IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISON

CASE NO.: 46543/2019

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
23/03/2022

In the matter between:

F[....] E[....] V[....]	Applicant
and	
I[....] V[....]	First Respondent
TRANSNET SECOND DEFINED BENEFIT FUND	Second Respondent

JUDGEMENT

SARDIWALLA J:

Introduction

[1] On 6 October 2020, an application was before me in the urgent court brought by the applicant against the first respondent in terms of Rule 6(12) Of the Uniform Rules of Court declaring him to be in contempt of various court orders.

Background to the Application:

[2] The applicant instituted divorce action against the first respondent on 2 July 2019 seeking a decree of divorce, provisions of the accrual claim as well as rehabilitative maintenance for the period of twelve months. The parties were married in Australia and lived there for a period of time. At the time of instituting the divorce action the applicant was residing in South Africa, within this Court's jurisdiction and the first respondent relocated to Australia. On 14 August 2019 the applicant sought a Rule 43 application for maintenance *pendite lite* as well as contribution towards her legal costs.

[3] There Rule 43 application was granted on 19 September 2019. The relevant parts of the agreements are as follows: -

> *"1. The Respondent shall pay a monthly contribution towards the Applicant's maintenance in the amount of R 10 000.00 per month, payable on the 1st month subsequent to this order and every 1st day of every month thereafter until the finalisation of the divorce action between the parties. This amount shall be paid into a bank account nominated by the Applicant;*
> *2. The Respondent shall make a contribution towards the legal expenses of the Applicant in the amount of R8000.00 in 4 instalments of R2000.00 each, the first payment to be made on the 1st day of the 1st month subsequent to this order and the next three payments on the 1st days of the next three months thereafter;*
> *3. The costs of this Rule 43 application shall be costs in the divorce action."*

[4] The first respondent has failed to comply with the order. at the time of this application he was in arears of maintenance in the amount of R120 000 and R8000.00 for legal costs and is escalating each month that the first respondent is in default.

[5] The application is opposed by the first respondent only. The first respondent has brought an urgent application to strike out the applicant's claim for irregularity in joining the second respondent as well as an urgent application in reconvention that the Rule 43 order be rescinded for lack of jurisdiction and a declaration that both parties are *peregrini*. He further requested a stay of proceedings until security for costs was secured.

Applicant's Argument

[6] It is the applicant's submission that the first respondent has wilfully and intentionally failed to comply with the Court order by failing to make payments as stipulated. The applicant averred that the first respondent, through the deliberate actions has frustrated any and all attempts by the applicant to secure complaince. The applicant avers that the respondent's actions amount to an obstruction to justice which is a criminal offence. It also indicated that the first respondent is aware of the court order as the first respondent was legally represented when the Rule 43 order was granted and the answering papers do not deny the allegation of non-compliance. That the applicant submits that it has exhausted all available remedies and that the first respondent's actions are clearly an attempt to frustrate the process and therefore can only be viewed as *mala fide* by attempting refusing to comply with the above court order.

[7] The applicant avers that she has made several attempts to get compliance of the order including a plethora of email communication to the first respondent without any success. The applicant approached the Maintenance Court, Pretoria North in November 2019 and lodged a complaint for contempt. A criminal case was subsequently instituted however; personal service could not be effected on the first respondent as required by the Magistrates' Court Rules as the first respondent had already relocated to Australia. Therefore, as the applicant cannot execute normal procedures against the first respondent she seeks a contempt of court order against the first respondent and an order inter alia directing that he complies with the order granted on 19 September 2019 alternatively an order directing the second respondent to make such payments from the first respondent's pension interest held with the second respondent. It lastly submitted that jurisdiction is determined by the

domicile of the parties at the time of the institution of the proceedings and therefore citizenship is irrelevant and security for costs is not required from the applicant. The applicant prays for an order as per the draft order attached to the replying affidavit.

First Respondent's Argument

[8] The first respondent opposes this application on the basis that the application lacks urgency and is without merit. He argues that the matter is premature as there is pending litigation as he has launched rescission applications against the order as he alleges that the Court did not have jurisdiction to adjudicate the matter. As a result, he avers that until such times as that application are finalised the court order be suspended and therefore the he cannot be said to be in contempt of court. It alleges that the urgent application was irregular and improper as the applicant is an immigrant without a permanent or temporary residence permit and has therefore misrepresented herself before the Court and therefore the Court did not have jurisdiction to hear the matter and the Rule 43 order must be rescinded. The first respondent submits that the matter lacks urgency as the applicant being aware that the maintenance was in arrears for 13 months did not take any steps to finalise the divorce and intentionally allowed the arrear maintenance to accrue in order extort payment from him. He alleges that since the Court lacked jurisdiction and the order must be rescinded there cannot be any arrear maintenance. Therefore, he cannot be held liable in terms of the court order.

Jurisdiction

[9] In the determining whether this court has this jurisdiction, the investigation must start with the provisions of section 21 of the Superior Courts Act 10 of 2013:

> ***'Persons over whom and matters in relation to which Divisions have jurisdiction***
>
> *(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance…'*

[10] This, however, is has been stated that this is not necessarily determinative as noted in *Erasmus: Superior Court Practice*:

> *'The position under this section materially corresponds with the position under s 19(1) of the Supreme Court Act 59 of 1959 prior to the repeal of that Act on the commencement of the Superior Courts Act 10 of 2013 on 23 August 2013. As was the case with s 19 of the now repealed Supreme Court Act 59 of 1959, this section does not contain a 'codification' of the jurisdiction of the High Court. In fact, it has been said that s 19 was deliberately couched in 'indefinite wording' because the intention of the legislature obviously was to interfere with the common law as little as possible. It is submitted that this also applies to s 21 of the Act.'*[1]

[11] In ***Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd***[2]*,* the Court was called upon to determine whether consent alone was sufficient to confer jurisdiction on the High Court which was faced with two peregrini: a local Defendant and a foreign Plaintiff. In the course of this judgment, the Appellate Division remarked on the traditional reasons and grounds upon which jurisdiction is established:

> *'Insofar as South African Courts are concerned, their jurisdiction is the right or authority of entertaining actions or other legal proceedings which is vested in them by the State.*[3]
>
> …
>
> *In view of the indefinite wording of s 19(1) of the Act and its predecessors, no doubt deliberately so couched because the intention of the Legislature obviously was to interfere with the common law as little as possible, recourse must be had to the principles of the common law to ascertain what competency each of the Supreme Courts in the Republic of South Africa possesses to adjudicate effectively and pronounce upon a matter brought*

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[1] *Erasmus* at RS 6, 2018, A2-88.
[2] 1987 (4) SA 883 (A).
[3] *Veneta Mineraria Spa* at 886E.

before and heard by it.[4]

…

A Court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit but also of giving effect to its judgment.'[5]

[12] The Court, at 890E, quoted *Brooks v Maquassi Halls Ltd* 1914 CPD 371, where Kotzé J said at 376-7:

''According to our common law and practice under it, the Court will exercise jurisdiction upon any one of the following grounds, viz: (1) ratione domicilii; (2) ratione rei sitae; (3) ratione contractus; that is, where the contract has either been entered into or has to be executed within the jurisdiction.''

[13] In ***Gallo Africa Ltd v Sting Music (Pty) Ltd***[6], the Supreme Court of Appeal was ceased with a case concerning an *incola* defendant facing a copyright infringement claim arising in South Africa and in 19 other countries. The Court discussed jurisdiction generally, noting that:

'Section 19(1)(a) of the Supreme Court Act provides that a High Court has jurisdiction "over all persons residing or being in and in relation to all causes arising . . . within its area of jurisdiction and all other matters of which it may according to law take cognizance". The section has a long history, which need not be related. However, our courts have for more than a century interpreted it to mean no more than that the jurisdiction of High Courts is to be found in the common law. For purposes of effectiveness the Defendant must be or reside within the area of jurisdiction of the court (or else some form of arrest to found or confirm jurisdiction must take place). Although effectiveness "lies at the root of jurisdiction" and is the rationale for jurisdiction, "it is not necessarily the criterion for its existence". What is further required is a ratio jurisdictionis. The ratio, in turn, may, for instance, be

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[4] *Ibid* at 886I.
[5] *Ibid* at 893E.
[6] 2010 (6) SA 329 (SCA).

domicile, contract, delict and, relevant for present purposes, ratione rei sitae. It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction. Domicile on its own, for instance, may not be enough. As Forsyth (at 164) rightly said:

"First there is the search for the appropriate ratio jurisdictionis; and then the court asks whether it can give an effective judgment. . . . [and] neither of these is sufficient for jurisdiction, but both are necessary for jurisdiction."'[7]

Contempt proceedings

[14] It is trite that compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure as far as possible with the provisions of section 35(3) of the Constitution[8]. ***Fakie NO v CCII Systems (Pty) Ltd***[9] is the leading authority on contempt of court proceedings. In this decision the Supreme Court of Appeal describes the application for committal for contempt by a private party as a *'peculiar amalgam'* because

'it is a civil proceeding that invokes a criminal sanction or its threat.' (para [8]).

The Court continues in paragraph [9]

'The test for when the 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,...'.*

However, in paragraph [41] the Court holds

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[7] *Gallo Africa Ltd* (supra) at para 10.
[8] *(JSO v HWO (24384/2009) (2014) ZAGPPHC 133 (19 February 2014))*
[9] *2006 (4) SA 326 (SCA)*

'*... this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites...*, *unless the respondent provides evidence raising* a *reasonable doubt* as *to whether non-compliance was wilful and mala fide the requisites of contempt would have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but, but only need evidence that establishes a reasonable doubt.'*

[15] The Supreme Court of Appeal summarised its findings in paragraph [42]:

a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirement.

b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.

c) In particular the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) *beyond reasonable doubt.*

d) But, once the applicant has proved the order, service or notice, and non- compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the *respondent fail to advance evidence that establishes a reasonable doubt* as to *whether non-compliance was wilful and* mala fide, *contempt will have been established beyond reasonable doubt.*

[16] In ***Pheko and Others v Ekurhuleni Metropolitan Municipality***[10] in a unanimous decision delivered by Nkabinde J, the Constitutional Court subsequently explained that:

"[30] The term civil contempt is a form of contempt outside of the court, and is

[10] *(No 2) [2015]ZACC 10*

used to refer to contempt by disobeying a court order. Civil contempt is a *crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by* a *disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour....*

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a *sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the role of law.*

[32] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a *person or legal entity before it to do or not do something (ad* factum praestandum), *the following elements need to be established on a balance of probabilities: (a) the order must exist; (b) the order must have been duly served on, or brought* to *the notice* of, *the alleged contemnor; (c) there must have been non-compliance with the order; and (d) the non-compliance must have been wilful or ma/a fide'.*

[17] The Constitutional Court confirmed the decision by the Supreme Court of Appeal in ***Fakie*** (supra) and held in paragraph [36] that the decision creates a presumption in favour of the Applicant –

'Therefore the presumption rightly exists that when the first three elements of the *test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.'*

[18] Nkabinde J continued in paragraph

> "*[37] - - However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such* as *declaratory relief,* a *mandamus demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.'*

The current application

[19] It is common cause between the parties before the Court that the first three elements of the test for contempt have been established. However, the first respondent denies that he is bound by the court order as the Court lacked jurisdiction.

[20] Since the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the respondents are able to lead evidence sufficient to create reasonable doubt as to their existence. The respondents thus need to rebut the presumption of *mala fides* and wilfulness.

[21] The meaning of the terms *mala tides* and wilfulness need to be determined. It was held in ***Fakie***[11] that a deliberate (wilful) disregard is not enough,

> *'since the non-complier may genuinely, albeit mistakenly, believe him of herself entitled to act in a way claimed to constitute 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).'*

[22] In light of the facts of this application the question would be whether (i) the first respondent indicated in his affidavit a factual inability to comply with the court

[11] *supra paragraph [9]*

order; (ii) and, if such a factual inability is evident from the documents before the Court, whether the first respondent honestly believed that non-compliance with the court order due to a factual inability to comply is justified.

[23] The applicant avers in the founding affidavit that the respondents are *mala fide* and in wilful contempt of the Court order. It is evident from the papers that the parties have been embroiled in extended litigation and that the relationship between the parties is acrimonious. The applicant states that the first respondent is aware of the court orders and has deliberately failed to comply. However, in addressing the first question, namely, whether the first respondent has indicated any factual inability to comply with the court order, it is imperative to take cognisance of the fact that the Court is not called now to adjudicate a grievance dispute between the parties. Kirk-Cohen J stated unequivocally in ***Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng***[12]

> *'Contempt of court is not an issue* inter parties; *it is an issue between the court and the party who has not complied with a mandatory order of court.'*

[24] Although there is no *onus* on the first respondent, but merely an evidentiary burden to create a reasonable doubt as to the existence of wilfulness and *mala fides.* I am not convinced that the first respondent has discharged the evidentiary burden in creating reasonable doubt as to the wilfulness and *mala fides* of his default to perform in terms of the court order. The reliance on the rescission application automatically suspending the operation of the order is incorrect. Such a rule only applies automatically to appeals and not rescission applications. In any event a Rule 43 order cannot be appealed and can only be varied. If the first respondent required, the order to be varied or amended the first respondent was required to have filed such order for variation immediately after the Rule 43 order was granted. The Court is cognisant of the fact that the first respondent has only launched an application raising the issue of jurisdiction after the contempt of court proceedings were filed by the applicant that the order be rescinded or varied. The Court is mindful that the first respondent was legally represented at the Rule 43 application and there was no

[12] *2002 (1) SA 660 (T) at 6730-E-*

allegation at the time of the proceedings of that application that the Court lacked jurisdiction, at least no such argument has been raised by the first respondent in its papers that it raised the issue at the Rule 43 proceedings. In any event the preceding case law clearly indicates that residence is a sufficient ground to establish jurisdiction. Further that, although residence is the first port of call to determine jurisdiction, it is not the only determining factor. The applicant also relies on the ground of *ratio contractu* which the Courts have found is a sufficient ground to establish jurisdiction. I am therefore satisfied that the applicant who is resident in Pretoria, holding rights to immovable property and whose marriage contract having been entered into within this Court's jurisdiction that this Court can entertain the claim.

[25] The first respondent alleges that the applicant does not possesses a lawful presence in South Africa to have changed her domicile despite the fact that he also acknowledges that they have been residing between Australia and Pretoria for the last ten years with a joint *domicilium* in Pretoria and they were married in South Africa. What is also interesting is that the first respondent confirms that he was residing in South Africa at the time the divorce proceedings were instituted and that he moved permanently to Australia after the summons was served which is sufficient to establish jurisdiction. Further he claims that the applicant's citizenship in Australia has lapsed as she failed to complete the requisite two years' residency to qualify for citizenship and therefore the Minister of Australia has the power to withdraw her spousal visa thereby which she will remain a South African citizen. If anything this just makes the first respondent's allegation of jurisdiction more cumbersome for him because the applicant is not yet an Australian citizen and the marriage contract was concluded in South Africa. Therefore, for all intents and purposes the applicant remains a South African citizen domiciled in the Court's area of jurisdiction and has *locus standi* to have instituted the proceedings. Therefore, the first respondent did not succeed in rebutting the presumption of wilfulness and *mala fides* nor in creating a reasonable doubt as to his non-compliance with the court order being wilful and *mala fide.*

[26] The first respondent save for alleging a lack of jurisdiction has not provided the court with any substantial reasoning for his conduct and its answering affidavit is in essence a bare denial to all the allegations. Therefore, there is no reason or even a

possibility of the first respondent's inability to comply with the order.

[27] I agree with the applicant that there was no requisite need for the joining of the second respondent in the main application as there was no relief sought against it in the main action. However, due the first respondent's failure to comply with the Rule 43 and relief being claimed in the interlocutory application it necessitated the second respondent being cited in the application. The final question then is whether there are any alternative means through which the court can ensure compliance with the court order. I am of the view that the applicant has exhausted all its remedies. In light of the absence of an adequate explanation for the first respondent's conduct, I am satisfied that the balance of convenience favours the applicant and that a failure to declare the first respondents in contempt and ordering the first respondent's committal to prison would result in irreparable harm being done to the applicant to which there is no alternate remedy.

[28] **Accordingly, the following order is made:**

1. The non-compliance with the rules of the Honourable Court in respect of dies, form and service, be condoned in terms of 6(12) of the Rules of Honourable Court and that this application be heard as an urgent application.

2. The respondents be declared in contempt of the following Court order dated 19 September 2019.

3. The first respondent is hereby directed to within five (5) days of the date of this order to comply with the order dated 19 September 2019 by making payment of all arrear maintenance due as at date of this order and by making the contribution towards the applicant's legal costs.

4. The first respondent is hereby directed and ordered to make future maintenance payments in the amount of R10 000 (ten thousand rand) per month in terms of the order dated 19 September 2019 to be paid on the 1st of every month with the first payment commencing 1 January 2022 into the applicant's attorneys trust account.

5. It is hereby directed that failing the first respondent's compliance with prayer 3 supra, the second respondent is hereby directed and ordered to make payment of all arrear maintenance and legal costs from the pension interest of the first respondent held by the second respondent into the trust account of the applicant's attorney.

6. It is hereby directed that failing the first respondent's compliance with prayer 3 supra, the second respondent is hereby directed and ordered to make future maintenance payments of R 10 000 (ten thousand rand) per month in terms of the Court order dated 19 September 2019 to be paid on the 1st of every month commencing on 1 January 2022 into the applicant's attorneys trust account.

7. The first respondent is ordered to pay the costs of the application on the scale as between attorney and client.

SARDIWALLA J
JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	:	6 October 2020
Date of judgment	:	23 March 2022
Applicant's Counsel	:	Adv. B Bergenthuin
Applcant's Attorneys	:	Gerhard Botha and Partners Inc.
First Counsel	:	DR T J Botha

Adv. Pretorious

First Respondents Attorneys :