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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE**

**CASE NO: 5955/2023**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

In the matter between:

**P[...] J[...] B[...]**

**APPLICANT**

**And**

**E[...] B[...]**

**RESPONDENT**

**JUDGEMENT**

**KGANYAGO J**

[1] On 10<sup>th</sup> May 2022 the applicant who is also known as Ruan which is his nickname has obtained an order on urgent basis. The order which the applicant had obtained on the 10<sup>th</sup> May 2022 read as follows:

“2. The status quo ante prior to the respondent’s unilateral thereof, is to be immediately resorted by directing and that the Applicant’s joint parental rights and responsibilities are forthwith restored in respect of the minor son to which this application pertains and per the terms as set out hereinunder, more specifically, that the minor son be immediately returned to the Applicant’s joint and shared primary care together with that of the Respondent;

3. The Family Advocate is requested to conduct a thorough and comprehensive investigation into the affairs and the best interest of the minor and to provide this Court with a report and recommendation regarding both parties' parental responsibilities and rights in respect of the minor's primary care and the manner in which the parents should exercise care, reasonable contact and access in respect of the minor;

4. Pending the investigation and report by the Family Advocate, the following interim order is made:

4.1 Both parties shall retain full parental responsibilities and rights in respect of the minor child, namely JJB born 3[...] M[...] 2020, (hereinafter referred to as "the minor child") as provided for in section 18 of the Children's Act 38 of 2005 (hereinafter referred to as the Act").

4.2 both parties be liable and responsible to attend to the minor child's primary care, to be exercised jointly in the following manner incorporating a rational basis:

4.2.1 the minor child's primary care and residence shall vest with the parties jointly;

4.2.2 the minor child will reside with "the custodial party" from Sunday morning at 8h00, (alternatively Monday morning), whereupon the "custodial party" is obliged to take the minor son to school and/or day-care alternatively return the minor son to the "non-custodial party's" place of residence;

4.2.3 The "non-custodial party" shall at minimum be entitled to telephonic and/or video contact every Wednesday evening whilst the minor is in the care of the other parent;

4.2.4 the afore going rotation is to commence on 15 May 2022 in the Respondent's favour and continue on a weekly basis thereafter;

4.2.5 the minor shall remain enrolled at a suitable day-care (currently A L[...] H[...] K[...] Kleuterskool).

4.3 Both parties shall be responsible and liable to maintain the minor child on equal basis each according to his/her own means whilst the minor is in their respective care, notwithstanding the foregoing the Applicant shall pay an amount of R800.00 to the Respondent in respect of the minor child maintenance commencing on 1 June 2022;

4.4 The Applicant, pending the report and investigation is to pay or cause to be paid the school fees and/or day care fees of the child at A L[...] H[...] K[...] Kleuterskool;

4.5 Th Applicant shall retain as beneficiary on the Applicant's medical aid scheme the minor, and every expense not covered by medical aid to be shared between the parties.

5. The parties are entitled to re-roll this application for hearing after the Family Advocate has conducted an investigation as envisaged, and permission is granted to the parties to supplement their papers, if necessary.

6. No order as to costs."

[2] The applicant is alleging that the respondent is in contempt of the order of the 12<sup>th</sup> May 2022, and has brought a contempt of court application on urgent basis. In the contempt of court application, the applicant is also seeking further orders which read follows:

“3. Directing that the Applicant’s parental rights and responsibilities forthwith be restored in respect of the minor child JJB born 3[...] M[...] 2020 to whom this application pertains.

4. It is directed that the Respondent immediately disclose the physical address where J is being held.

5. It is directed that J be placed in the primary contact, care, and residence of the Applicant within 12 (twelve) hours of this order until the divorce action is finalised.

6. Directing that the order granted by this Court on 12 May 2022 be reinstated except that primary contact, care and residence shall vest in the applicant and that contact between the respondent and J be reduced to every second weekend.

7. That a warrant of arrest is authorised committing the Respondent to imprisonment for contempt of court for a period of 45 (forty-five) days or imposing such period of imprisonment, as is deemed appropriate by this Court.

8. Imposing a fine of R75 000.00 (seventy-five thousand rand) and a further R1000.00 (one thousand rand) per day for each day that the Respondent remains in contempt of the order from the date of granting of this order or such fine as is deemed appropriate by this Court. The fine shall be paid to the Registrar of this Court within 10 (ten) days from date of service of this order by way of electronic mail on the respondent.”

[3] The applicant in his founding affidavit has stated that he is being denied his parental rights by the respondent who is refusing to allow him to see his son, and also that his son be returned to him. The last time the applicant had contact with the minor child was on Friday the 28<sup>th</sup> April 2023. The respondent is refusing to divulge the details of the address where the minor child is being kept despite numerous requests by the applicant.

[4] The respondent is opposing the applicant's application and in her answering affidavit has stated that the applicant's urgent application is an abuse of court processes as the applicant wanted to circumvent the office of the family advocate's investigation, the interim protection order granted on 10<sup>th</sup> May 2023 and the children's court application launched on 11<sup>th</sup> May 2023. The applicant has further stated that she has been complying with the court order from May 2022 up to April 2023, and thereafter there was *bona fide* non-compliance.

[5] The respondent avers that on 31<sup>st</sup> May 2023 the minor child got upset when he was supposed to go and visit the applicant. She had made the applicant aware during April 2023 that she was relocating to Brits as she had obtained a better employment opportunity with outstanding perks. That this urgent application could have been avoided had the applicant agreed to her relocation. After moving to Brits, she had provided the applicant with the specific area of surrounding where the Brits home was situated. That the applicant is now staying with a girlfriend who is having two children aged 10 and 6 respectively. The applicant's girlfriend has threatened her, and the minor child does not want to visit the applicant and had told her that the applicant and his girlfriend are naughty.

[6] The applicant avers that in the light of the applicant's kidnapping incident, the alleged substance abuse by the applicant's girlfriend, the applicant's girlfriend older children, the remarks of the minor child and minor child's refusal to visit the applicant, she started to fear for the minor child's safety when in the care of the applicant and his girlfriend. That led to the applicant approaching the domestic violence court for a protection order against the applicant. She had obtained an interim order and the return date is on 2<sup>nd</sup> August 2023.

[7] The respondent further avers that the applicant is not before court with clean hands, in that he had unilaterally elected to withhold payment of the minor child's school fees since April 2023. The relocation to Brits has the effect that the applicant and her are no longer able to adhere to joint primary residence, care and contact. Further that the applicant's previous kidnapping incident and his girlfriend's background is a real concern for her and that it is not in the minor child's best

interest that the applicant right to contact remains as prior to April 2023. That her motivation for withholding the minor child from the applicant and his girlfriend is justified under the aforesaid circumstances, and her failure to comply with the court order was not wilful nor an intentional and deliberate disobedience.

[8] The respondent has also brought a counter application seeking variation of the 12<sup>th</sup> May 2022 order to the effect that, pending the full comprehensive investigation by the office of the family advocate, and due to the primary residence now being changed, the current *status quo* of her having the sole primary residence of the minor child remain unfettered.

[9] It is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once all these elements are established, wilfulness and *mala fides* are presumed and the respondent bears evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established. (See *Secretary of Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*<sup>1</sup>).

[10] It is not in dispute that there is a valid court order that was granted on 12<sup>th</sup> May 2022, the respondent had knowledge of that court order, and that from April 2023 the respondent has not been complying with the court order. There is a presumption which the respondent has to rebut that she was not wilful and *mala fide*. According to the respondent, the non-compliance with the court order was not wilful, intentional and deliberate disobedience but was *bona fide*.

[11] In *Fakie v CCII Systems (Pty) Ltd*<sup>2</sup> Cameron JA said:

“The test for when disobedience of a civil order constitutes contempt has to be stated as whether the breach was committed ‘deliberately and mala fide’. A

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<sup>1</sup> [2021] ZACC 18 (29 June 2021) at para 37

<sup>2</sup> 2006 (4) SA 326 (SCA) at para 9

deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)".

[12] From the respondent's answering affidavit, it appears that the problems started on 21<sup>st</sup> April 2023 when the respondent sent a message to applicant's girlfriend through a face-book congratulating her for being together with the applicant. According to the respondent, the applicant's girlfriend responded with a threatening message telling her that she had no idea who she was, and that she must not tempt her. The respondent alleges that the minor child did not want to visit the applicant as the minor child had told her that the applicant and her girlfriend were naughty. The respondent also took into consideration the previous kidnapping incident by the applicant, the rumours that the applicant's girlfriend had a problem of substance abuse, and also the issue that the applicant's girlfriend had older children. All these according to her made her to fear for the minor child's safety when in the care of the applicant and his girlfriend.

[13] All these issues were triggered by the response which the respondent got from the applicant's girlfriend through the face-book. The respondent was aware of the applicant's living arrangement prior to the 21<sup>st</sup> April 2023 and did not have a problem with it. The problem only started after the face-book message, and was between her and the applicant's girlfriend, and it does not seem that the said problem was brought to the attention of the applicant, but the respondent out of her own unilaterally took a decision that the minor child was no longer to be in the care of the applicant. There is not even a single incident which the respondent had mentioned to have been committed by the applicant to the minor child which justify her fear. The rumours which the respondent had mentioned is untested. The minor child is only 3 years old, hence the respondent herself could not explain in detail as to what the minor child had meant when he allegedly told her that the applicant and his girlfriend were naughty.

[14] The order of the 12<sup>th</sup> May 2022 grant both parties joint and shared primary care which the respondent does not seem to be happy with it, hence she had launched all these various other applications against the applicant. If the respondent was genuine with her fear, she would have brought a proper application for the variation of the order of 12<sup>th</sup> May 2022 rather than to resort to her tactics. If indeed the respondent was concerned about the safety of the minor child, she would have first discussed the alleged problems with applicant and if the applicant persists with his actions which was allegedly threatening the safety of the minor child, the proper route to follow was to bring a variation application. If the situation was so dire and needed urgent attention, then she would have been justified in resorting to take that drastic route. The respondent has failed to state a single reason which justify her actions.

[15] On 20<sup>th</sup> May 2023 the applicant's then attorneys wrote a letter to the respondent's attorneys notifying them that the respondent had unilaterally and without consultation denied the applicant access to his child in breach of the order of the 12<sup>th</sup> May 2022 and that her actions were *mala fide*. The respondent was requested to comply with the order of the 12<sup>th</sup> May 2022 within 7 days failing which the applicant will launch a contempt of court application. The respondent's attorneys in response to the applicant's attorneys letter have merely stated that the respondent had proceeded with an application in the children's court and obtained an interim order which the applicant was aware of. The respondent's attorneys did not deal with the issues raised by the applicant's attorneys despite the fact that the order of the 12<sup>th</sup> May 2023 was at no stage varied or set aside. The interim order of the children's court did not in any way vary, set aside or supersede the order of the 12<sup>th</sup> May 2023.

[15] The respondent alleges that when she drops the minor child at the applicant's homestead, she is not allowed to enter his residence, Therefore, she is unable to account whether the rumours that the applicant's girlfriend abuses substances were correct. Based on this on 10<sup>th</sup> May 2023 the respondent approached the domestic violence court and obtained an interim protection order against the applicant, wherein the applicant is ordered to no longer contacts and abuses her. The return date for the interim protection order is the 2<sup>nd</sup> August 2023.

[16] The interim protection order was obtained immediately after the respondent had relocated to Brits. The mere fact that she was refused entry into the applicant's homestead in my view, does not in any way justify her assumption to fear for the safety of the minor child whilst in the applicant's care. The real issue is what the respondent had stated in her answering affidavit that had the applicant agreed to her relocation to Brits, this application would have been avoided.

[17] The interim protection order was in retaliation to the applicant refusal to agree to her relocation, and she was therefore acting *mala fide*. If the respondent was under the mistaken belief that she was acting *bona fide* and it was in the best interest and safety of the minor child, she was warned on 20<sup>th</sup> May 2023 that her actions were *mala fide* and that she should remedy that within 7 days. Despite that warning she persisted with her actions of denying the applicant access to his minor child. In my view, the respondent had a problem with the applicant's girlfriend and is using the minor child to punish the applicant for the deeds of his girlfriend, which makes her action to be *mala fide*. The respondent was therefore acting wilfully and with malice in refusing the applicant access to his minor child.

[18] All these counter applications which the respondent has launched against the applicant are a ploy to frustrate the order of the 12<sup>th</sup> May 2022. The respondent is therefore in contempt of the order of 12<sup>th</sup> May 2022. At this stage there is no merit in the respondent's counter application. This court does not find any reasons to vary the order of the 12<sup>th</sup> May 2022 without a comprehensive report by the family advocate.

[19] In the result the following order is made:

19.1 The respondent is found to be in contempt of the order made by the Honourable MG Phatudi on 12<sup>th</sup> May 2022 under case no 3893/2022.

19.2 The applicant's parental rights and responsibilities are restored in respect of the minor child JJB born 3[...] M[...] 2023 to whom this application pertains.

19.3 The respondent is directed to immediately disclose the physical address where JJB is being held.

19.4 The order of the 12<sup>th</sup> May 2022 will remain in force as it is until the divorce order is finalised, and the respondent to comply with it within 24 hours of this order.

19.5 A warrant of arrest is authorised committing the respondent to imprisonment for contempt of court for a period of 45 (forty-five) days. However, the warrant is wholly suspended on condition that the respondent complies with the order of 12<sup>th</sup> May 2022 within 24 hours of this order.

19.6 The respondent's counterclaim is dismissed.

19.7 The respondent to pay the costs of this application on party and party scale.

**KGANYAGO J**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA,**  
**LIMPOPO DIVISION, POLOKWANE**

**APPEARANCES:**

<b>Counsel for the applicant</b>	<b>: Adv R Caprari</b>
<b>Instructed by</b>	<b>: E Botha and Y Erasmus INC</b>
<b>Counsel for the respondent</b>	<b>: Adv S Nieman</b>
<b>Instructed by</b>	<b>: Wynand du Plessis Attorneys</b>
<b>Date heard</b>	<b>: 11<sup>th</sup> July 2023</b>
<b>Electronically circulated on</b>	<b>: 24<sup>th</sup> July 2023</b>