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

**CASE NO: 2016/10540**

**REPORTABLE: NO**

**OF INTEREST TO OTHER JUDGES: YES**

**REVISED. YES**

**13 September 2022**

In the matter between:

**H [....], J [....] E [....]  
(formerly B [....])**

Applicant / Plaintiff

and

**B [....], A [....]**

Respondent / Defendant

**JUDGMENT**

**INTRODUCTION**

1. Each party accuses the other of failing to comply with court directives issued during the course of case management.
2. On 1 June 2020 the plaintiff brought her application seeking to hold the defendant in contempt of court for;

- a. failing to file his Financial Disclosure Form (“FDF”), which in terms of a directive issued by me was due on 25 March 2020;
  - b. failing to pay maintenance in terms of the rule 43 order granted by Msimeki J on 8 September 2017.
3. In addition, the plaintiff sought orders requiring the defendant;
- a. to file a fully completed and commissioned FDF by 1 July 2020;
  - b. to pay by 1 August 2020;
    - i. the sum of R 333 912. 02 which was owed as at 1 June 2020 in terms of the rule 43 order;
    - ii. all “*bills of costs drafted in terms of costs orders*” granted against him; failing which that the defendant be imprisoned for a period of 30 days.
  - c. costs
4. On the same date the defendant brought an application against the plaintiff in which he sought to hold her in contempt of various court orders, court management directives and directives of the Parenting Co-ordinator (“*the PC*”) in relation to their daughter who had turned two years old in February 2016 for;
- a. refusing him contact, including telephonic contact on numerous occasions during 2016 and 2017;<sup>1</sup>
  - b. refusing to allow the daughter to reside with him on 5 May 2017 and attend therapy on that day;
  - c. refusing to provide the defendant;

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<sup>1</sup> See record 001-77 to

- i. contact information when she took the daughter away;
  - ii. medical information concerning the daughter;
  - iii. other information concerning the daughter;
  - iv. utilising the medical aid in respect of the daughter in contravention of a medical aid directive issued by the PC;
- d. failing to provide, as required under the rule 35(3) directive all the requested documents, including bank statements, demonstrating her incurring of legal costs in the case

The defendant sought relief in various forms, in some instances imprisonment (as in the case of allegedly refusing him contact and residence and failing to provide the daughter with therapy) to a suspended sentence or a fine with or without a suspended sentence and in some other instances requiring the plaintiff to make up time where contact and residence orders or directives were not complied with.

5. The defendant also sought orders;

- a. condoning his non-compliance with the rules of court;
- b. staying the relief sought by the plaintiff in her application until all criminal matters pending against her were finalised
- c. effectively bringing a counterclaim for maintenance under Rule 43 by seeking to enrol such an application
- d. directing that each party pays his or her own costs because the issue concerns the interests of a minor child (namely a failure to take care of her best interests by failing to pay maintenance)

## **PRINCIPLES APPLICABLE TO CONTEMPT APPLICATIONS**

6. The law is well settled. In order to establish criminal contempt, the respondent's conduct in disobeying the court order must be both wilful and *mala fide*. In *Pheko v Ekurhuleni City*, 2015 (5) SA 600 (CC) the Constitutional Court confirmed the decision in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) that an applicant in contempt proceedings must establish that an order was granted against and served on the respondent (or that the respondent had knowledge of it) and that the respondent failed to comply with the order. Once that is demonstrated, wilfulness and *mala fides* are presumed and the respondent then bears an evidentiary burden to establish reasonable doubt as to the presence of those elements. Unless the respondent does so, a contempt of court will be established.

## **THE CASE MADE AGAINST THE PLAINTIFF**

7. Since *bona fides* will defeat an application for contempt, even where the respondent acted wilfully, the case made against the plaintiff hinges on whether her alleged conduct, even if in breach of a court order (which she denies), was done in good faith. Generally, that will be illustrated by a respondent's attempt to vary an existing court order supported by evidence of harm being inflicted on the child, or anticipated harm detrimental to the child's best interests. The enquiry is likely to be resolved by determining whether the object of disobeying the court order was directed against the other party or was to genuinely protect the child's best interests.

8. In the present case the plaintiff had persisted through court applications and during case management meetings to prevent the defendant having contact with their daughter, whether directly or through the school because of the risk of irreparable harm to her by reason of allegations of abuse and serious misconduct on the defendant's part towards the child. In a judgment delivered on 18 February 2020 Dippenaar J was satisfied that on the papers before her, and in particular by reference to the contents of the expert report of Belinda de Villiers an educational psychologist, that the defendant posed a risk to their daughter and ordered that an interim order be granted awarding the plaintiff sole parental rights and

responsibilities and effectively suspending all contact with their daughter or physically accessing the school she attends or its WhatsApp groups.

9. The order stands and there is nothing which the defendant has said to dissuade this court as to its appropriateness having regard to the findings and recommendations of the expert. Moreover, the defendant has now come to court and claimed that he has lived outside the Gauteng area for a considerable period, now lives on a friend's farm in the Western Cape on some tenuous basis and survives on the hand-outs of others. If the court were to take his allegations seriously then the plaintiff has failed to set out any basis to revisit the order of Dippenaar J.

10. In the result any court order or directive which the plaintiff may have breached prior to securing the order from Dippenaar J was not done *mala fide*, but in order to protect their daughter. In this regard it is significant that the plaintiff took active steps to vary, through a properly motivated court application, the pre-existing arrangements (whether they were in terms of court orders, or a court or PC directive) with the express purpose of protecting the best interests of their daughter and so far she has been vindicated.

11. One of the essential requirements for finding a respondent in contempt of court is therefore lacking in the case of the application brought by the defendant against the plaintiff. It is accordingly unnecessary to deal with the minutia of each and every allegation and response.

12. There is however one issue which should be mentioned. The plaintiff contended that there cannot be a contempt for failing to comply with a court directive. A procedural directive of the High Court, unlike a direction in the Land Claims Court, does not statutorily or in other respects amount to an order of court. The defendant did not produce authority to argue that it does. The defendant was a practicing advocate and without producing such authority or presenting argument on the point, the court is reluctant to take the issue further.

13. In any event, it is difficult to fathom the defendant's actual complaint because in answer to para 3.3 of the FDF, the plaintiff states in a separate attachment that her stepfather has "*subsidised my legal expenses and assisted me financially to ensure I am able to comply with the various court orders and PC directives requiring various interventions.*" The defendant has not set out why this is an inadequate response since there is no evidence presented by him at this stage to seriously suggest that she either is utilising capital resources, has undeclared sources of income or is concealing assets to pay for her lawyers.

14. The attempt to reintroduce a rule 43 application requiring the plaintiff to contribute towards the defendant's maintenance must fail. He attempted to do so before Msimeki J and it was given short shrift.<sup>2</sup> During the course of its judgment the court indicated that the defendant had not played open cards and that significant amounts were unaccounted for.

15. Where a party, as here, has failed to properly complete the FDF then the court is justified in not having regard to his or her claims. One of the consequences of failing to properly complete an FDF is that the court does not have the necessary material before it to come to that party's assistance. The defendant tries to bring it under a type of counter-claim, but as Msimeki J pointed out in the judgment of 8 September 2017, the application brought by the plaintiff concerns the interests of the minor child- not maintenance between spouses *inter se*.

16. All the other substantive orders sought by the defendant require a finding that the plaintiff is in contempt of court, save for the order sought by him;

- a. suspending the plaintiff's own application against him; and
- b. suspending the effect of the interim order of Dippenaar J (which suspended his parental rights in relation to their daughter) pending the finalisation of criminal proceedings instituted by him against the plaintiff.

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<sup>2</sup> See the judgment of Msimeke J at paras 8 and 25.

17. The obvious difficulty is that the rights which the plaintiff seeks to enforce are not those which she may have against the defendant, but those which she is seeking to exercise on behalf of the child against him pursuant to his parental obligations owed to their daughter- not to the plaintiff.

18. The order sought by the defendant is obviously not one capable of set off against the applicant's claims. It asks a civil court to stay the resolution of rights concerning the child's immediate and future best interests as well as the legal responsibilities which may be owed by a father to his child. The determination of these rights and responsibilities has nothing to do with the guilt or innocence of the plaintiff pursuant to criminal charges laid against her at the instance of the defendant.

Even if the order sought by the defendant otherwise satisfied the requirements which would enable a court to exercise its discretion to stay the proceedings pending the outcome of criminal proceedings, then one must have regard to the fact that the defendant seeks the suspension of both the application brought for the benefit of the interests of the child and the enforcement of the order granted by Dippenaar J which was also made for the benefit of the child.

19. No sound basis has been set out as to why the outcome of a criminal complaint by one parent against the other should be determined ahead of;

- a. the enforcement of the right of a child to maintenance from a parent;
- b. the determination of whether the father is in contempt of court for failing to pay maintenance for his child;
- c. any compliance or enforcement of the interim orders of Dippenaar J, which self-evidently are concerned with protecting the best interests of the child if regard is had to the conclusions contained in the expert report and the reasons for them.

d. the finalisation of divorce proceedings and the finalisation of child maintenance in the divorce proceedings which would otherwise be frustrated if there has not been compliance with the financial disclosure requirements under this court's procedures as set out in the Practice Manual pursuant to the Full Court judgment of *E v E* mentioned later in this judgment.

20. The application to suspend High Court civil proceedings involving the interests of the child pending the outcome of criminal charges initiated by the defendant against the plaintiff is misconceived and incompetent.

It also demonstrates a cynical disregard by the defendant of his parental responsibilities to his daughter and her best interests.

## **THE CASE MADE AGAINST THE DEFENDANT**

### **Completion of Financial Disclosure Form**

21. The parties are obliged to upload all documents relevant to the proceedings onto CaseLines. The plaintiff's FDF was uploaded within the time required by the court directive. The parties were required to serve them as far back as September 2019 and because of the defendant's failure to do so he was given an extension until 25 March 2020. The defendant did not file his FDF despite this further directive requiring him to do so. This justifies the plaintiff launching her application to compel compliance.

22. Until then the only explanation offered by the defendant for failing to serve his FDF was that he required documents from the plaintiff before he could do so.

If one has regard to the information which must be provided in an FDF, then it is evident that the party concerned is required to provide information regarding his or her own financial position, not that of the other party. The furthest the FDF goes is for the party to provide brief details of the standard of living enjoyed during the marriage (para 3.2) and any other circumstances which could affect the matter, including any agreement made between the parties themselves.



These were answered by the plaintiff under oath on 19 September 2019. The defendant does not contend that the replies to these questions were inadequate.

23. Accordingly, the defendant's excuse for not completing the FDF must be rejected. No doubt anticipating this outcome, the defendant's next step was to deliver an unsigned FDF on 1 June. It was eventually uploaded on 20 June 2020.

The defendant only provided a signed FDF later. It was signed on 29 June 2020.

24. The FDF is a document which must be taken seriously by parties to divorce proceedings. The need for its introduction was set out in *Ts v Ts* 2018 (3) SA 572 (GJ). The judgment was confirmed by the Full Court of this Division in *E v E*; *R v R*; *M v M* 2019 (5) SA 566 (GJ).

25. In *E v E* the court was directed by the Judge President to determine whether it has a discretion to permit the filing of applications that have departed from the strict provisions of Rule 43 (2) and (3). In the course of answering the question in the affirmative, Makume J on behalf of the Full Court said that it was necessary to issue a practice directive making it mandatory for parties "*in all opposed divorce matters to complete and submit a detailed financial disclosure form* " and that it is to be completed under oath.<sup>3</sup>

The format of the FDF endorsed by the Full Court and now included in the Practice Manual is a reduced version of the Form E which is required under English Family Court proceedings.

26. In *Ts v Ts* [2018] ZAGPJHC 29 at para 22 the court said that the purpose of an FDF deposed to under oath is to enable each party to more properly assess their respective positions, to present argument based on a more informed position, to have an available remedy for misrepresentation or material non-disclosure and to enable the court to make an order based on an informed decision. In *E v E* at paras

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<sup>3</sup> *E v E* at paras 55-56

56 to 57 the Full Court said that the benefit of financial disclosure is that parties will not have to file lengthy affidavits, that it will force the parties to be transparent with each other and with the court from an early stage, thereby making early settlement possible and placing the court in a better position *“to decide the matter in a manner that does justice to the parties and takes care of the best interests of the minor children.”*

27. On the first page of the FDF the party completing it is notified that:

- *You have a duty to the court to give a full, frank and clear disclosure of all your financial and other relevant circumstances*
- *A failure to give full and accurate disclosure may result in an adverse court order if you are found to have been deliberately untruthful, criminal proceedings or perjury and/or fraud*
- *The information given in this form must be confirmed under oath or affirmation. Proceedings for contempt of court may be brought against a person who makes or causes to be made, a false statement in a document verified under oath or affirmation*
- *You must attach documents to the form where they are specifically sought ...*
- *Essential documents that must accompany this statement are detailed in the form.*

28. In order to drive the point home, at the end of the form and immediately preceding the jurat provision for administering the oath, the form repeats in bold print that:

*“Proceedings for contempt of court may be brought against a person who makes, or causes to be made, a false statement in a document under oath or affirmation”*

29. In short the FDF is a mandatory document required to be properly completed and commissioned in all divorce proceeding. The defendant's failure to explain why he did not sign the FDF he initially submitted despite being given an extended time to serve it and his unacceptable excuse for not properly completing even the one he subsequently signed is not without consequences. The FDF states that a failure to make a “*full and accurate*” disclosure may result in an adverse court order.

30. The purpose of Rules of Court and this court's Practice Manual is to facilitate the expeditious and fair hearing of cases in an orderly manner. <sup>4</sup>

31. A party who uses court rules and procedures to frustrate these objectives must expect to be mulcted with the unnecessary costs occasioned by such stratagems, particularly in cases where there are individual litigants who generally can ill afford the cost of litigation. Abuse of court procedures as a device to debilitate and out-litigate the other party should be discouraged by special cost orders because it affects the fair trial rights of the other party to an expeditious and cost effective resolution of the dispute and adversely impacts on court resources that have to be unnecessarily allocated.

32. The defendant was a practicing advocate with some 20 years' legal experience. It is reasonable to expect a person with such experience to fully appreciate that if the completion of the FDF can be circumvented he will prejudice the fair trial rights of the plaintiff, the fair determination of maintenance for the benefit of their child and avoid the consequences which would flow if the FDF is attested to under oath or affirmation and found to be incorrect.

33. The defendant failed to serve the FDF as required by this court's directive, then failed to attest to the one filed at the eleventh hour and finally, failed to complete

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<sup>4</sup> Court logistics and resources are also factors.

in material respects the one eventually attest to. It is materially incomplete in relation to questions which, if frankly answered, would provide insight into his financial needs and in turn raise issues as to his source of funding or borrowings.

34. The failure to make proper disclosure as required in the FDF strikes at the very core of trial preparation. The defendant cannot be permitted to use his failure to make proper financial disclosure either as a means to delay the trial or to force the other party to accept something less than required just to get the matter to trial. This is a 2016 case and after six years cannot be allocated a trial date due to the defendant's conduct.

35. Divorce proceedings cannot be allowed to continue in this manner particularly where the plaintiff (or her father-in-law) had to pay for lawyers while the defendant litigates in person as an experienced advocate, albeit no longer on the Roll.

36. The plaintiff has set out sufficient facts to bring into question the motive for the defendant's failure to depose to and deliver an FDF. She has referred to their lifestyle during the marriage, the defendant's "*extensive fine art collection*" and the diversion of the proceeds of the sale of his last property to an account opened in his brother's name. Previously Msimeke J in 2017 referred to some R580 000 that had been unaccounted for in relation to the defendant's disclosures in the initial rule 43 application.

37. Instead of producing the best evidence, which is the transferring attorneys' distribution account, the defendant seeks to divert the focus by trying to pick holes in the plaintiff's assertions without producing direct evidence of his own to substantiate his averments. Moreover he refused to disclose into which accounts the proceeds of sale were transferred, and the transferring attorneys were told by him not to divulge the information.

The contents of the defendant's affidavits vacillate between evasiveness and being elliptical.

38. *Inter alia* in order to afford the defendant a final opportunity to regularise the position, at the case management meeting called on 22 August, which was pursuant to receiving responses from the plaintiff and defendant on 15 August 2022, the court directed that:

1. *At the in-person case management hearing in court 6D on Monday 22 August 2022 the parties or their duly appointed legal representatives will deal with the following issues only:*

a. *whether any party wishes to add to any of the submissions regarding compliance or non-compliance with the Court directive of 25 March 2020 regarding financial documents;*

b. *whether there is any further event since the last hearing which may be relevant to the contempt of court issues raised by each party*

c. *whether the contents of para 8 of the letter dated 15 August 2022 from the Plaintiff's attorney in response to this court's directions dated 4 August are factually correct.*

2. *In the physical absence of any party to the in-person hearing on 22 August the court will proceed on the basis of the contents of the respective party's communications to the court of 15 August 2022 and their submissions in open court at the hearing of 22 August 2022.*

39. The contents of the plaintiff attorney's letter of 5 August alleged that

*"The plaintiff has since instituted maintenance proceedings in the Magistrates Court. At the previous hearing, the transferring attorneys who attended to the transfer of the defendant's Parkhurst residence were subpoenaed and testified that they were directed by the defendant to pay the proceeds of the purchase price to the defendant's brother, clearly in an attempt to hide from the defendant's maintenance obligations in terms of the rule 43 order"*

40. In its letter, the plaintiff attorney's claimed that the defendant refused to disclose his new physical address which is allegedly in Durban, and that at the Maintenance Court the magistrate had ordered the defendant to provide his physical address at the next hearing on 25 August. The court asked for the defendant to provide his physical address. He said that the address was that of his mother at a retirement village in Durban. When the court had difficulty in appreciating how he could be living in a retirement village with his mother he then claimed to be living in the Cape Province at a farm Rachelsfontein in Simondium but averred that there was no name at the farm gate.

The court requested physical features or location points to assist in the service of process, but nothing distinctive was provided. The court attempted to call up the name of the farm on *Waze*. The directions given were inadequate and the court eventually elicited from the defendant that the farm was in fact opposite the Oumeal business, an obvious landmark which one would have expected to be immediately disclosed.

41. The exchange revealed that the defendant had been deliberately evasive in providing the Durban address despite giving the clear impression that he was residing there, then when pressed provided a vague address without sufficient features and only after the *Waze* search indicated that the only possible position might be opposite a well-known business in the area was he prepared to admit to it.

42. Insofar as the disposal of the proceeds of the sale of his property was concerned, the defendant confirmed that the money had been diverted to an account opened up in the name of his brother but claimed that it had all been used to pay debt.

43. For this reason, there could be no prejudice to the account being frozen, the court understanding that the only money entering the account was from the proceeds of the sale, and that the plaintiff was entitled to a court order for payment of the arrear maintenance claimed and any further amounts which the maintenance court might find owing. Based on his claim that there was no money in the account which

his brother appeared to operate on his behalf, the defendant did not disagree with such an order being made together with the production of bank statements for the account.

## **ARREAR MAINTENANCER AND CONTEMPT OF COURT**

44. I am satisfied that the amount of arrear maintenance has been correctly calculated and, by the defendant's own admission, he had been given the order of Msimeki J and was in wilful default.

45. The outstanding question is whether the defendant was *mala fide*.

46. The defendant claims poverty and therefore it was his financial circumstances which precluded him from complying with the court order. The defendant bears the evidential burden of demonstrating that he was not *mala fide*.

He has not done so because;

- a. at no stage did he bring an application for reduction of maintenance;
- b. he attempted to conceal the proceeds of the sale of property;
- c. he has not accounted for his fine art collection
- d. he has failed to properly complete the FDF and as notified in the FDF, the terms of which were endorsed by the Full Court in *E v E* , the failure to make full and accurate disclosure may result in an adverse court order.

There must be consequences in a failure to complete an FDF as required. Without teeth its purpose will be frustrated and it will be just another form to be ignored. The consequences in the case before the court, and having regard to the defendant's conduct and incomplete financial disclosures previously, is that no reliance can be placed on his say so without reference to a properly completed FDF. The FDF is itself unsatisfactory and its

contents cannot be taken at face value. The failure to provide best evidence through readily accessible documents further exacerbates the position.

e. he has not been frank with the court as evident when asked to disclose his residence

47. In the result the defendant is;

a. liable to pay arrear maintenance as at 1 June 2020 together with interest;

b. declared to be in contempt of court for failing to pay the arrear maintenance.

48. The plaintiff must however have her bills of cost taxed before the court can order the payment of any cost awards.

## **COSTS AND DEFENDANT'S CONDUCT IN THE LITIGATION**

49. I will not mince my words. The defendant who at some stage was an admitted practicing advocate believes that he can, with impunity, take advantage of the processes of the court in order to undermine their purpose and function. The defendant has deliberately tested the tolerance of the court believing that he can abuse the system.

50. There is a limit to the court's tolerance for the antics of any litigant, whether represented by counsel or not, where the objective is to either delay proceedings interminably or to outlitigated the other party by requiring them to continually pay their lawyers with little to show for it.

51. Earlier on, this judgement dealt with the conduct of the defendant and the costs consequences that should follow. I will not repeat them. The defendant's conduct in this litigation is deliberate and sufficiently egregious to warrant a special order for costs.



52. Stark choices should face a recalcitrant litigant, particularly where there has been a failure to properly complete an FDF for no acceptable reason. The order I make is intended to cover that.

## ORDER

53. The following order is made:

1. *The defendant's applications (and counterapplications) are dismissed with costs, such costs on the attorney and client scale*

2. *The defendant shall by no later than Friday 30 September 2022 serve and file a completely new Financial Disclosure Form ("FDF") which shall;*

a. *be in legible printed letters*

b. *contain all annexures;*

c. *be complete in all respects and in particular provide the details required in para 3 and a proper answer to para 4.1*

d. *be duly deposed to*

e. *be uploaded onto CaseLines*

3. *In the event that the defendant fails to comply with para 2 hereof by 30 September 2022 he shall show cause on 12 October 2022 at 10.00 in open court why he should not be held in contempt of court and if so found to be in contempt of court why he should not be incarcerated until such time as he duly completes the FDF*

4. *The defendant is held to be in contempt of the Rule 43 court order granted against him on 8 September 2022 and should the amount set out in*

*para 5 hereof together with interest not be paid by 30 September 2022 he is to show cause at the aforesaid hearing on 12 October 2022 at 10.00 why he should not serve a period of imprisonment*

*5. The defendant is required to make payment of the sum of R 333 912.02 which was owed in terms of the said rule 43 court order as at 1 June 2020 together with interest thereon at the prescribed rate as from 1 June 2020*

*6. Such amount may be levied against any amount standing to the credit of account no [...]held at ABSA Bank under the name of Mr D [...] B [...] and to that extent and for such purpose the order of 22 August 2022 freezing the said account is relaxed accordingly*

*7. The defendant is to pay the taxed or agreed costs pursuant to the costs awarded on 1 August 2020 within 30 court days of such taxation or agreement*

*8. The defendant is to pay the plaintiffs costs of the present application on the attorney and client scale.*

*9. The reasons for this order will be delivered to the parties designated email addresses on 13 September 2022 at 09:30*

**S PILG, J**

DATE OF JUDGMENT: 13 September 2022

FOR PLAINTIFF: Adv. R Andrews  
HJW Attorneys

FOR DEFENDANT: In person