IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 21127/2009

In the matter between:

CARINA LOUISE VISSER Applicant

and

GIDEON JOHAN VISSER Respondent

JUDGMENT DELIVERED ON 15 DECEMBER 2009

BREITENBACH AJ:

1. This is an urgent application for orders declaring the respondent to be in contempt of an order made on 31 August 2009 by this court (*per* Van Reenen J) under case number 20817/08 in proceedings in terms of Uniform Rule 43, sentencing the respondent to 30 days' imprisonment, or an alternative punishment, suspended for a period to allow the respondent to purge his contempt and directing that the respondent pay the applicant's costs of suit on the attorney and client scale.

2. The order made by Van Reenen J ("the order) has two elements, made under Uniform Rules 43(1)(a) and (b) respectively. The first requires the respondent

to pay the applicant interim maintenance of R25 000 per month pending the determination of divorce proceedings between the parties in this court, the first payment to be made by 7 September 2009 and the subsequent payments to be made by the 7th of each month thereafter. The second requires the respondent to pay the applicant a R20 000 contribution towards her costs in the divorce proceedings, in four monthly instalments of R5 000 to be paid on the last day of the four months starting on 30 September 2009.

Background

3. In the divorce proceedings, which the respondent instituted against the applicant during December 2008, it is common cause that the applicant lives on the De Zalze Estate in Stellenbosch ("De Zalze"), that she married the respondent out of community of property on 8 May 1999 and that no children were born of the marriage.

4. On 12 June 2009 the applicant instituted the proceedings in terms of Uniform Rule 43 against the respondent ("the Rule 43 proceedings"), claiming maintenance *pendente lite* of R40 000 per month and a contribution towards her costs in the divorce proceedings of R25 000.

5. In her founding statement in the rule 43 proceedings the applicant alleged that the respondent worked as an architect at Dennis Moss Planners and Architects ("DMP") in Stellenbosch and that in 2004 he was appointed as the chief architect for De Zalze, a position which included drawing up the building guidelines for the Estate. In his answering affidavit, which is dated 31 July 2009, the respondent did not dispute the correctness of those allegations. He confirmed that he was working as an architect on projects in De Zalze.

6. In her founding statement in the Rule 43 proceedings the applicant added that the respondent supplemented his income from DMP (R28 562,93 nett in

December 2008) by means of private work as an architect. She says that during their marriage she saw to the respondent's bookkeeping and was consequently au fait with his earnings until 15 October 2008, when he changed his bank account to Absa Bank account number 9214745774. She attached to her affidavit part of a bank statement for that account which reflects total credits of R107 129,58 for the period 14 November 2008 to 31 January 2009 and submitted that it included his salary from DMP as well as his income from private work. In his answering affidavit, however, the respondent said: "*Waar ek in die verlede 'n aansienlike inkomste gegenereer het uit privaatwerk het die inkomste uit hierdie bron bykans heeltemal opgedroog, onder andere, weens die huidige ekonomiese klimaat en die feit dat my werkgewer my nie meer toelaat om by privaatprojekte betrokke te raak nie*". The respondent admitted the bank statement and the R107 129,58 total credits, but said that they comprised his salary from DMP for three months (approximately R84 000), a bonus of approximately R2 000 from DMP, an amount of R1 870 due to the cancellation of a policy and "*gelde deur my broer en suster in my bankrekening inbetaal [toe ek op 'n stadium nie geld vir petrol gehad het nie]*". (By my reckoning those payments for petrol must then have amounted to approximately R19 250!)

7. In response to an allegation in the applicant's founding statement in the Rule 43 proceedings that to the best of her knowledge the respondent did not have significant monthly expenses because his two cars were paid off and he was living with a female friend and she strongly doubted that he was making a contribution to the cost of the accommodation, the respondent set out 11 items comprising his average monthly expenditure (which totalled R18 260).

8. On 20 August 2009 the respondent made a supplementary affidavit in the Rule 43 proceedings, saying that on 31 July 2009, after he had signed his answering

affidavit, he was informed by DMP that he had been retrenched with effect from 30 September 2009.

9. On 31 August 2009, after hearing argument from counsel for the parties, Van Reenen J made the order described in paragraph 2 above.

Applications for committal for contempt generally

10. The leading modern decision on applications for the committal to prison of persons alleged to have disobeyed court orders, is *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) ("*Fakie*"). There, Cameron JA (for the majority) said the following:

(a) "[A] *private litigant who has obtained a court order requiring an opponent to do or not do something (ad factum praestandum),* [is permitted] *to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction*" (*Fakie* para 7).

(b) "*In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat*" (*Fakie* para 8).

(c) *"The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings. 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. 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" (*Fakie* para 42(b) to (d)).

(d) "*The test for when 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, 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 the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)*" (*Fakie* para 9).

11. In *Fakie* at paragraphs 53 to 56 and 62 to 64 Cameron JA added that in an application for committal for contempt, if a real, genuine or *bona fide* dispute arises as to one of the *facta probanda* such as whether an admitted or proven non-compliance was wilful and *mala fide*, the applicant has not applied for the matter to be referred to oral evidence, and the respondent's version is not "'*fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence*", the court must decide the matter on the facts stated by the respondent, together with those the applicant avers and the respondent does not deny.

12. Before dealing with the respondent's defences to the relief sought by the applicant, it is necessary to consider whether the order to pay a contribution to the applicant's costs in the divorce proceedings can be enforced by contempt of court proceedings.

A failure to pay a contribution to costs: enforceable by contempt proceedings?

13. As explained in Cilliers, Loots and Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5ed, 2009) volume 2:

"*Orders of court requiring compliance are, generally speaking, divided into two categories: orders ad pecuniam solvendam (ie orders to pay a sum of money) and orders ad factum praestandum (ie orders to do or abstain from doing a particular act). Not every order of court can be enforced by committal for contempt. The order must be one ad factum praestandum before the court will enforce it in that manner. When the order is for the payment of money simpliciter (for example an order to pay damages) it cannot be enforced by a committal for contempt even if the person ordered to pay has the means to do so but refuses to pay ...*

Orders for the payment of money for the maintenance of wives and children, while seemingly ... orders ad pecuniam solvendam, are treated as orders ad factum praestandum and are therefore enforceable not only by the ordinary methods of execution but also by way of committal for contempt.

Indeed, these are the most usual cases in practice in which applications for committal arise.

The explanation for this inconsistency has been stated to be that although such an order is in form ad pecuniam solvendam it is in substance ad factum praestandum because it is the failure to maintain which is punished" (pages 1106 to 1107 (footnotes omitted)).

14. A similar point is made in *Fakie*:

"*Although money judgments cannot ordinarily be enforced by contempt proceedings, 'it is well established that maintenance orders are in a special category in which such relief is competent': Bannatyne v Bannatyne*

(Commission for Gender Equality, as Amicus Curiae) 2003 (2) SA 363 (CC) (2003 (2) BCLR 111) in para [18]" (*Fakie* para 7, footnote 9).

15. Despite the omission from these passages of any mention of orders to pay a contributions to costs in the divorce proceedings, it appears from the judgment of the full bench of this court in *Hofmeyr v Fourie; B J B S Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (C) at 597A to F that by 1975 in this court the practice of committing for contempt in cases of failure to pay maintenance, the first reported instance of which is *Slade v Slade* (1884) 4 EDC 243 (which was confirmed and followed in this court in *Hawkins v Hawkins* (1908) 25 SC 784), had been extended to cases where a defendant husband had failed to obey an order to contribute to his wife's costs of her action against him. By then, the reported cases in which that had been approved or done in other courts were *Bocian v Bocian* 1921 SWA 17; *Snyman v Snyman* 1937 WLD 62; *Hubbard v Hubbard* 1947 (4) SA 7 W); *Claassen v Claassen* 1955 (1) PH F69 (O); *Swanepoel v Swanepoel* 1961 (3) SA 193 (O), albeit *dubitante*; and *Bezuidenhout v Bezuidenhout* 1964 (1) SA 7 (T), again *dubitante*.

Jurisdiction; urgency

16. An application for committal for contempt of court has to be made to the court which made the order that the respondent is alleged to have wilfully disobeyed (*Komsane v Komsane* 1962 (3) SA 103 (C); *Els v Weideman and Others* (3392/2008) [2009] ZAWCHC 29 (18 March 2009) paragraphs 6 to 13). As Van Reenen J has retired since he granted the order and the applicant alleged that the present application is urgent, it was heard by me in the "fast lane" of the third division of this court on 11 December 2009 in the circumstances described more fully below.

17. The respondent alleges that the application is not urgent.

18. I disagree. The course of the proceedings to date is as follows. The application was instituted on 8 October 2009. It was enrolled for hearing as an urgent matter on 29 October 2009. On that date, by agreement between the parties, it was postponed for hearing on 20 November 2009 in order to permit the applicant to deliver a reply to the respondent's answering affidavit made on 22 October 2009. The applicant delivered her replying affidavit on 16 November 2009. On 20 November 2009, by agreement, the matter was postponed once again for hearing on 8 December 2009. For some reason the matter was enrolled on the unopposed roll for hearing on that date. When the matter was called, I ordered in terms of practice note 17 that it be postponed to 11 December 2009 for hearing in the "fast lane". I did so because the ongoing breach of a court order, which is common cause on the papers, introduces an element of urgency (*HEG Consulting Enterprises (Pty) Ltd and Others v Siegwart and Others* 2000 (1) SA 507 (C) at 516 *in fin* to 517A) and, besides the adverse effect of the breach on the applicant, who despite the order has received no maintenance and no contribution to the costs of the divorce proceedings from the respondent, "[c]*ontempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of government*" (*Victoria Park Ratepayers Association v Greyvenouw CC* [2004] 3 All SA 623 (SE) at paragraph 5).

<u>The evidence in this case; the respondent's defence</u>

19. In this case it is common cause that the order was granted against the respondent and that he has not made any or any part of any of the payments required by the order.

20. The issue for decision, therefore, is whether the respondent has advanced evidence that establishes a reasonable doubt as to whether his admitted non-compliance with the order was wilful and *mala fide*.

21. This necessitates an analysis of the affidavits in the present matter and the annexures thereto.

22. In her founding affidavit the applicant says that the respondent left the common home during October 2008 and, since then, he has not paid her any maintenance or contributed to the bond repayments. She says the respondent is an architect and that he worked as such at DMP until 30 September 2009. She says that to the best of her knowledge he is still involved with several of DMP's projects because no-one at DMP shared the responsibility with him for the projects he was working on at the time he left. She says she believes he is carrying on with those projects under his own name. She mentions three examples of such projects, namely "*Franschoek Le Hermitage*" (which she says has a project value of R200 million), the "*Bassons van Bosmanstraat*" (with a project value of R30 million) and a new exclusive restaurant at "*Kleine Zalze*" (the project value of which is unknown to her). She adds that to the best of her knowledge the respondent is also busy with at least eight private projects, which she says were more fully described in her founding affidavit in the Rule 43 proceedings (which, in fact, is not the case). She says that for a period of five years she was fully apprised of all the respondent's income, both from DMP and from his private projects, the latter being extremely profitable. She submits that it makes economic sense for him not to be formally employed by a firm of architects. Consequently, she submits, although the respondent has not been formally employed by DMP since 30 September 2009, "*hy tans oor die nodige inkomste beskik, sowel as geakummuleerde fondse deur die afgelope jaar, om die betalings te maak soos hierdie Agbare Hof beveel*".

23. In his answering affidavit the respondent says that he was notified of the order and its terms on 1 September 2009, but denies that the intentionally refused or failed to comply with the order or that his conduct has been *mala fide*. He explains that he has not paid anything because he has been unable to pay.

24. Inability to pay is a defence in proceedings for committal for contempt arising from non-payment of maintenance. In *Slade's* case, *supra*, Shippard J said:

"*What gives the Court power to deal with this case as one for a committal order, is the fact that the respondent was, after the investigation as to his circumstances, ordered to pay alimony to his wife at a certain place and by a certain date. It is on that account, and because there was a judgment not merely for a money payment in general terms, but for alimony to be paid in a prescribed manner, that the Court is enabled to deal with the respondent's refusal as a contempt. Every case of this kind must be dealt with on its merits. I am far from saying that in every case where an order for the payment of money, and also ad factum praestandum, has been disobeyed, the Court would entertain an application for committal for contempt. The exercise of the power of committal, even where an apparently strong prima facie case has arisen, must always be entirely within the discretion of the Court; for the party in default may be prepared to show that he was not able to comply with the judgment. In such a case the respondent is to be heard in his own justification or defence before he is committed to prison; and proof of his inability may protect him... If a respondent should prove that he was unable to pay the amount in terms of the order, the Court would take a merciful view of the case; and the mere fact of non-payment in accordance with the judgment would not be sufficient ground for committing. Whether the default arose from lack of means or want of will is the point to be decided*" ((1884) 4 EDC 243 at 248 to 249).

(See also *Campbell v Herbert* (1908) 18 CTR 22; *Hannay v Hannay* (1908) CTR 25; *Bhy v Bhy* (1909) 19 CTR 863; *Wickee v Wickee* 1929 WLD 145 at 147 to 148; *Dezius v Dezius* 2006 (6) SA 395 (T) paragraphs 25 to 26.)

25. The paragraph of the answering affidavit in which the respondent sets out the factual foundation of his inability-to-pay defence (paragraph 6) reads as follows:

"*Die rede waarom ek nie die hofbevel kan nakom nie, is bloot eenvoudig omdat dit vir my finansieël onmoontlik is om aan die bepalings daarvan te voldoen en wel om die volgende redes:*

6.1 Ek het einde Julie 2009 kennis gekry dat ek met ingang 1 Oktober 2009 oorbodig ('retrenched') verklaar word.

6.2 Die hofbevel is op 31 Augustus 2009 toegestaan met ingang 1 Augustus 2009.

6.3 My salaris vir Augustus 2009 ten bedrae van R27 377,24 is op 29 Augustus 2009 in my spaarrekening inbetaal.

6.4 Ek het eers op 1 September 2009 kennis gekry van die hofbevel en toe was die saldo in my spaarrekening slegs R3 461,28. Sien afskrifte van my bankstate hierby aangeheg en gemerk aanhangsel 'GJV1' tot 'GJV3'.

6.5 Daarna is slegs twee verdere bedrae in my rekening inbetaal te wete R2 949,11 op 14 September 2009 en R704,67 op 29 September 2009.

6.6 'n Salaris ten bedrae van R27 595,46 is ook op 29 September 2009 vir die laaste keer deur my werkgewer in my spaarrekening betaal. Na al die aftrekkings was daar 'n bedrag van R20 000 vir my beskikbaar totdat ek weer 'n inkomste kan verdien.

6.7 Ek het tans geen inkomste nie.

6.8 Ek probeer ander argitekswerk bekom, maar dit is uiters moeilik as gevolg van die huidige ekonomiese toestande.

6.9 In die lig van die voorafgaande was dit vir my finansieël onmoontlik om die hofbevel op enige tydstip na te kom.

6.10 Op 4 September 2009 is ek na aanleiding van my benarde finansiële toestand geadviseer om 'n klagte ingevolge Artikel 6(1)(b) van die Wet op Onderhoud, 99 van 1998 by die plaaslike onderhoudsbeampte te Stellenbosch Landdroshof vir vervanging of opheffing van die bestaande onderhoudsbevel (die hofbevel) aanhangig te maak. Nadat ek van bakboord na stuurboord gestuur is en my in burokratiese rompslomp vasgeloop het, het ek die vorms ongeveer 18 September 2009 verkry, voltooi en op 25 September 2009 ingehandig te Landdroshof Stellenbosch. Ek wag intussen om in kennis gestel te word wanneer die klagte aangehoor sal word. 'n Afsrif van die vorm J107A word hierby aangeheg en gemerk aanhangsel 'GJV4'."

26. The respondent deals in his answering affidavit with the applicant's allegations in her founding affidavit in the present matter regarding his continuing to work on projects he had been doing at DMP and his private projects, as follows (paragraph 7.7):

"*7.7.1 Ek ontken dat ek betrokke is by en deel is van verskeie projekte van my gesegde vorige werkgewer.*

7.7.2 Ek ontken dat ek betrokke is by enige ander privaatprojekte soos deur Applikant beweer. Die Applikant maak hierdie blatante bewerings sonder om dit te kan staaf.

7.7.3 Ek is oorbodig ('retrenched') verklaar en Applikant wil dit eenvoudig net nie aanvaar dat ek werkloos is en in die huidige resessie wat ons beleef, sukkel om argitekswerk te kry."

27. These general denials concern matters peculiarly within the respondent's knowledge, namely the carry-over work from DMP the applicant alleges he is doing and the private work the applicant alleges he has. They go to the heart of

his defence that he is out of work and consequently has no money to make the payments required by the order. Despite the applicant's allegations, which are summarised in paragraph 22 above, and the fact that the respondent bears the burden of adducing evidence that establishes a reasonable doubt as to whether his admitted non-compliance with the order was wilful and *mala fide*, the respondent has not elucidated the facts or substantiated his denials beyond repeating that he left DMP's employ at the end of September and he has not been able to find other work as an architect since then. For instance, he has not said whether or not the applicant is right to say that while at DMP he was the architect responsible for the "*Franschoek Le Hermitage*", "*Bassons van Bosmanstraat*" "*Kleine Zalze*" restaurant projects; and, if so, who at DMP has taken over from him; and he has not said when the private projects which the applicant referred to ended.

28. In her replying affidavit, in response to the respondent's denial that he has had any private work since leaving DMP, the applicant says that she regularly sees the applicant at De Zalze, "*waar hy, onder andere, met kliënte konsulteer en met ten minste een projek betrokke is, soos hieronder sal blyk*" (paragraph 8.2). She then goes on to explain that before the respondent left the common home he did private work under the trade name "*V1 Architects*". To substantiate this she attached to her replying affidavit copies of two invoices issued in 2005 and 2007 respectively (the one apparently signed by the respondent and the other unsigned by with a signature line for "*G J Visser*") and a schedule of proposed fees issued in 2006, all of which are headed "*V1 Architect*". Both of the invoices contain "*bank details*", namely an account with Absa Stellenbosch with a different account number to the account number which appears on the copies of the statements for the respondent's savings account which he attached to his answering affidavit (as annexures "GJV1" to "GJV3"). The first and third the documents reflect V1 Architect's fees as being 7% of the construction cost and all of them indicate a split of payments over several "*workstages*".

She also attaches a photograph of a building board on Erf 445, De Zalze, which she says she took on 13 November 2009. The board includes the following: "*Architect: V1*". She says that the building project in question is at approximately wall height and submits that the respondent must have been involved with it at the time when he made his answering affidavit. She alleges that, based on her knowledge of the respondent's private practice while they lived together, at this stage of the project the respondent is probably receiving monthly payments from the employer.

29. Once again, despite the applicant's rebuttal of the respondent's denial that since leaving DMP he has been doing private work and despite the burden of adducing evidence that he bears, the respondent has not sought leave to file dealing with the applicant's allegations about V1 Architects, the building on Erf 445, De Zalze and the manner in which he is normally paid for work of that sort.

30. Another striking feature of the respondent's answering affidavit in the present proceedings is that the bank statements he has attached show that between 31 August 2009 and 15 October 2009 he withdrew approximately R35 000 in cash from his savings account. When I raised this with the respondent's counsel during the course of his argument, he said that the withdrawals had to be seen in the light of the respondent's statement of his monthly income and expenditure dated 25 September 2009, made in support of his complaint under section 6 of the Maintenance Act 99 of 1998. According to the statement, during that month the respondent's net income was R27 371,55 after deductions for income tax, a contribution to the unemployment insurance fund and for maintenance to his child from an earlier marriage (R1 771,10) and for what I was informed at the hearing was a contribution to the legal costs of his first wife (R1 000). The statement also shows his total expenses for that month as being R21 577,87, including R5 500 for rent, R3 000 for water and

electricity, R600 for service charges and tax, R600 for domestic help, R1 500 for (further) maintenance (for an unspecified beneficiary) and R2 500 for legal costs. What is clear from these documents is that, in fact, the respondent had money with which to pay at least some of the amounts Van Reenen J had ordered him to pay during September 2009, but instead of complying with those obligations he chose to spend all of his money on himself (including nearly R10 000 per month on his own accommodation and R2 500 per month on his own lawyers).

31. As regards the respondent's complaint under section 6 of the Maintenance Act, I should mention that it appears from the applicant's replying affidavit that on 16 November 2009 the messenger of the Stellenbosch Magistrates' Court served on her a subpoena in terms of section 9(2) thereof. Although she does not say whether she has been subpoenaed in terms of section 9(1)(a)(i) to appear before the maintenance court and give evidence or subpoenaed in terms of section 9(1)(a)(ii) to produce a book, document or statement, it appears that pursuant to the respondent's complaint the maintenance officer has decided to institute an enquiry in the maintenance court into the provision of maintenance by the respondent to the applicant. There is no indication in the papers, however, of the date of the enquiry let alone that pursuant to the enquiry the maintenance court has made any order in terms of section 16(1)(b) or (c). (For completeness sake I should also mention that the respondent has not applied for a variation of the order under Uniform Rule 43(6) on the basis that there has been a significant change in his circumstances since it was made.) Consequently, at all material times since 31 August 2009 the maintenance order made by Van Reenen J has stood unamended.

Conclusion

32. I conclude that the respondent has failed to adduce evidence that establishes a reasonable doubt that his admitted non-compliance with Van Reenen J's order was because at all material times he has been unable to pay anything at all, i.e., as he put it in his answering affidavit, that "*dit was vir my finansieël onmoontlik om die hofbevel op enige tydstip na te kom*". I have no doubt that his failure to pay anything at all is due to a lack of will to pay rather than a lack of means. The respondent is thus guilty of contempt of the order.

33. As will be apparent by now, on the papers as they stand it is not possible to determine whether the respondent could have paid everything he was ordered to pay and, if not, the amounts that he was able/unable to pay in respect of each element of Van Reenen J's order. Those however are matters relevant to the sentence to be imposed if the respondent does not now pay the arrears due under the order. In that eventuality, the respondent should be afforded an opportunity to adduce evidence in mitigation of the sentence, which if he alleges an inability to pay the arrears or any part thereof may include evidence of that.

Costs

34. In my view, an order of costs on the attorney and client scale is warranted. It will serve as a mark of this court's displeasure at the respondent's contempt of the order and it will limit the extent to which the applicant will be out of pocket in respect of the expense of this application.

Order

35. In the result, and for the reasons set out above, the following order is made:

(a) The respondent is declared to be in contempt of the order made by this court (*per* Van Reenen J) on 31 August 2009 in case number 20817/2008.

(b) The respondent is directed to pay to the applicant all amounts due under such order within 10 days.

(c) Failing compliance with paragraph (b) above the respondent is ordered to show cause at 10:00 on Wednesday 13 January 2010 why this Court should not sentence him to 30 days' imprisonment or impose another appropriate sentence upon him.

(d) The respondent is ordered to pay the costs of this application on the attorney and client scale.

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BREITENBACH, AJ