

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG PROVINCIAL DIVISION

**CASE NO.: 79503/2017**

**REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED.  
23/3/2022**

In the matter between:

**J[....] K[....]**

Applicant

and

**G[....] O[....] K[....]**

Respondent

**JUDGEMENT**

**SARDIWALLA J:**

**Introduction**

[1] On 7 October 2020, an application was before me in the urgent court brought by the applicant against the 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 respondent on 30 November 2017 under case number 79503/2017 seeking a decree of divorce, full particulars of the respondent's estate and monthly maintenance. The parties were married on 10 October 1998 in Pretoria, out of community of property and subject to the accrual system. On 31 July 2018 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 24 August 2018 and the draft order was made an order of Court. The relevant parts of the agreements are as follows: -

- “1. The Applicant is entitled to continue to reside in the matrimonial home at section [...], S[...], Equestria, Pretoria, Gauteng Province;*
- 2. The Respondent is ordered to retain the Applicant as a dependent on his current medical aid scheme and to pay all medical expenses not covered thereby on presentation to him of an account;*
- 3. The Respondent is ordered to provide the Applicant with the motor vehicle which the Applicant was always allowed to drive previously, namely the Mercedes Benz A250;*
- 4. The Respondent is ordered to pay monthly maintenance to the Applicant in the amount of R25 000.00 per month, which maintenance is payable on or before the 1<sup>st</sup> day of each and every month;*
- 5. The Respondent is ordered to effect payment to the Applicant in the amount of R40 000.00 in monthly instalments of R1000.00 per month for the purposes of effecting payment of the Applicant's arrear obligations;*
- 6. The Respondent is ordered to make a contribution towards the Applicant's legal costs in the amount of R15 000.00 which amount to be paid in 3 (three) monthly instalments of R5 000.00 per month;*
- 7. The costs of the application to be costs in the cause.”*

[4] The first respondent has failed to comply with the order. at the time of this application he was in arrears of maintenance in the amount of R676 000.00 and R15 000.00 for legal costs and is escalating each month that the respondent is in default.

[5] The application is opposed.

### **Applicant's Argument**

[6] It is the applicant's submission that the respondent has wilfully and intentionally failed to comply with the Court order by failing to make payments as stipulated. The applicant averred that the respondent, through the deliberate actions has frustrated any and all attempts by the applicant to secure compliance. The applicant avers that the respondent's actions amount to an obstruction to justice which is a criminal offence. It also indicated that the respondent is aware of the court order as the first respondent was legally represented when the Rule 43 order was granted. That the applicant submits that it has exhausted all available remedies and that the 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. Therefore, as the applicant seeks a contempt of court order against the respondent and an order inter alia directing that he complies with the order granted.

### **Respondent's Argument**

[7] The respondent opposes this application. He argues that he has made several offers to settle the matter to which he received no response and as a result stopped the monthly payments as it seemed the applicant was comfortable receiving monthly payments without wanting to finalize the divorce proceedings. He further submitted that there is a difference between what the applicant needs and that her demands are unreasonable and that the Court make the settlement offer made to the applicant on 25 June 2018 an order of Court.

### **Contempt proceedings**

[8] 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<sup>1</sup>. ***Fakie NO v CCII Systems (Pty) Ltd***<sup>2</sup> 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

*'... 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.'*

[9] 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*

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<sup>1</sup> (JSO v HWO (24384/2009) (2014) ZAGPPHC 133 (19 February 2014))

<sup>2</sup> 2006 (4) SA 326 (SCA)

*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.*

[10] In ***Pheko and Others v Ekurhuleni Metropolitan Municipality***<sup>3</sup> 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 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*

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<sup>3</sup> (No 2) [2015]ZACC 10

*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'.*

[11] 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.'*

[12] 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**

[13] It is common cause between the parties before the Court that the first three elements of the test for contempt have been established.

[14] Since the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the respondent is able to lead

evidence sufficient to create reasonable doubt as to their existence. The respondent thus need to rebut the presumption of *mala fides* and wilfulness.

[15] The meaning of the terms *mala fides* and wilfulness need to be determined. It was held in **Fakie**<sup>4</sup> 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).'*

[16] In light of the facts of this application the question would be whether (i) the respondent indicated in his affidavit a factual inability to comply with the court order; (ii) and, if such a factual inability is evident from the documents before the Court, whether the respondent honestly believed that non-compliance with the court order due to a factual inability to comply is justified.

[17] The applicant avers in the founding affidavit that the respondent is *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 respondent is aware of the court orders and has deliberately failed to comply. However, in addressing the first question, namely, whether the 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**<sup>5</sup>

*'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.'*

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<sup>4</sup> *supra* paragraph [9]

[18] Although there is no *onus* on the 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 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 Court is mindful that the respondent was legally represented at the Rule 43 application. 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*.

[19] The respondent save for indicating that he is not financially in a position to do so has because he has to maintain two households 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 respondent's inability to comply with the order.

[20] 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 respondent's conduct, I am satisfied that the balance of convenience favours the applicant and that a failure to declare the respondent in contempt and ordering the respondent's committal to prison would result in irreparable harm being done to the applicant to which there is no alternate remedy.

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

**1. The Draft Order marked "X" is made an order of Court.**

SARDIWALLA J

JUDGE OF THE HIGH COURT

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<sup>5</sup> 2002 (1) SA 660 (T) at 6730-E-



## **APPEARANCES**

Date of hearing : 7 October 2020

Date of judgment : 23 March 2022

Applicant's Counsel : Adv.: Z Schoeman

Applicant's Attorneys : Couzyn Hertzog & Horak

Respondents Counsel : Adv.: A Granova

Respondents Attorneys : Mfolole Incorporated