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

CASE NO: 2019/34367

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

11/10/2022

In the matter between:

C [....], L [....] 1 E [....]

Applicant

and

C [....], L [....] J [....]

Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Contempt of court – standard of proof – beyond reasonable doubt – three requirements namely (1) the existence of a court order, (2) that was served on or made known to the respondent, and (3) and that was then ignored or disobeyed by the respondent - in the absence of evidence raising a reasonable doubt as to whether the respondent acted wilfully and mala fide, all the requisites of the offence will have been established.

Order

[1] In this matter I make the following order:

1. *The late filing of the respondent's answering affidavit is condoned;*
2. *The applicant is ordered to pay the costs of the respondent's application for condonation;*
3. *The respondent is found in contempt of court for failing to comply with the order of the Gauteng Division, Johannesburg under case number 34367 of 2019 granted on 28 November 2019;*
4. *The respondent is committed for to imprisonment for contempt of court for a period of thirty days, which committal is suspended on condition that -*
 - a. *the respondent complies with paragraph 5 of the order of 28 November 2019 and makes payment of the arrears maintenance that amounted to R1 301 930 as at 1 March 2022, in monthly instalments of R30 000 commencing on 1 January 2023 until the full outstanding amount payable in terms of the order of 28 November 2019, together with mora interest at the prescribed rate of 9% per annum calculated from the date of this order to date of payment, has been paid and provided that in the event that the order of 28 November 2019 is varied retrospectively by order of court then the amount payable in terms of this order shall be adjusted accordingly;*
 - b. *the respondent complies with paragraph 8 of the order of 28 November 2019 by making a contribution towards the legal costs of the applicant in the amount of R150 000.00, together with mora interest at*

the prescribed rate of 9% per annum calculated from the date of this order to date of payment, before or on 1 November 2022;

5. *Nothing in this order shall detract from the continued operation and efficacy of the court order granted on 28 November 2019 and any amounts payable by the respondent in terms of such order, including any amounts payable as from April 2022;*

6. *Should the respondent fail to comply with this order as set out of in paragraph 4 the applicant may approach this Court on the same papers, amplified if necessary, for an order committing the respondent to imprisonment;*

7. *The respondent is ordered to pay the costs of the main application.*

[2] The reasons for the order follow below.

INTRODUCTION

[3] This is an application for an order that the respondent be held in contempt of court of an order made in terms of Rule 43 of the Uniform Rules. The criminal standard of proof, namely proof beyond reasonable doubt, applies. The applicant must show -

3.1 that the respondent was served with or otherwise informed

3.2 of an existing court order granted against him,

3.3 and has either ignored or disobeyed it.¹

[4] To avoid being convicted the respondent must establish a reasonable doubt as to whether his failure to comply was wilful and *mala fide*. In *Fakie*,² Cameron J said:

¹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paragraph 6 et seq. See also *Uncedo Taxi Service Association v Maninjwa* 1998 (3) SA 417 (ECD) 429 G – I, *Dezius v Dezius* 2006 (6) SA 395 (CPD), *Wilson v Wilson* [2009] ZAFSHC 2 paragraph 10, and *AR v MN* [2020] ZAGPJHC 215.

[23] It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.

THE EXISTING RULE 43 ORDER

[5] On 28 November 2019 Budlender AJ granted an order *pendente lite* in an application in terms of Rule 43 of the Uniform Rules in the opposed motion court in Johannesburg. The relevant paragraphs of the order are paragraphs 2 and 5, and these paragraphs read as follows:

Paragraph 1:

The Respondent is to pay maintenance in respect of the Applicant and the minor child in the sum of R85 000-00 per month payable on or before the 1st day of the month after which the order is granted, and thereafter payable on before the 1st day of each and every succeeding month

Paragraph 5:

The Respondent is to make payment of a contribution towards the Applicant's legal costs in the sum of R150 000-00, payable on or before the 1st day of each and every succeeding month

[6] The payments were to commence on or before the first of December 2019. The total amount of maintenance payable between December 2019 and March 2022

² *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paragraph 23.

was R2 380 000. The contribution to costs was to have been paid in full by May 2020.

CONDONATION FOR THE LATE FILING OF THE ANSWERING AFFIDAVIT

[7] The applicant initially opposed the condonation of the late filing of the answering affidavit but the opposition was abandoned on the day of argument. The degree of lateness was negligible and there was no prejudice to the applicant. If anything, the opposition could potentially have delayed the hearing on the merits.

[8] Condonation is granted and the applicant is ordered to pay the costs occasioned by the condonation application that the respondent was compelled to bring.

THE MERITS

[9] When the application was brought the respondent had paid the amount of R1 078 070 towards maintenance and payments due were in arrears in the amount of R1 301 930. The contribution to costs that was due by May 2020 was never paid.

[10] I requested counsel through their attorneys to attempt to agree on amounts, if any, received since the end of March 2022. They were unable to do so.

[11] The applicant's calculations are met by a bald denial in the answering affidavit. The amount payable is a matter of a simple calculation and the respondent does not allege or set out to prove³ that payments were made in addition to the payments alleged and admitted by the applicant. The amounts due are therefore not in dispute.

[12] The respondent raises a number of defences:⁴

12.1 He states that his case was not properly presented to the court when the matter was argued in 2019;

³ See *Pillay v Krishna* 1946 AD 946 951 and *Ward v Sulzer* 1973 (3) SA 701 (A) 705E.

⁴ Answering affidavit paragraph 5 (Caselines 012-8).

12.2 He suffers from severe stress and is receiving treatment;

12.3 He was not aware that the Rules provided for orders in terms of Rule 43 to be varied until he was advised of this fact by his current attorneys;

12.4 He was unable to comply with the order since the day it was granted.⁵

[13] The respondent deals with his income from the company incorporated in October 2019.⁶ The financial statements he annexes, some of them redacted,⁷ are those of the company. He also deals with withdrawals from a provident fund⁸ and attaches personal bank statements.⁹

[14] The respondent then goes on to say that:¹⁰

14.1 His income from the company he controls was R1 308 691 for the year ending in February 2020 and R684 490 for the year ending February 2021. For the year ending February 2022 his income was R1 230 869.

14.1.1 However, according to the financial statements attached to the answering affidavit his salary for the year ending February 2020 was only R480 000 (and not R1 308 691).¹¹ Similarly, his salary for the year ending February 2021 was R387 643 (and not R684 490)¹² and for the year ending February 2022 his salary was R485 000 (and not R1 230 869).¹³

14.1.2 It is therefore not possible to determine the facts, and it is not clear whether the lower amounts exclude amounts that are included in the higher amounts for the same year.

⁵ Answering affidavit paragraph 5.20 (Caselines 012-15).

⁶ Answering affidavit paragraph 5.5, 5.16 (Caselines 012-11, 14)

⁷ In the financial statements for 2021 (Caselines 012-47) the amount of a director's loan was erased. A list of expenses appear at Caselines 012-48 but the amounts have been erased. Similarly at Caselines 012-71.

⁸ Answering affidavit paragraph 5.13 (Caselines 012-13)

⁹ Answering affidavit paragraph 5.21 (Caselines 012-15)

¹⁰ Answering affidavit paragraph 5.5, 5.6 (Caselines 012-11)

¹¹ Caselines 012-35, 39.

¹² Caselines 012-50.

¹³ Caselines 012-73.

14.1.3 No other sources of income are listed and it is not apparent whether there are other sources of income.

14.1.4 In the financial disclosure forms submitted by the respondent there is a reference to a company that does not feature in the answering affidavit. The name of the company is Ngwanye (Pty) Ltd and it is alleged that the respondent is a creditor of this company.¹⁴ When the financial disclosure forms were filed respondent predicted an annual income of R300 000 to him from this company. It is not known what happened to this company.

14.2 The respondent attaches personal bank statements for March 2021 to 2022.¹⁵

14.2.1 It is not apparent whether he has, or has access to any other bank accounts.

14.2.2 No inferences can be drawn from the bank statements other than the debits and credits listed.

14.3 The Covid19 pandemic of March 2020 impacted on his business.

14.4 He moved from luxury accommodation in the upmarket township of Dainfern to a garden flat at R7 000 per month and from there to a cottage at R15 000 per month.

14.5 He had to deplete his provident fund to make maintenance payments.

14.5.1 The document evidencing the provident fund details¹⁶ is in the Portuguese language and is therefore not of assistance.

¹⁴ Replying affidavit paragraph 34.1 (Caselines 013-14) and the financial disclosure document at Caselines 013-25.

¹⁵ Caselines 012-77.

¹⁶ Caselines 012-55.

14.5.2 It does show what appears to be a balance of P57 622 059.38 in December 2018, P12 823 599.26 in December 2019, P207 440.03 in December 2020, and nil in 2021.

14.5.3 It is not clear whether he has any other investments.

[15] Nowhere in the answering affidavit does the respondent set out all assets, all liabilities, all income and all expenditure in a fashion one would expect him to do.

THE RULE 43(6) APPLICATION

[16] The answering affidavit in this matter was signed on 14 April 2022. The matter was enrolled for the motion court week of 3 to 7 October 2022. On Friday, 30 September 2022 the respondent brought an application in terms of Rule 43(6) for an order varying the November 2019 order.

[17] The application for a variation was brought two years and nine months after the order and five months after it was hinted at in the answering affidavit in this application. In his answering affidavit the respondent states:¹⁷

“I accept now, pursuant to the advice I received from the legal representatives in preparation for this answering affidavit, that I should have taken steps sooner to have the terms of the current Rule 43 order varied”

[18] He nevertheless did not apply to court for a variation for a further five months. There is no explanation for the delay on the papers and none was offered in argument, except for a period of four weeks that is explained.

[19] In the application in terms of Rule 43(6) the respondent (as applicant) seeks an order that the award of November 2019 be varied retrospectively. The respondent’s counsel referred to *Harwood v Harwood*¹⁸ as authority that this can be done, but the case deals with an award of maintenance and not with the variation of an existing order. This is not a question to be decided in this application and I accept

¹⁷ Answering affidavit paragraph 5.23 (Caselines 012-16)

¹⁸ *Harwood v Harwood* 1976 (4) SA 586 (C) 588D-E

without deciding for the purposes of this application that such an order can be varied retrospectively.¹⁹

[20] Rule 43(6) provides for a change in circumstances. The court may, “*on the same procedure,*²⁰ *vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate.*” Rule 43(6) must be strictly interpreted.²¹ It is not permissible to seek a re-hearing or a review of an existing order under the guise of a Rule 43(6) application, or to appeal the existing order.

[21] The respondent alleges that he was unable to comply with the order since the day it was granted.²² It follows that his inability to pay may not be due to a material change in circumstances. This possible inference is supported by the evidence that his income from the company for the year ending in February 2022 was very similar to his income for the year ending in February 2020. These matters will however be decided when affidavits have been exchanged and the application in terms of Rule 43(6) can be fully argued. I in no way intend to pre-judge the variation application.

¹⁹ See also *Gobel v Gobel* [2013] ZAWCHC 91 paragraph 12.

²⁰ In other words, the procedure in Rule 43(2) and (3).

²¹ See *Jeanes v Jeanes* 1977 (2) SA 703 (W) 706F, *Grauman v Grauman* 1984 (3) SA 477 (W) 480C; *Micklem v Micklem* 1988 (3) SA 259 (C) 252E-G and *Maas v Maas* 1993 (3) SA 885 (O) 888C.

²² Answering affidavit paragraph 5.20 (Caselines 012-15).

CONCLUSION

[22] The respondent failed to lead evidence to establish a reasonable doubt as to his contempt. In the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, the requirements for a conviction have been met.²³ The respondent acted wilfully and in bad faith in two ways: firstly he intentionally disobeyed the court order, and secondly he intentionally refrained from bringing an application in terms of Rule 43(6) at any time between November 2019 and 29 September 2022, even though he was at all times represented by attorneys and was aware of the provisions of Rule 43(6), if not since November 2019 then certainly since April 2022.

[23] Court orders remain in force until set aside or varied. They should not merely be ignored. The order of 28 November 2019 therefore stands unless it is amended at some future date. The order I make above, provides for the eventuality that the existing order may be varied.

Costs

[24] There is no reason to deviate from the general principle that the cost should follow the result of the order.

[25] I therefore make the order set out in paragraph 1 above.

**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

²³ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paragraph 23,

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **11 OCTOBER 2022**

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DATE OF THE HEARING: 3 OCTOBER 2022

DATE OF ORDER: 11 OCTOBER 2022

DATE OF JUDGMENT: 11 OCTOBER 2022