REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: Yes / No
(2)	OF INTEREST TO OTHER JUDGES: Yes / No

_____ _____

DATE SIGNATURE

Case No.: 12496/2019

In the matter between:

S[....], V[....] M[....] (BORN M[....]) Applicant

and

S[....], A[....] Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email.

Gilbert AJ:

1. This application is about the enforcement of an order granted in terms of Uniform Rule 43 in terms of which the respondent was ordered to pay maintenance to the applicant and for his three children and which provides him access to his children including removing them from the applicant's residence. The respondent short-paid R6 000.00 of his total maintenance obligation of R27 835.00, which was due on 1 May 2020. Eighteen days later the applicant launched contempt proceedings because of this short-payment. The respondent, a salaried architect, says that he was unable to pay the full amount because his salary had been reduced by his employer because of the Covid-19 pandemic. The respondent was able to make up the shortfall on 3 June 2020 when he received Covid relief funds. The applicant, who describes herself as an unemployable housewife, persists in her application that the respondent be held in contempt and further that should he again breach his maintenance obligations that he be committed to prison.

2. The respondent has counter-applied for a declaratory order that the applicant abide the court order in relation to his access to his three children. It is common cause that the applicant did not permit the respondent to remove the children from her residence although the

order provides for removal. The applicant seeks to rely on the health risks posed by Covid-19 to justify her conduct.

3. The respondent also has counter-applied for a temporary reduction in his maintenance obligations for the period that his salary has been reduced.

4. For the applicant to succeed in establishing that the respondent was in contempt of the order she would have to demonstrate that there was an order, that there was service or notice of the order, that there was non-compliance with the order by the respondent and that he did so wilfully (deliberately) and with *mala fides*.[1] Should the applicant prove the order, the service or notice of the order and the non-compliance of the order by the respondent, the respondent will bear the evidential burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence that establishes a reasonable doubt whether his non-compliance of the order was wilful and *mala fide*, contempt will have been established beyond a reasonable doubt.[2]

5. There is no dispute that there is an order, that the respondent had notice thereof and that he failed to comply with the order by reason of his short-payment of R6 000.00 for the month of May 2020.

6. It is therefore necessary to consider the evidence on the affidavits to establish whether the respondent has demonstrated a reasonable doubt

[1] *Fakie NO v CCII Systems (Pty) Limited* 2006 (4) SA 326 (SCA) at para 9 and 10.
[2] *Fakie* above at para 42; and applied in the context of enforcing an interim order in matrimonial proceedings in *Dezius v Dezius* 2006 (6) SA 395 (T) at para 17 and 18.

as to whether he wilfully and with *mala fides* failed to comply with the order.

7. The facts relied upon by the respondent are either common cause or not seriously disputed.

8. Both applicant and respondent stay with their respective parents, who assist them financially. The respondent also has financial assistance from his brother. The three children stay with the applicant at her parent's home. Both parents continue to hold full parental responsibilities and rights in respect of their minor children.

9. The respondent's maintenance obligations for the month of May 2020 totalled R27 835.00. Before his salary was reduced, it was R35, 722.84. after deductions. This meant that the respondent paid 78% of his net salary towards his maintenance obligations. This is the effect of the order by Bam AJ in the rule 43 proceedings in February 2020.

10. The respondent explains that he also in May 2020 paid R1 673.00 for cellular phone charges for a cellular phone that was in the possession of the applicant and/or his children so that he could have telephonic contact with his children. If this additional amount is taken into account, over 83% of his net salary was being paid towards his maintenance obligations and exercising his rights of contact.

11. It is not surprising that Bam AJ in the rule 43 judgment said of the respondent that the evidence did not "*characterise him as someone who is shying away from maintaining his family*".

12. The respondent explains that because of the effect of the national lockdown brought about by the COVID-19 pandemic, his employer with effect from April 2020 reduced his salary by some 20% so that he no longer received a net amount of R35 722.84, but only R29 110.15.

13. On 29 April 2020, the same day that the respondent was informed by his employer of the salary reduction, his attorneys wrote to the applicant's attorneys informing them of this reduction in salary, recording that he would make payment of his maintenance obligations but that instead of paying his maintenance obligations of some R27 925.00,[3] he would be paying R6 000.00 less. The letter attached various correspondence from the respondent's employer demonstrating that application had been made for a suspension of the respondent's provident fund contributions and that this should be approved, and a reimbursement made of his provident fund contribution, that amount would be paid to the applicant.

14. The applicant's attorneys responded the next day, 30 April 2020, insisting that the respondent must nevertheless comply with his full maintenance obligations under the order and that full payment was to be made on 1 May 2020, failing which contempt proceedings would be launched. The covering letter to the email records that the applicant's

[3] Depending upon which figures in the affidavits are used, there are calculation differences of a few hundred rands but these differences are not materially relevant for present purposes.

attorneys were in the process of preparing the contempt application and would be proceeding on an urgent basis to court if the full maintenance obligation was not paid.

15. It bears repeating that on these undisputed figures, the applicant expected the respondent to pay over some R27 925.00 of his net salary of R29 110.00, that is 96% of what he had earned, leaving for himself an amount of R1, 185.00. Should the applicant in addition pay the amount of R1 673.00 in respect of the cell phone in the possession of the applicant and his children, he would be left with no monies.

16. These figures go a long way in establishing that there is at least reasonable doubt as to whether respondent wilfully and *mala fide* breaching the order when he did not make full payment of the maintenance on 1 May 2020. The amount that was paid over by the respondent to the applicant on in May 2020 notwithstanding the reduction in his salary still constituted some 75% of his net income (81% if the cell phone charges are included). This percentage is in line with that as was ordered by the court some three months earlier in February 2020. Whilst I appreciate that the order has not been varied to allow for such lesser payment, as these figures demonstrate, for the respondent not to have breached the court order he would have had to pay over virtually his entire salary.

17. In establishing reasonable doubt the evidence does not end there. Upon the respondent immediately upon being informed of his salary

reduction, his attorneys informed the applicant's attorneys. He did so even before the payment became due on 1 May 2020. As undertaken by him in his attorney's letter of 29 April 2020, he did make payment of that he said he could afford for May 2020. This is what is expected of a person who is not *mala fide*.[4] The respondent also made good on his undertaking to make payment of the shortfall as soon as he was able. On 31 May 2020 the respondent received a reimbursement of a provident fund contribution and on 3 June 2020 also received payment from the TERS/UIF relief scheme and paid the shortfall on 4 June 2020. The respondent was therefore in arrears of a portion of his maintenance obligations for May 2020 for little more than a month.

18. The respondent has also made a sufficiently full disclosure of his financial circumstances to justify his short-payment for that month.

19. The applicant seeks to counter this compelling evidence adduced by the respondent why he default is not deliberate and *mala fide* by contending that instead of the respondent deducting the shortfall on his usual salary from his maintenance obligations, he should have rather reduced his expenses . This argument is unpersuasive, where even if the respondent had no expenses at all, which was not the case, he was still required to pay over virtually his full salary.

20. Nevertheless, the respondent persuasively sets out in his answering affidavit that such expenses he does have cannot be reduced. The

[4] Per Kollapen J in *D v D* [2016] ZAGPPHC 368 (16 May 2016)

respondent explains that he still needs to pay his own medical aid (a decision for which he cannot be faulted in light of the raging COVID-19 pandemic, particularly in May 2020), to pay costs towards his motor vehicle which he explains is used to do grocery shopping for the applicant and his children and to visit them as well as to get to and from work in order to earn an income as well spend a modest amount of R1 000.00 for his food, fuel and entertainment when he is with his children. It is difficult to see what expenses the applicant expected the respondent to reduce so that he must pay more than he did for May 2020.

21. When considering these figures one may wonder what other source of income the respondent may have given that even before his salary reduction, he had very little left for himself in order to survive. It is common cause on the papers that the respondent receives considerable assistance from his family, such as his parents with whom he continues to stay and his brother who assists in payment of legal fees. There is no evidence that the respondent has some other source of income or assets stored away that he can draw upon that would render his failure to make payment of the May 2020 shortfall as contemptuous.

22. The applicant submits that the respondent's decision to rather pay his lawyers the monies sourced from his brother instead of satisfying his maintenance obligations in full, is demonstrative of a wilful and *mala fide* breach of the order. This submission is misguided in several respects. It is not a decision whether to pay maintenance or pay lawyers. It was the

applicant who launched these contempt proceedings on 18 May 2020. Should the respondent not have engaged lawyers, he was at risk of being imprisoned should he have been found in contempt. It was more accurately a choice as to whether he pay maintenance or to go to jail. That the respondent chose to pay his lawyers in these circumstances cannot be indicative of a wilful and *mala fide* breach of the order. There is also no indication that if he did pay the shortfall that the applicant would not have initiated or persisting in her contempt application. The respondent did pay the shortfall on 4 June 2020 but the applicant persisted in these proceedings. It is the applicant who chose to bring the respondent to court and therefore cannot complain should the respondent engage lawyers to effectively defend his liberty.

23. To the extent that the respondent had to pay legal fees arising from the earlier rule 43 proceedings, there too it is was the applicant who elected to engage the respondent in litigation. There does not appear to be any indication from the judgment of Bam AJ that the applicant received a maintenance order in favour of her and the children that went substantially further than what the respondent was prepared to pay in any event. I also cannot be blind to the applicant, who describes herself as a unemployed housewife, has herself found the resources to pay for senior lawyers, electing to bring contempt proceedings for a single short-payment of maintenance rather than to make use of those funds to support herself and her children.

24. The following passage from Krishnaiyer J[5] in the Supreme Court of India in *Jolly George Verghese and Another v Bank of Coc*hin[6] is apposite:

> *"The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not a mere omission to pay but an attitude of refusal or demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently."*

25. In the circumstances, I find that the respondent has adduced sufficient evidence that there is reasonable doubt whether his breach of the order was committed 'deliberately and *mala fide.'*[7]

26. The applicant has failed to demonstrate that the respondent is in contempt and therefore must fail in her application.

27. The respondent having purged his default and the applicant persisting in seeking that the respondent nevertheless be held in contempt and that a sentence of imprisonment be suspended provided that he continued to

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[5] With Pathak J concurring.

[6] [1980] INSC 20 ([1980] 2 SCR 913) at 921 - 2 (SCR), as cited with approval in *Dezius* above in para 28.

[7] Although wilfulness (i.e. whether the order was disobeyed deliberately) and mala fides are separate requirements (*Clement v Clement* 1961 (3) SA 861 (T) at 866A), it is unnecessary on the facts in the present instance to precisely delineate whether or not the respondent's breach was wilful (deliberate), as there is at least reasonable doubt whether the breach, even if deliberate, was *mala fide*.

comply in the future with his maintenance obligations led to some debate as to whether such relief was competent in relation to breaches that had not yet taken place. This led to the parties, after I had reserved judgment and at my invitation, uploading additional submissions and authorities, for which I am grateful. The applicant also uploaded an amended draft order relating to the conditions of the suspension of sentence following a finding of contempt. The adaptions made by the applicant to her initial relief by way of this draft order appears to be informed by the judgment of Snyckers AJ in *A R v M N*[8] in which the court specifically provided for the applicant to return to court on the same papers duly supplemented for the upliftment of the suspension of the sentence of imprisonment in the event that the respondent again breached the order. But as I have found that the respondent is not in contempt, the issue as to formulation of an appropriate sentence and the suspension thereof need not be considered.

28. The respondent contends that the application was an abuse and seeks costs on an attorney and client scale. The respondent gave notice in his answering affidavit that such a costs order would be sought.

29. The evidence adduced by the respondent was largely known to the applicant before she launched her contempt proceedings. To the extent that such evidence was not available, it was included in the answering affidavit. Although the respondent had purged his breach of the order by 4 June 2020 and had explained his default in his answering affidavit, the

[8] [2020] ZAGPJHC 215 (21 September 2020)

applicant persisted in seeking that the respondent be held liable for contempt for his default in May 2020.[9]

30. The sudden onset of the COVID-19 pandemic caused widespread suffering and financial distress, and still does, to many, including the parties in this matter. The applicant has not disputed substantively any of the evidence adduced by the respondent in relation to the effect of the Covid-19 pandemic on his salary, yet persisted in the contempt application.

31. The applicant's insistence that the respondent pay over virtually his whole salary notwithstanding the reduction in his salary demonstrates, in my view, a remarkable callousness.

32. The applicant's immediate response to the respondent's advices that he would not be able to pay the full maintenance obligation for May 2020 because of the reduction in his salary was to adopt a particularly belligerent approach, threatening the respondent with contempt. The applicant made good on her threat and within eighteen days launched these contempt proceedings. The need for parties to constructively engage with each other is intensified in midst of the COVID-19 pandemic. It is evident from the correspondence from the applicant's attorneys as well as the affidavits in these proceedings that the applicant had no desire to engage constructively with the respondent. This

[9] Although applicant in a supplementary affidavit filed in December 2020 produces a schedule of subsequent shortfalls in maintenance payments over the period June to November 2020 (but which same schedule shows that the respondent soon makes up any shortfall), the applicant's counsel, justifiably, confined the contempt application to the May 2020 shortfall as that was the case sought to be made out in the founding affidavit.

notwithstanding that Uniform Rule 41A expressly required of her together with her application to serve upon the respondent a notice indicating whether she agreed to or was opposed a referral of the dispute to mediation.

33. The applicant's founding affidavit is terse. The terseness of her affidavit is perhaps understandable in circumstances where she need only demonstrate that there was a court order, that the respondent had notice thereof and that he had breached the order. But what cannot be so easily excused is her persistence in the application after receipt of his extensive answering affidavit, the factual contents of which she does not substantively challenge.

34. What also weighs against the applicant in the exercise of my discretion whether to accede to the respondent's request to grant a punitive costs award, is the detailed judgment handed down by Bam AJ in the Rule 43 proceedings.

35. It was the applicant who approached the court for that rule 43 order. it was the applicant that attached the judgment to her contempt application. Yet, when that judgment is read, it is clear that the applicant did not take any appreciable cognisance of what was said in that judgment before launching the present contempt proceedings.

36. Bam AJ in concluding on the applicant's claim for interim maintenance:

> "*To conclude the point on maintenance required for the children and the applicant, there is evidence that the respondent already*

> *pays a substantial amount towards the family's expenses. That his means cannot meet all that the applicant demands simply suggests that the applicant has a choice to either tone down the family's expenses drastically to a level commensurate with the family's income or begin looking at ways to generate income.*"

37. The applicant contended in her rule 43 proceedings that although she has a degree in architecture, she describes herself as unemployable because she had not written her professional exams. The applicant also sought to justify why she could not be expected to seek employment. This did not find favour with the court who rejected the notion that she was unemployable and that she should "*also step up efforts to find employment*" and that "*it might be that she will start at a low base, probably not in her line of training, but that will still assist with some of the family's maintenance requirements*".

38. No evidence was adduced by the applicant in these proceedings of any attempts to find employment.

39. Bam AJ continued in the judgment:

> "*Shorn of verbiage, and what I conclude are incautious demands made by the applicant, she wants to be paid money so she can control her own life. I formed this view after carefully reading the papers. I have already noted that the respondent's bank account and his payslips do not characterise him as someone who is shying away from maintaining his family. In addition to what the respondent pays on a monthly basis, applicant seeks the whole of respondent's monthly income. It is on this basis that I am inclined to refuse applicant's request for contribution towards legal costs.*"

40. The applicant has not given any regard to what has been stated in the judgment as she persists in making "*incautious demands*" that the respondent pay over virtually his entire salary. This has been demonstrated in my analysis of the figures.

41. Bam AJ then continues in the judgment as follows:

> "*At this point I am compelled to note my observation before I consider the issue of access arrangements. The entire theme coming across from reading applicant's papers is that the only outcome she will accept is where everything she desires is acceptable; anything else is rejected. It is this all-or-nothing attitude that must have stood in the way of resolving what would otherwise have been a relatively simple question of trading-off direct cash into applicant's bank account viz-a-viz payment to service providers. The entire pursuit of respondent including the present application, is born out of applicant's push for a lifestyle that the respondent cannot afford. He could not afford it when they were still living as a family, and still cannot afford it now as they are separated. Quite simply, the applicant has painted herself as an unreasonable person*."

42. In my view, these findings made by Bam AJ in the preceding rule 43 proceedings between the same parties are materially relevant in relation to a consideration of an appropriate costs order. The applicant has continued to demonstrate herself as being unreasonable, having an all-or-nothing attitude and of continuing to reject anything else other than what she desires.

43. The applicant continues to be represented by the same attorneys, who would have paid close attention to the judgment of Bam AJ. Although the applicant's counsel has changed, the applicant is represented by experienced senior counsel. I must therefore accept that the applicant's legal practitioners in the discharge of their duties towards the applicant brought to the attention of the applicant what had been stated in the judgment of Bam AJ and that their instructions nevertheless remained to launch and persist in the contempt proceedings.

44. In the circumstances, I am prepared to accede to the respondent's request that costs be granted against the applicant on an attorney and client scale.

45. Turning to the respondent's counter-application, I deal first with his request that his maintenance obligations be temporarily reduced.

46. I am not inclined to do so, not because the respondent may not be able to make out a substantive case for such a reduction, but rather on the basis that this may not be the appropriate forum to do so. Although the applicant submitted that it was not for this court to do so and that the respondent was obliged to seek a variation of the order as expressly provided for in Uniform Rule 43(6) or to approach the maintenance court for the appropriate relief, in respect of which I make no finding, this court does not appear to be possessed of all that which is relevant or which the parties may wish to put before me to substantiate or oppose such a reduction. For example, the world has moved on since the exchange of

papers in this matter, even after the filing of supplementary affidavits in December 2020, and the respective positions of the parties as to their income and expenses is not before the court. For example, it is not clear from the papers as to whether the respondent still has a salary reduction, and if so, the extent of that reduction and whether such reduction will be made up by way of various relief payments, such as TERS payments and/or suspension of provident fund contributions.

47. I turn to the respondent's counter-application for an order effectively enforcing his access rights in the order by way of declaratory relief. The rule 43 order, which the applicant insists in her contempt application be honoured to its full extent in relation to the respondent's maintenance obligations, also provides that the respondent is entitled to certain rights of access. Apart from the callousness described above in relation to the applicant's decision to launch contempt proceedings, her approach towards her obligations in respect of the respondent's access also demonstrates double-standards on her side when it comes to obeying the order.

48. This includes the right of the respondent to remove the children from the applicant's home to exercise conduct every weekend on either Saturday or Sunday, on an alternating basis, for a period of six hours, from 10h00 to 16h00. Notwithstanding that that is what the order provides, the common cause evidence demonstrates that the applicant through her attorney in May 2020 refused contact in the form of permitting the respondent to so remove the children. The reason given is the

applicant's fear that such removal would unnecessarily expose the children to the COVID-19 virus.

49. On the common cause evidence the applicant is in breach of the court order.

50. The respondent has chosen not to bring contempt proceedings. The respondent is entitled to is to pursue alternate relief for purposes of enforcing the order, such as by way of a declarator.[10] This is what he has done in the present instance.

51. The relevant regulations that were in place at the time permitted the movement of the children within the same metropolitan area or district municipality if the co-holders of parental responsibilities and rights were in possession of a court order.[11]

52. The applicant's justification for breach of the order can therefore not be founded upon any statutory prohibition that would have prevented compliance with the order.

53. It was not surprising, in my view, that at the commencement of the hearing the applicant's counsel sought to downplay the applicant's failure to comply with the order by proffering an undertaking on the part of the applicant that the applicant would abide the order in respect of maintenance and therefore submitted that the relief sought by the

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[10] *Fakie* above para 42.

[11] Regulation 17(1)(a) of the regulations issued in terms of section 27(2) of the Disaster Management Act, 2002, Government Notice No. 43258 of 29 April 2020.

respondent was unnecessary. A similar approach had been adopted by the applicant in her supplementary affidavit filed on 14 December 2020 in which she stated that given the relaxation of the lockdown regulations from what was in place in May 2020, that the relief was "*now moot*".

54. Firstly, as appears above, at the time the lockdown regulations did not preclude compliance with the order.

55. Secondly, on the evidence before me the issue is not moot. The respondent delivered a substantial supplementary affidavit on 21 December 2020 (the applicant having filed a supplementary affidavit on 14 December 2020) describing the applicant's continued conduct in frustrating his rights of access under the order. The applicant elected not to respond to those averments.

56. At the time of this matter being argued and this judgment being prepared, the regulations in place are those for "*Adjusted Level 3*".[12] These do not appear to provide for any restrictions on the movement of children other than the general restrictions on movement. It is uncertain what the future holds in relation to what regulations may be in force to combat the COVID-19 pandemic.

57. The respondent has adduced sufficient evidence to demonstrate the applicant's continued frustration of the order,[13] and that therefore he is entitled to relief to enforce his access rights under the order and to bring

[12] Published on 11 January 2021, Government Notice 44066.
[13] Bearing in mind that the onus of proof is that of a balance of probabilities, as the declaratory relief sought by the respondent is civil in nature.

certainty to the situation. The applicant has demonstrated herself to be unreasonable and the respondent need not be satisfied with a belated undertaking by the applicant to abide. It is not for the applicant to second-guess what the regulations may provide as to the movement of children and when there is an order in place affording the respondent rights of access.

58. Apposite is the following *dicta* of ROMER, L.J., in *Hadkinson v Hadkinson*,[14]

'Disregard of an order of the Court is a matter of sufficient gravity, whatever the order might be. Where, however, the order relates to a child, the Court is, or should be, adamant on its due observance. Such an order is made in the interests of the welfare of the child, and the Court will not tolerate any interference with or disregard of its decisions on these matters.'

59. It remains open to the applicant to seek a variation of that order in the appropriate forum.

60. In the circumstances, I am prepared to grant the respondent's declaratory relief that the applicant complies with the access order,[15] subject to such COVID-19 regulations as may be in place at the time of exercising access.

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[14] 1952 (2) A.E.R. at p. 571 as cited with approval in *Kotze v Kotze* 1953 (2) SA 184 (C) at p 187, and also in *Clement v Clement* 1961 (3) SA 861 (T) at 865H.
[15] *Clement* at 867C and F as an example where the respondent was ordered to abide the order.

61. Insofar as costs of the counter-application are concerned, the respondent seeks costs on the ordinary scale. Although the respondent did not succeed in his counter-application for a temporary reduction in his maintenance obligations, I am nonetheless of the view that he did have substantial success in his counter-application in relation to enforcing the order in respect of his rights of access. Accordingly, he is entitled to the costs of his counter-application.

62. The following order is made:

62.1. the applicant's application is dismissed, the applicant to pay the costs on an attorney and client scale.

62.2. It is declared that the respondent is authorised to exercise contact with the minor children as specified in the order dated 11 February 2020 including to remove the three minor children from the applicant's residence and the applicant is obliged to comply with, and is directed to comply with, the order, subject only to such restrictions on movement as may be provided for under the Disaster Management Act, 57 of 2002 and the Regulations pursuant thereto from time to time.

62.3. The applicant is to pay the costs of the counter-application on a party and party scale.

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Gilbert AJ

Date of hearing:	27 January 2021
Date of judgment:	8 February 2021
Counsel for the Applicant:	S Nathan SC
Instructed by:	Jacqueline Ellis Attorneys
Counsel for the Respondent:	C J Smith
Instructed by:	Leoni Attorneys