

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

CASE NUMBER: 2020/4853

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: YES

*A. De Wet*  
A. DE WET

13 SEPTEMBER 2021

In the matter between:

KIVETTS, MAJEDA

Applicant

and

BRUGMANS, WERNER ALFRED JOHAN

Respondent

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JUDGMENT

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DE WET AJ:

1. On 8 June 2021 the applicant, a businesswoman, brought an application in terms of rule 6(12) of the Uniform Rules of Court against the respondent, a businessman, for the following relief:

- 1.1 An order declaring that the respondent is contempt of the court order which was issued in a rule 43 application, dated 21 May 2021;
  - 1.2 an order committing the respondent to prison for a period of a year, alternatively imposing a fine on the respondent in the sum of R100 000,00;
  - 1.3 suspending the committal or fine for a period of one year, alternatively that the court impose upon the respondent such sentence as it deems appropriate;
  - 1.4 an order that the respondent pay the costs of the application on the attorney/client scale.
2. The respondent opposed the application.
  3. At the hearing of the urgent application on 23 June 2021 the matter was removed from the urgent roll and the application was postponed to the opposed motion roll of 16 August 2021 and the issues relating to costs of the urgent application and urgency were reserved.
  4. The applicant brings this application as a consequence of the respondent's failure to comply with a rule 43 court order dated 21 May 2020, which order contained a patent error and which error was corrected on 25 May 2021 ("the rule 43 order").

5. In terms of the rule 43 order, the respondent was directed to:

- 5.1 Pay cash maintenance *pendente lite* to the applicant in the amount of R65 000,00 per month with effect from 28 May 2021, and thereafter by no later than the last working day of each succeeding month ("the cash maintenance");
- 5.2 retain the applicant on the Discovery Classic Plan as well as pay any necessary reasonable excess, not covered by the plan, including the cost of hospitalisation, treatment and/or medical expenses and medication as a result of the applicant's prevailing health and related conditions;
- 5.3 hand to the applicant's attorneys the current licence disc of the Porsche Panamera within 48 hours of the order;
- 5.4 continue to pay the monthly instalments and insurance premiums in respect of the Porsche Panamera;
- 5.5 make a contribution towards the applicant's legal costs in the amount of R250 000,00 by 28 May 2021 ("the cost contribution");

6. The costs of the rule 43 application were reserved.

7. The applicant herein contends that the respondent is in contempt of the rule 43 order as a consequence of:
  - 7.1 his failure to hand over the current licence disc of the Porsche Panamera within 48 hours of the rule 43 order;
  - 7.2 his failure to pay the full amount in respect of the cash maintenance to the applicant on or before 28 May 2021;
  - 7.3 his failure to pay the amount of R250 000,00, being the costs contribution, on or before 28 May 2021.
8. It is common cause that the respondent at all material times had knowledge of the rule 43 order and his obligations in terms thereof. It is further common cause that the respondent has not complied with all his obligations under the rule 43 order.
9. The respondent delivered the current licence disk of the Porsche Panamera to the applicant, albeit 11 days after the date that he was directed to do so. He afforded a reasonable explanation for his failure to comply with his obligation in this regard. Consequently, it is not necessary to further deal with this complaint.
10. The respondent paid an amount of R35 000,00 to the applicant on 28 May 2021. The respondent contended, in the rule 43 application, that the applicant would

require R34 045,91 per month to provide for her maintenance requirements. One may conclude that he, notwithstanding the rule 43 order, still held the view that she would not require more than the foresaid amount.

11. The respondent on 8 June 2021, after the urgent application had been brought, paid the balance of the cash maintenance, being R30 000,00. In addition, he on the same day paid the amount of R40 000,00 to the applicant as a “first instalment” towards the costs contribution.

12. The issues to be determined herein are as follows:

12.1 Whether the application was properly brought in terms of rule 6(12) of the Uniform Rules of Court;

12.2 whether the respondent’s failure to comply with the rule 43 order was wilful and *mala fide*.

13. The applicant, in support of the relief claimed, relies on the judgment of Fakie N.O. v CCII System (Pty) Ltd <sup>1</sup>, where the Supreme Court of Appeal held that once the applicant has proved the existence of a court order, notice thereof to the respondent and non-compliance by the respondent with the court order, the respondent bears an evidentiary burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence that establishes a reasonable

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<sup>1</sup> 2006 (4) SA 326 (SCA)

doubt as to whether his non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt.

14. The applicant further referred to *Nyathi v MEC for Department of Health, Gauteng & another*<sup>2</sup> in which judgment the Constitutional Court at paragraph [80] held as follows:

*"Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That in my view means at the very least that there should be a strict compliance with court orders."*

15. The respondent contended that the application was not urgent, that the applicant *inter alia* submitted insufficient reasons for urgency and the fact that the applicant will be afforded substantial redress in due course all demonstrate that the matter is not as urgent as contended by the applicant.

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<sup>2</sup> 2008 (5) SA 94 CC

16. In *Uncedo Taxi Service Association v Maninjwa & others*<sup>3</sup> the court held at 429 G-H that all matters of contempt are relatively urgent. In *Protea Holdings Ltd v Wriwt & another*<sup>4</sup> the court held that the required element of urgency would be satisfied if in fact it was shown that the respondent was continuing to disregard the court order and there was a continued breach thereof. The applicant argued that the failure of the respondent to comply with the court order, which failure he did not remedy in respect of the costs contribution, rendered the application urgent. In addition, the respondent has further failed to comply with his obligations in terms of the court order for July 2021 and August 2021.
17. The rule 43 order provides for maintenance for the applicant. She testified that she was not able to pay her most basic requirements as a consequence of the respondent's failure to comply with the court order. In addition, she contends that she is severely prejudiced as a consequence of the respondent's failure to make the contribution to her legal costs as directed, as she is not able to advance her litigation against the respondent and pursue her lawful claims. Such inability impacts on various rights of the applicant including her constitutional right to access to the court.
18. The application is before this court on truncated time periods and on an anticipated date for the hearing. Considering the caseload of this division, an application in the normal course would not have resulted in a hearing of the issues

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<sup>3</sup> 1998 (3) SA 417 E

<sup>4</sup> 1978 (3) SA 865 (W)

herein for an extended period. I find that, considering the nature of the terms of the rule 43 order and the circumstances of the parties that there is such a measure of urgency that the applicant cannot be faulted in having approached the court in terms of the provisions of rule 6(12) of the Uniform Rules of Court.

19. The respondent joins issue with the applicant when she contends that he is attempting to reargue the rule 43 application, that his arguments herein are *res judicata* and that the respondent is estopped from relying on and explaining his worsened financial position as he had similarly relied on such facts in the rule 43 application and at the hearing thereof.
20. The respondent relies herein on the absence of funds and means to justify his failure to comply with the rule 43 order. He does so in an attempt to discharge the evidentiary burden which he bears in relation to wilfulness and *mala fides*. His financial position and means are accordingly central to the issues herein
21. I find that the respondent is entitled to place all relevant facts before this court on which he may wish to rely to prove his inability to comply with the rule 43 order. Accordingly, I do not uphold the applicant's argument that the issue of the respondent's inability to pay is *res judicata*.
22. The respondent similarly referred to Fakie *supra* and particularly where the Supreme Court of Appeal elaborated, on page 33 of the judgement, on the test to be applied in matters of contempt of court:

[9] *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 himself – 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).*

[10] *These requirements – that the refusal to obey should be both wilful 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 a deliberate and intentional violation of the Court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."*

23. It is trite that the requirements for contempt must be satisfied beyond a reasonable doubt if enforcement is sought by way of criminal sanction.
24. The respondent filed lengthy affidavits setting out his financial difficulties in an attempt to demonstrate that he is not *mala fide* in his failure to comply with the

court order. He further contends that he will not be able to comply with the court order in future.

25. The respondent stated that he is and has been, since prior to the rule 43 application, reliant on credit, to wit his overdraft facilities and credit cards, which he rolls in order to meet his financial obligations. In support of these contentions he attached numerous bank statements and credit card statements evidencing the numerous transfers between the various accounts. Such accounts include accounts in the name of Werner Brugmans Family Trust, IT 4972/2003 of which he is the founder, a trustee as well as an income and capital beneficiary.
26. The trust is the shareholder in the majority of the companies of which the respondent is a director. Much of his income, he informed, is generated by the assets of the trust. He has the benefit of residing in a property registered in the name of the trust. Yet, he failed to take the court into his confidence and disclose the financial affairs of the trust.
27. He contends that the amounts awarded in terms of the rule 43 order are substantial amounts which he could not "scrape together" timeously or without completely depleting his credit facilities and/or ignoring other financial commitments and obligations.
28. In his financial disclosure form, which he attested to on 28 April 2021, which formed part of the papers in the rule 43 application, and to which reference was

made in this application, the respondent disclosed the value of his assets as R19 396 593, 75, his liabilities as R 1524 640, 48 and his net asset value as R18 146 130, 73. He further recorded therein that he had sold a gaming machine to a certain Brett for R245 000, 00, to meet his obligations. He has not provided an explanation herein why he cannot use his assets, which are substantial, to comply with the rule 43 order. The financial disclosure form was deposed to subsequent to the sale but prior to the transfer of an immovable property, referred to as the Comanche Street property, to the purchaser.

29. The respondent disclosed his monthly expenses as R142 550, 29, which amount includes the expenses relating to the Comanche Street property and the amount of R19 739.08 which he pays as maintenance for his two dependant sons. He gives extensive explanations as to the extent to which COVID-19 Pandemic and the downturn in the economy has impacted upon his various business interests, which are numerous and wide ranging.
30. The respondent earns an income as director from three companies, namely Express Model Trading, Bright Path Investments and Build Line Projects. He further relies on income generated by investments in business ventures and properties. He has arranged his affairs such that his income from the above entities is paid directly to SARS, being an amount of approximately R145 157, 00 per annum, R12 096, 41 per month, and that he usually receives an annual refund, the last which amounted to R137 168, 50 during November 2020.

31. The respondent refers to drawings that he and the trust receive which are deducted from loan accounts of the trust against various entities. The extent of the loan accounts are not disclosed. These entities include Express Model Trading, Bright Path Investments, Build Line Projects and Jokosi Properties. Mr L 'Ecluse, a close friend and business associate of the respondent, administers these drawings and transfers it into the respondent and the trust's accounts respectively. The amounts so disclosed for the past six months amount to approximately R517 151, 38, being an average of R86 191,73 per month. The respondent received into his accounts approximately R58 104, 29 per month. He received a further amount of R15 000,00 which he paid as maintenance for his children. He contends that his total monthly income from the corporate entities, be it income or drawings amounts to R73 104,29 per month. The respondent disclosed that he receives a limited amount and an irregular payment of rental in respect of a property known as Wollies place. He does not appear to have taken steps against this tenant who pays the rental and arrears as and when she is able to do so.
32. The respondent informed that he does not qualify for further credit nor a personal loan.
33. The respondent's ongoing monthly expenses far exceed his disclosed income. The declared income and the rolling of credit cannot fund the disclosed living expenses. He does not explain this discrepancy.

34. On carefully considering the contents of the various bank statements and other annexures to his opposing papers, the respondent's contention that he has attempted to comply with the court order as far as possible but that he could not manage to make all payments timeously or in full due to his financial position, rings hollow.
35. The following facts demonstrate that the respondent's contention that he had no funds with which to comply with his obligations in terms of rule 43 application is untrue.
36. The respondent, at the hearing of the rule 43 application, was still the registered owner of the immovable property known as the Comanche Street property. It had been sold to a third party for an amount of R1 700 000, 00, but as at date of the hearing of the rule 43 application the transfer had not yet been effected. The transfer was effected on 26 May 2021 and the net proceeds of the sale of the property amounted to R799 169, 63. He did not utilise the proceeds of the sale or any part thereof to comply with his obligations in terms of the rule 43 order.
37. On 28 May 2021 the respondent's attorneys of record, Van Andel-Brink Attorneys, in writing informed the applicant's attorneys that he will use the proceeds of the sale of the Comanche property to comply with his obligations in terms of the rule 43 order.

38. Shortly thereafter the respondent, in his answering affidavit, denies that his attorneys of record were mandated to address the letter in the terms contained therein to the applicant. No explanation for the letter and erroneous tender of his attorneys were provided save to deny the mandate of his attorneys to make the tender.
39. The respondent contends that on 5 April 2017 he concluded a lease agreement with Mr L'Ecluse for the rental of certain gaming machines to be used in one of the businesses in which he held an interest. He fell behind with the payments. Mr L'Ecluse started exerting pressure on him for payment of the arrear rental whereupon they entered into a settlement agreement, so he contends, in respect of the arrears on 6 May 2021 in terms whereof he undertook to pay the arrears to Mr L'Ecluse from the proceeds of the sale of the Camanche Street property. On 26 May 2021 Mr L'Ecluse's attorneys, Lood Pretorius-Erasmus Attorneys, addressed a letter to the conveyancers, Potgieter Incorporated, recording that the respondent is indebted to Mr L'Ecluse, their client, in the amount of R875 000,00 in respect of the lease agreements. In such correspondence Lood Pretorius-Erasmus Attorneys request that the conveyancing attorneys not pay the balance of the purchase price to the respondent but rather retain it until settlement has been reached between the parties, this against the background that there was no dispute and that the settlement agreement is dated 6 May 2021.
40. The date upon which the conveyancers agreed to retain the funds and not pay it to the respondent is pertinent, being 26 May 2021, two days prior to the date upon

which the respondent was obliged to pay the funds to the applicant in terms of the rule 43 order. The respondent does not contend that he made any attempt to arrange that a portion of the funds could be paid to the applicant in compliance with the court order, or that his friend of many years would give no further extensions of payment.

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41. The respondent yields to his friend and business partner's demand that he receive the entire net proceeds of the sale of the property to settle the debt, whereafter he contends that he had no funds with which to comply with the rule 43 order. This, notwithstanding that Mr L'Ecluse had displayed latitude to his friend for many years prior to May 2021 and him being the nominated beneficiary on no less than four of the respondent's policies. At that stage the respondent was fully aware of the terms of the rule 43 order and that he was obliged to pay to the applicant the cash maintenance and the costs contribution on 28 May 2021.
42. On 29 May 2021, after the transfer of Comanche Street property had been effected and the bond account settled, the respondent received an amount of R95 944,39 in respect of the surplus in the Access Bond over the Comanche Street property. He, rather than paying such amount to the applicant, in part compliance with his obligations in terms of the rule 43 order, albeit one day late, elected to pay the funds to Builder Boys, the builders who had been contracted to effect reparations to properties owned by him, including the Comanche Street property. He explained that this amount was paid to the builders as the debt was long overdue and payment had to be effected. He however, fails to explain why

he settles his debt to this creditor but fails to comply with the court order that obliged him to make payment to the applicant, his judgement creditor, by 28 May 2021. Further to the foregoing, upon having paid the builders there was, as example, an amount of R116 802,34 available in the respondent's First National Bank cheque account, ending with numbers 1835, which he did not use to comply with his maintenance obligations under the rule 43 order. He also had a balance of R33 197,66 available in his First National Bank cheque account with the number ending 1835. On analysing the respondent's various bank statements and credit facilities as at 28 May 2021 the respondent had in excess of R250 000, 00 credit available to him, after he had paid the builder, which he could and should have utilised towards payment of his judgement debt to the applicant. Yet he elected not to do so.

43. On the date upon which the respondent deposed to the answering affidavit, being 15 June 2021, he had credit available in the various facilities in the amount of R141 541,47, which included R44 203,93 on his FNB overdraft facility, R2 740,00 on his FNB credit card, R65 676,54 on his ABSA credit card (exclusive of the budge facility), R5 828,00 in on his Standard Bank credit card and R23 093,00 on his Virgin Money credit card.
44. The respondent informs that he did not utilise his available credit to comply with the rule 43 order as he would then not have been in a position to pay his own expenses. He does not explain why he provides for his own expenses, which are not insignificant, but fails to comply with the rule 43 order. This against the

background that the respondent was advised by his legal representatives to pay remaining funds in certain accounts to the applicant's attorney as part compliance with the contribution towards legal expenses. Such amounts, included funds available on his Discovery credit card, his Standard Bank Money Market account, his Standard Bank cheque account, his Altcoin Trader account. His failure to use the available funds towards payment of his obligations under the rule 43 order demonstrates his disregard for the authority of the court and the rule 43 court order.

45. The respondent explains that the payment of R30 000,00 as second payment towards the cash maintenance as well as R40 000,00 towards the costs contribution, were made late as the respondent wanted to ensure that his own debit orders were first deducted. In respect of the debit orders, he states that it also includes expenses on behalf of the applicant. Again, he does not explain why he ensured that his own payments are met prior to complying with the court order.
46. If regard is had to the daily use of the respondent's credit cards and bank accounts, the court notices regular payment of expenses which cannot constitute necessary expenses of the respondent and are clearly expenditure on a lavish lifestyle. Numerous purchases are made virtually on a daily basis at Woolworths, various upmarket restaurants, luxury purchases, Netflix, entertainment, payment of traffic fines, all between date of judgment and date of the urgent application for contempt of court.

47. Notwithstanding the downturn in the economy and the effect of the pandemic on the businesses and therefore income of the respondent, he appears to continue enjoying a lavish lifestyle. I cannot but conclude that the respondent's conduct hereinabove demonstrates that he had scant regard for his obligations under the rule 43 order, that he continued with his chosen lifestyle, that he did not deny him the luxuries of life, that he paid his debts to creditors, colleagues and friends, that he ensured that there were sufficient funds to meet his own maintenance needs and personal debit orders, all whilst being fully aware that he had obligations to fulfil in terms of the rule 43 order.
48. The respondent could and should have arranged his affairs differently but elected not to do so.
49. Further to the above, the respondent does not seriously, if at all, contend that he was of the honest belief that he could act as he elected to do. I cannot find that he was *bona fide*, but mistaken, when he settled his debt to the builder or when his conveyancer agreed on his behalf to not release the proceeds of the sale of the Comanche Street property to him which would have enabled him to comply with the rule 43 order.
50. I am not persuaded by the respondent's evidence that he endeavoured to comply with the court order.

51. On a careful consideration of all the evidence before the court I find that the respondent's failure to comply with the rule 43 order has been wilful and *mala fide*. I further find that the applicant has proved beyond a reasonable doubt that the respondent is in contempt of court. Consequently, I hold the respondent in contempt of the rule 43 order and the court.


52. The applicant contends that the respondent's conduct displayed such a degree of contempt for the rule 43 order that costs should be awarded against him on a punitive scale. I am persuaded by her submission that the respondent's conduct herein demonstrates that he has little if no regard for the authority of this court and that the court should display its displeasure at such attitude and conduct of the respondent by directing that he should pay the costs of this application on an attorney / client scale and in so finding and in so doing, restore the dignity and repute of the court.

53. Consequently, the following order is made:

1. Werner Alfred Johan Brugmans ("the respondent") is in contempt of court in failing to comply with the court order which was handed down by his Lordship Acting Justice Majavu on 21 May 2021 read with the order dated 25 May 2021 ("the rule 43 order"), which was granted in the rule 43 application under case number 04853/2020;

2. The respondent is directed to pay, within 30 days of the granting of this order:
  - 2.1. The balance of R210 000, 00 in respect of the contribution to the applicant's legal costs;
  - 2.2. The arrear cash maintenance for the months July 2021 and August 2021 in the amount of R106 680, 00;
  - 2.3. Any necessary and reasonable excess not covered by the Discovery Classic Plan, including the costs of hospitalisation, treatment and or medical expenses and medication as a result of the applicant's health and related conditions, which remains due and payable by the respondent as at date hereof;
3. A warrant of arrest is to be issued forthwith committing the respondent to imprisonment for contempt of court for a period of 30 (thirty) days;
4. The warrant of arrest is only to be executed in the event that the respondent fails to pay the amounts set out in paragraph 2 above and in so doing purge his contempt of the rule 43 order within 30 (thirty) days of the granting of this order, such time period to be calculated from the date of email transmission of this order to the respondent's attorney, Van Andel-Brink Attorneys;

5. The respondent shall pay the costs of the application on the attorney / client scale, including the costs reserved on 25 June 2021.

  
A. DE WET  
*Acting Judge of the High Court  
Gauteng Local Division, Johannesburg*

Heard:	16 August 2021
Judgment:	13 September 2021
Applicant's Counsel:	Adv. C.J.C. Nel
Instructed by:	AF Coetzee Attorneys
Respondent's Counsel:	Adv. M. Haskins SC and Adv. H.J. Basson
Instructed by:	Van Andel Brink Attorneys