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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NUMBERS: 10211/2020

In the matter between:

M T Applicant

and

T H First Respondent

NATIONAL COMMISSIONER OF POLICE Second Respondent

In re

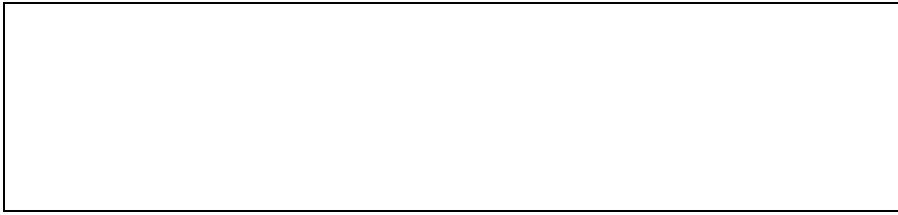
M T Applicant

and

T H Respondent

1. Reportable: No
2. Of interest to other judges: No

DP de Villiers AJ



JUDGMENT

De Villiers AJ:

- [1] This matter came before me in urgent court.
- [2] In issue is contempt of court proceedings where the imprisonment of Mr T H, further referred to as “*the first respondent*” herein, was ordered. Yacoob J ordered the imprisonment of the first respondent for contempt of court for non-payment of an order made by Vally J.
- [3] The realty is that this matter has been in the urgent court about twelve or thirteen times since the end of April 2020, as far as I could determine. In issue is the non-payment of maintenance and contempt of court proceedings. At no stage has a writ of execution been issued. Initially the purpose of the many applications was to imprison the first respondent. The focus has now shifted to imprison the Commissioner of Police too.
- [4] In all these cases, the applications were brought on very short notice, usually enrolled for less than a week after issuing (not mentioning service), with insufficient time to be answered and the answer replied to before the hearing. As a result, the requirement in the Practice Manual (Para 9.23.18) that when an urgent application is brought for a hearing on the Tuesday at 10h00 (the default time), the applicant must ensure that the relevant papers

are filed with the Registrar by the preceding Thursday at 12h00, could not be complied with in any of the cases (that I had access to).

- [5] The further requirement in law, and as set out in the Practice Manual, that the applicant “*must provide a reasonable time, place and method for the respondent to give notice of intention to oppose the application and must further provide a reasonable time within which the respondent may file an answering affidavit*”, that “*the date and time selected by the applicant for the enrolment of the application must enable the applicant to file a replying affidavit if necessary,*” and that “*deviation from the time periods prescribed by the rules of court must be strictly commensurate with the urgency of the matter as set out in the founding papers*”, were all seemingly ignored.
- [6] Seemingly in no case was service effected by the Sherriff, or the failure to make use of the Sherriff, explained. One must bear in mind that personal service is required in terms of immemorial practice, and now too in terms of the Practice Manual too (Para 9.19) in cases of contempt of court.
- [7] Over time many judges signalled their dissatisfaction with the approach of the applicant and repeatedly struck matters from the roll. Unperturbed, the applicant would enrol an application again, sometimes on the same day, not supplemented to explain the past events, or in several cases, not explaining to the recipient what was being re-enrolled. It is exceedingly difficult to ascertain what matter was purportedly re-enrolled, unless one has knowledge of what was before the court, what was struck from the roll and/or withdrawn.
- [8] I address these matters in the order that I make. I also address further contempt proceedings in the order that I make. I do so, as it is predictable from the history that I set out below, that more contempt proceedings will follow. It seems also to be necessary to compel the applicant to follow due process. I am in no way unsympathetic to the applicant. Her case is that she is in need of maintenance, maintenance that the respondent does not pay. This does not justify the jettisoning of due process aimed at imprisonment.

[9] In order to obtain an order to imprison the first respondent and/or the Commissioner of Police for contempt of a court order, a court has to be satisfied beyond reasonable doubt of four matters:¹

[9.1] the existence of the order;

[9.2] that the order was duly served on, or (duly) brought to the notice of, the respondent;

[9.3] there must be non-compliance with the order; and

[9.4] the non-compliance must be wilful and *mala fide*.

[10] The last requirement wilful and *mala fide* non-compliance could be inferred from the failure by the respondent to appear to state why he did not comply with the order. See *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42:

“[42] To sum up:

- (a) *The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
- (b) *The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.*
- (c) *In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*
- (d) *But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*
- (e) *A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”*

[11] As these are motion proceedings, they have to be adapted to constitutional requirements, to offer analogous criminal law protection especially for the

¹ See *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35 para 75.

inference of wilful and *mala fide* non-compliance to be drawn. One requirement is already built into the Practice Manual, personal service. In criminal proceedings, the rights of an unrepresented accused have to be explained. This includes of explaining to that person the effect of failing to put a version to a witness and/or to dispute evidence by a witness. The same should hold true for contempt of court proceedings. A respondent should be advised of the consequences of a failure to appear at the hearing of the application in which imprisonment is sought and/or the failure to provide reasons (in these cases) for non-payment or non-arrest of the first respondent. This is of particular importance where the respondent may be too poor to afford legal representation and may have no knowledge of an inference to be drawn from silence. A further analogous protection to be borrowed from criminal law, would be that the respondent should be advised of the availability of free legal representation by the entities that provide such services. At present in this court include Legal Aid South Africa, the law clinics of the two universities in Johannesburg, and ProBono.Org. It also seems to me that arrest only on the strength of a warrant of arrest would be a further analogous safeguard to due process. Lastly, the court would have to decide if direct imprisonment is the appropriate remedy, if a suspended sentence is appropriate, or if the appropriate order is that the police must arrest the respondent and bring the respondent before a court for an enquiry..

- [12] All cases dealing with urgency, must be read in the context of the time. For instance, our well-known *Luna Meubels*² was decided in a time when access to court on the normal court roll in a very short time as possible (good law as it undoubtedly still is). Similarly, judgments of the 1980's, 1990's and 2000's were given when access to court in a very short time on the normal court roll, was possible. These matters differ between divisions. Longer periods for enrolment, may require greater flexibility in the urgent court to ensure access to justice but this does not mean a rough-and-ready approach is permissible. There is a belief that all contempt of court matters are so-called "*inherently*

² *Luna Meubels Vervaardiges (Edms) Bpk V Markin And A (t/a Makin's Furniture Manufactures)* 1977 (4) SA 1035 W.

urgent". Under this reasoning, adequate time for a respondent to obtain legal representation, take advice, put up a defence, and prepare for a hearing, are often jettisoned. Nothing could be farther from the truth. These matters require appropriate time limits, dependent on the facts of each case. If ignored, they too stand to be struck from the roll.

- [13] The summary of findings earlier herein about the litigation instituted by the applicant, was prepared from my attempts to put together a chronology of events from those documents I could gain access to. The records are incomplete.
- [14] The applicant and the first respondent were married, and were divorced before Mabesele J on 09 October 2018. The first respondent had to pay maintenance for two minor children in the sum of R29 707.95 per month, plus an annual escalation. The day of the month when payment had to be made, was not stipulated. The parties also agreed to share "*variable costs*" for the children. Later the first respondent would state that his attorneys at the time let him down, that unbeknown to him he was barred from pleading, and that he did not know of the order.
- [15] On 20 August 2019 the applicant obtained a dismissal by default of appearance of an application brought by the first respondent to vary the maintenance order. The order was granted by Dlamini AJ. Later the first respondent would state that his attorneys at the time let him down.
- [16] On 20 April 2020 the applicant issued an application to be heard on 28 April 2020 for the following relief:

- "1 *Directing that this matter be dealt as one of urgency in terms of Rule 6 (12) of the Rules of this Court;*
- 2 *That the Respondent is in contempt of the court order granted by Justice Mabesele on 09 October 2018 marked "A1", for failing to pay maintenance towards the children;*
- 3 *The sheriff be authorised to attach only monies in the Respondent's bank accounts (FNB, Account Number: ... and FBN, Account Number: ...) necessary for the payment of the maintenance in the sum of R29 707.95;*
- 4 *The Respondent to pay the costs, on a punitive scale."*

- [17] The amount of R29 707.95 may have been stated in error, as more seems to have been in issue, in fact R229 444.05 was alleged to be due if variable expenses were considered too. Coppin J seems to have struck the matter from the roll on 28 April 2020.
- [18] There appears to have been a re-enrolment or re-enrolments of the matter on 7 May 2020 and/or on 8 May 2020, which notice necessarily must have been issued on or after 28 April 2020. It is not clear what happened on 7 May 2020 and/or on 8 May 2020.
- [19] There then appears to have been a re-enrolment of the matter for hearing on 12 May 2020, when Francis J seems to have struck the matter from the roll. This necessarily means that the notice was issued at the earliest on 7 May 2020.
- [20] There appears to have been a re-enrolment of the matter for hearing on 19 May 2020, or a new application may have been issued. On 15 May 2020 the first respondent served an answering affidavit thereto. Relevant is that the first respondent alleged that he had no income, as his business had taken a change for the worse. He alleged that he paid what he could afford, being a minimum of R18 300.00 per month, excluding certain rental income of R15 000.00 per month. He also alleged that he had no knowledge of the maintenance payment ordered when the order of divorce was granted. It is not clear what happened on 19 May 2020.
- [21] Somehow a matter came before Vally J. The first respondent was represented before Vally J. It is not clear if it is the matter of 19 May 2020, or a new matter. It may have been a new matter as Vally J issued an order on 1 June 2020:

- “1 *The respondent is to pay the applicant the sum of R50 000.00 on or before 10 am on 5 June 2020*
- 2 *The respondent will continue to pay the applicant the sum of R50 000.00 each month for a further period of eleven months from the 1 July 2020 which amount shall be paid on the first working day of the month.*

3 *The respondent will after twelve months from the date of this order continue to pay the applicant the amount referred to in paragraph 4 of the order of Mabesele J dated 9 October 2018.*

4 *Each party shall pay its own costs."*

[22] On 10 June 2020 another urgent application followed, enrolled for 17 June 2020:

"1 *Directing that this matter be dealt as one of urgency in terms of Rule 6 (12) of the Rules of this Court;*

2 *That the Respondent is in contempt of the court order granted by Justice Vally on 01 June 2020 marked "A1 ", for failing to pay maintenance towards the children on 05 June 2020.*

3 *Direct the South African Police to immediately arrest the respondent and commit him for six month for being in contempt of the above mentioned court order.*

4 *The Respondent to pay the costs, on a punitive scale."*

[23] It seems that this matter did not make it to a court roll on 17 June 2020. On 22 June 2020 notice of another urgent hearing followed, enrolled for 30 June 2020:

"TAKE NOTICE THAT the Applicant apply to this Court that the matter be re-enrolled at 10h00 on 30 June 2020."

[24] Attached thereto was the 10 June 2020 application. This matter seems to have been struck from the roll by Mahalelo J.

[25] On 2 July 2020 notice of another urgent hearing followed, enrolled for 7 July 2020:

"TAKE NOTICE THAT the Applicant apply to this Court that the matter be re-enrolled at 10h00 on 7 July 2020."

[26] This matter seems to have been struck from the roll by Twala J on 7 July 2020.

[27] On the same day, 7 July 2020, notice of another urgent hearing followed, enrolled for 10 July 2020:

"TAKE NOTICE THAT the Applicant apply to this Court that the matter be re-enrolled at 10h00 on 10 July 2020."

[28] It seems that Yacoob J granted the following order on 10 July 2020:

- "1 *The matter is urgent.*
- 2 *The respondent is in contempt of the court order granted by Justice Vally on 1 June 2020 marked "A1";*
- 3 *The Respondent is ordered to purge the order marked A1 by paying the sum of R 100,000.00 to the Applicant within a day of the service of this order;*
- 4 *Should the Respondent fail to comply with the order in paragraph 3 above, the South African Police Service in the Republic of South Africa is ordered to arrested the Respondent being in contempt of the order marked A1 and this order, on the first court day after failure to comply with paragraph 3 above.*
- 5 *Upon his arrest the Respondent must show cause why he should not be committed for 30 days.*
- 6 *The Respondent is ordered to pay the costs of this application.*
- 7 *The Applicant is directed to serve this order immediately by way of message to the respondent's cellphone number, as well as by any email address the respondent may have, and to ensure personal service on the respondent."*

[29] On 8 September 2020 an urgent application was issued, to be enrolled for 15 September 2020. The second respondent was stated to be "National Commissioner of Police Khehla John Sithole". The relief sought was:

- "1 *Directing that this matter be dealt as one of urgency in terms of Rule 6 (12) of the Rules of this Court.*
- 2 *The Second Respondent are in contempt of the order marked A4.*
- 3 *The Second Respondent take steps, necessary to purge the contempt of the order marked A4 within 2 days of this order;*
- 4 *The Second Respondent to file affidavit within 5 days explaining why he should not be arrested and committed for being in contempt of the order marked A4.*
- 5 *The Second Respondent to pay punitive costs."*

[30] The document contained no proof of service. The founding affidavit contained no proof of compliance with paragraph 7 of the order by Yacoob J. Instead the applicant stated:

"On 17 July 2020, I served the police at the Booyens Police Station with the Judge Yacoob's order and to enable them to effect the arrest of the First Respondent."

- [31] On 14 September 2020 the applicant withdrew an application. The document has the heading “*notice of withdrawal*” and it reads: “*TAKE NOTICE THAT the Applicant withdraw the urgent application in the above matter.*” The document contained no proof of service, and did not contain an offer to pay wasted costs.
- [32] On 17 September 2020 followed a new notice of motion and its annexures. It was an urgent application and was enrolled for 22 September 2020. The second respondent was stated to be “*National Commissioner of Police Khehla John Sithole*”. The relief sought was “*the second respondent be joined to these proceedings*”. What relief would be sought once joined, was not stated. The document contained no proof of service.
- [33] On 18 September 2020 followed a document with the heading “*Urgent Application: Amended Notice of Motion*”. It was said to be enrolled for 22 September 2020. It was not preceded by a notice of intention to amend. The document contained no proof of service. The additional relief sought (excluding urgency and the joinder of the second respondent) was that:
- “3. *The second respondent be compelled to take steps, necessary to comply with the order marked A4 within 2 days of this order and arrest the first respondent;*
4. *The second respondent to pay punitive costs.*”;
- [34] I later learnt that this matter was struck from the roll by Strydom J on 22 September 2020.
- [35] On the same day, 22 September 2020 the applicant prepared a document with the heading “*Notice of Re-Enrolment*”. It reads: “*TAKE NOTICE THAT the applicant apply to this Court that the matter be re-enrolled at 10:00 on 29 September 2020.*” What application was re-enrolled, was not stated. The document contained no proof of service. The respondents had to deliver answering affidavits by 28 September 2020.
- [36] I took over in urgent from *inter alia* Strydom J late on 23 September 2020. I noticed that in the electronic file was a certificate of urgency prepared by attorney Marweshe on 24 September 2020. The document did not disclose

that the application was struck from the roll the previous week by Strydom J on 22 September 2020. Attorney Marweshe was duty bound to bring this fact to my attention, but he failed to do so. Also in the file were a practice note and a draft order. The Draft order sought slightly different relief to the relief set out in the notice of motion of 17 September 2020 or the purported amended notice of motion dated 18 September 2020. The differences are not material for present purposes, but should have been brought to my attention. The file contained an affidavit of service by attorney Marweshe dated 28 September 2020.

[37] The application(s) were not served on the first respondent. The affidavit contains no proof either of compliance with the order by Yacoob J. Service on the State Attorney was defective too. A note by the state attorney relied upon setting out e-mail addresses for service, also contains a request that they be phoned when documents are served by e-mail. Compliance with this request was not alleged.

[38] As there was no compliance with the order by Yacoob J, the police could not have arrested the first respondent. In addition, no case for an amendment of the Notice of Motion dated 17 September 2020 has been made out. In addition, the applications before me, were not properly served. It seems to me that the appropriate remedy is not another round of confusing supplementary documents.

[39] In the premises I make the following order:

1. The applications dated 17 and 18 September 2020, are struck from the roll with costs;
2. The applicant is ordered to serve by Sherriff the following court orders on Mr T H, further referred to as "*the first respondent*", unless a court on application authorises alternate or substituted service-
 - 2.1. The order dated 1 June 2020 by Vally J;
 - 2.2. The order dated 10 July 2020 by Yacoob J; and
 - 2.3. This order;

3. The applicant may not seek the imprisonment of the first respondent
contempt of court for non-payment under a court order-
 - 3.1. Unless ten days have expired after compliance with paragraph 2;
 - 3.2. Without having obtained a warrant of arrest and providing the original
of such warrant to the police for execution,
unless a court on application orders the variation of this paragraph;
4. The applicant is prohibited from enrolling an application in which it seeks
to join the police to this matter and/or compel the police to arrest the first
respondent for contempt of court for non-payment under a court order-
 - 4.1. Unless ten days have expired after compliance with paragraph 3;
 - 4.2. The application is served by the Sherriff on the police at its head
office not less than ten days before the hearing,
unless a court on application orders the variation of this paragraph;
5. The applicant is prohibited from enrolling an application in which it seeks
a further order against the first respondent for contempt of court for non-
payment under a court order -
 - 5.1. The application is served by the Sherriff on the first respondent not
less than ten days before the hearing;
 - 5.2. The applicant has duly adapted the notice of motion to to
constitutional requirements, offering to analogous protection as
applicable in criminal law appropriate to motion proceedings,
unless a court on application orders the variation of this paragraph;
6. The applicant is ordered to not to enrol an urgent application unless-
 - 6.1. The times for the delivery of the answering and replying affidavits
have elapsed, by Thursday 12H00 of the week preceding the
enrolment of the urgent application;
 - 6.2. The applicant has fully complied with this Court's Practice Manual
and Practice Directives for the enrolment of urgent applications,

unless a court on application orders the variation of this paragraph.

DP de Villiers AJ

Heard on: **29 September 2020**

Delivered on: **2 October 2020 electronically, by e-mail and by
uploading on CaseLines**

On behalf of the applicant: **Mr. MW Marweshe of Marweshe Attorneys**