

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

CASE NO: 55507/2012

DATE: 16 MAY 2016

IN THE MATTER BETWEEN:

[J.....] [D.....]

**APPLICANT**

Vs

[D.....] [D.....]

**RESPONDENT**

**JUDGMENT**  
**KOLLAPEN J:**

1. In this application an order is sought seeking the committal of the respondent to prison for being in contempt of various orders of this court made in respect of maintenance obligations of the respondent towards the minor children born of his erstwhile marriage to the applicant.

The respondent opposes the relief sought.

**Background**

2. Following the breakdown in the marriage of the parties and the institution of litigation the matter came before this Court and various orders were made in the course of that litigation which include:
  - a) An order made on the 8<sup>th</sup> of August 2012 in Rule 43 proceedings directing the respondent to pay maintenance *pendente lite* in the sum of R18000.00 per month in respect of both minor children.
  - b) An order made upon the granting of a final divorce order on the 28<sup>th</sup> of May 2015 directing the respondent to pay maintenance in the sum of R 12 000.00 per month in respect of both minor children.
  - c) An order made on the 25<sup>th</sup> of February 2013 finding the respondent to be in contempt of Court and imposing a sentence of imprisonment upon the respondent which was suspended on condition that the respondent paid the arrear maintenance which was then due.
3. It is common cause that apart from payments which in their totality amounted to some R4000.00 made in the period from 2012 to 2016 (R3000.00 of which was paid this year after the launch of these proceedings) the respondent has made no other payment as directed by the various orders to which reference has been made.
4. The stance of the applicant is that the respondent has, with *mala fides*, and willfully, disobeyed the various orders of this Court and that the relief she seeks is both competent and justified.
5. The respondent in opposing the relief sought has intimated that he is not possessed of any income or assets and that his failure to comply with the various orders of Court is beyond his control and is neither wilful nor *mala fide*.

#### **The law**

6 In *FAKIE NO v CCII SYSTEMS (PTY) LTD 2006 (4) SA 326 SCA*, the Court set out the approach to be taken in the following terms:

*‘The respondent in civil contempt proceedings was not an ‘accused person ’ but was entitled to such analogous protections as were appropriate to motion proceedings. In particular, the applicant had to prove the requisites of contempt (the order, service of notice, non- compliance and wilfulness and mala fides) beyond a reasonable doubt. But, once the applicant had proved the order, service or notice and non- compliance, the respondent bore an evidentiary burden in relation to wilfulness and mala fides: Should he fail to advance evidence that established a*

*reasonable doubt as to whether his non-compliance was wilful and mala fide, the applicant would have proved contempt beyond a reasonable doubt. ’ (at 327A -B).*

6. In these proceedings it was common cause that the requirements relating to the order, service thereof, and non-compliance were met and that accordingly the evidentiary burden in relation to the absence of wilfulness and mala fides was on the respondent and that unless the respondent was able to advance evidence to show reasonable doubt, the applicant would have succeeded in proving contempt beyond reasonable doubt.

**The case for the respondent**

7. In arguing the absence of wilfulness and *mala fides* the respondent’s case is that:
  - a) He has been unable to honour the orders made against him as he is in a financial crisis and lacks the means to pay. He states that he lost his businesses and due to his age it has been difficult to secure a business or employment.
  - b) He further states that during the period June to December 2015 he was involved as a part-time consultant with the business known as DDW Moago from which he would earn an amount of R6000 from time to time. He does not provide any further detail as to what amounts he earned during this period but states that his monthly expenses were more or less that amount.
  - c) In support of his position the respondent has also annexed various bank statements in respect of the various accounts he holds and in explanation of the activity on his Capitec Account [1.....], he states that during 2013 he allowed one of his friends Mr [T.....] [N.....], who had temporarily hired him, to use this savings bank account to conduct his business and it was through this account that Mr [N.....] conducted his financial transactions. In support of this an affidavit has been filed by Mr [N.....] as well as a pro forma income and expenses schedule. From the copies of the bank statements provided as well as the schedule of income and expenses of Mr [N.....] the following appears
    - i. Various payments are recorded as being made to TM [N.....] to Account Number [12.....];
    - ii. That during the period April 2013 to February 2014, the respondent would have received a salary in the total amount of R29500.00 from Mr [N.....];
  - a) While the respondent does not provide a full exposition of his income and expenses, it does appear from an application he has brought in the Magistrate’s Court to vary the existing

maintenance order that he lists his income as R7478.42 and his expenses as R5000.00. It is not clear how the income of R7478.42 is earned.

- e) In a supplementary affidavit filed after hearing, the defendant stated his pension income as R1737.62 and the income from an Old Mutual annuity as R670.92.

### **Analysis**

9. From what emerges it is apparent that during the period 2012 to the present, the respondent received two streams of income, his monthly pension of about R2400.00 and the money earned from DDW and Mr [N.....]. If one works from the premise that the respondent's monthly expenses were R5000.00 as he has indicated in the proceedings currently pending in the Magistrates Court, then it is clear on his own version that for various periods (and in particular while he worked for DDW and Mr [N.....]) his monthly income would have consisted of the aggregate amount of his pension and his salary. During those months, at the very least, he would have had a total monthly income of R2400-00 together with what he earned (R5000-00 to R6000-00). That would have constituted an amount ranging from R7400.00 to R8400.00 per month at a time when his monthly expenses were R 5000.00 per month, leaving him with excess funds in the region of R2400-00 to R3400-00 per month.
10. One would at the very least have expected that in those good months, accepting that the flow of income was not consistent, the respondent would have been able to pay some money towards his maintenance obligations. He offers no explanation in this regard and falls considerably short in demonstrating how he would have utilized this increased income during those times.
11. The obligation to pay maintenance is a serious and indeed onerous one and in my view the very generalised nature of the respondent's assertions of being in a constant financial crisis falls considerably short of what is expected of him in discharging the evidentiary burden that rests upon him.
12. In addition the utilisation of the respondent's savings account raises more questions than it provides the answers for. If Mr [N.....] requested of the respondent that the former used his savings account, one must assume that Mr [N.....] did not have an account of his own - why else such a request? Yet the entries on the savings account purport to show a transfer of funds to an account in the name of TM [N.....]. This is not explained either. In addition I have some difficulty in accepting that a

person in the position of the respondent, who was at the time in serious and substantial default of his maintenance obligations would allow another to use his banking account and through which account close to R500000.00 passed in a short time between February and June 2013.

13. In addition the respondent on his own version offered to pay total maintenance of R2000-00 per month for his children during the divorce negotiations in mid-2015. Surely he would not have volunteered to pay R2000-00 per month if he was unable to afford it. He does not provide an explanation for this either.

14. Under these circumstances and it does appear that even on the respondent's own version he was possessed of funds which would have enabled him to pay at least some of his maintenance obligations during some of the times in question, the respondent has failed to discharge the evidentiary burden in showing his default was not willful or *mala fide*.

is. I am accordingly satisfied that having failed to do so, the consequence is that the applicant has proved that the default was beyond a reasonable doubt, willful and *mala fide* entitling the applicant to the relief she seeks.

**ORDER**

16. I make the following order:

- i. The respondent is found to be in contempt of the orders of this Court of the 8<sup>th</sup> of August 2012, the 25<sup>th</sup> of February 2013 and the 28<sup>th</sup> of May 2015.
- ii. The respondent is committed to prison for sixty days.
- iii. The respondent is ordered to pay the costs of the application.

N KOLLAPEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

55507/2012

HEARD ON: 18 APRIL 2016

FOR THE APPLICANT: ADV. BURGER

INSTRUCTED BY: M SMUTS ATTORNEY

FOR THE RESPONDENT: MS M MAZIBUKO

INSTRUCTED BY: MAMYENI MAZIBUKO ATTORNEYS