolous proceedings; (b) dishonesty or fraud of the litigant; (c) blameworthy conduct of the said litigant; (d) reckless or malicious proceedings; a deplorable attitude or conduct of the litigant towards the court. The list is not exhaustive, it may also include instances where that party for instance, is guilty of

¹³ *Ibid* para 4.09.

gross failure to place essential facts before the court for consideration.

[70] Having regard to my earlier discussion, I am satisfied that the applicant was reckless in the manner in which she conducted this matter. Any person has the right to change his or her mind but the applicant led the respondent down the garden path time after time by seemingly committing to a settlement just to renege on it a few days later.

[71] This court must show its displeasure in respect of how the applicant conducted this matter by granting an appropriate cost order. This court is satisfied that the matter at hand is an appropriate case where cost should be granted on a punitive scale.

[72] My order is therefore as follows:

- a) The applicant's application to compel as set out in the notice of motion dated 4 April 2017 and the prayer contained therein is dismissed with cost (including the cost of the failed *res judicata* point)
- b) Such cost to be on a scale of attorney /client.

J S Prinsloo
Judge

APPEARANCES:

APPLICANT:

F X Bangamwabo (erstwhile legal
practitioner - Application to compel)

Of FB Law Chambers

and

Ms A N Jason (legal practitioner on
record)

Of Shikongo Law Chambers

RESPONDENT:

K Klazen

Of Ellis Shilengudwa Inc.