IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **5245 /2017**

In the matter between:

C N Applicant

v

T N Respondent

Coram: ***Dlodlo J***

Date of Hearing: 25 April 2017

Date of Judgment: 31 May 2017

JUDGMENT

DLODLO, J

[1] This is an application in which the applicant seeks an order, inter alia, that (a) the respondent be found to be in contempt of the court order granted by Salie-Hlophe J on 13 August 2015 under case number 11898/15 ('the court order'); (b) the respondent be committed to prison for contempt of court for a period of 30 days or such period as the court deems just and equitable, (c) the respondent's committal to prison be suspended for a period of one year on condition that: (i) the respondent pays the applicant the sum of R 264 149-91 (the amended quantum calculation is mentioned later herein) within 14 days from the date on which the order was granted; (ii) the respondent forthwith complies with his obligations set out in the court order ('the main application'). The respondent launched a counter application in which he seeks an order that, *inter alia*: (a) the court order be discharged (2) the respondent be permitted to enter the property situate at […] R. Street, Stellenbosch ('the property') accompanied by a sworn valuator for purposes of compiling an inventory and valuing the movable assets at

the property. (c) the costs of the sworn valuation be paid from the sale of proceeds of the property situated at […] P. Street, Vermont ('the Vermont property'). (d) the respondent be permitted to remove specified movable assets from the property ('the counter application'). The parties shall hereinafter be referred to as they are cited in the main application. It is perhaps prudent to first consider the counter application launched by the respondent.

THE COUNTER APPLICATION

[2] Mr Mouton preceded his submissions in the above regard by referring to **Jeanes v Jeanes** 1977 (2) SA 703 (W) at 706 G where the Court held as follows:

'Rule 43 (6) provides that the Court may on the same procedure vary its decision in the event of a material change taking place in the circumstances of either party or a child or the contribution towards costs proving inadequate. The relevant words, in my view, are "on the same procedure". In other words, if there is a change in circumstances, a simple application in terms of Rule 43 can be made. If there is any other good cause for a variation of a maintenance order the maintenance debtor is not precluded from approaching the Court for relief by way of ordinary motion proceedings. In this regard it is only necessary to quote one authority, namely Beneke v Beneke, 1965 (1) SA 855 (T) at p. 856, where VIERYA, J., said:
"…the term 'good cause' has a wide connotation. It means any reason which in particular circumstances of the case would render it equitable for the Court to exercise its discretion in favour of the applicant."

He also referred to **Beneke v Beneke** 1965 (1) SA 855 (T) where it was held that, inter alia, an order to pay maintenance in respect of minor children after divorce may be varied even though made in terms of an agreement between the parties provided only that good cause is shown for such variation. Essentially Mr

Mouton's submission is the following as far as the counter application is concerned:

'It is clear that Applicant has in excess of R3 000 000 to maintain herself and the parties' minor child pendente lite, whilst Respondent's only source of income, Jetvest, cannot pay the arrears of R253 954, 33 and R100 000 per month until the divorce action and his claim in terms of section 7 (3) of the Divorce Act is finalised; Having regard to the respective current financial positions of the Applicant and the Respondent, it would be just and equitable to suspend the order granted by the above Honourable Court on 13 August 2015.'

[3] I fully agree with Mr McClarty SC that the court must view the conduct of the respondent seriously in that he opposes the main application without purging his contempt. In fact such conduct is fatally defective. I shall demonstrate hereunder. One must mention that the minor child of the parties is actually the person that has suffered the most prejudice because of the respondent's failure to pay maintenance contemplated in the court order. Ordinarily, courts should not allow respondents such as the present one to be heard until such time that their/his contempt has been purged. It comes as no surprise at all that the applicant invites me not to allow the respondent to be heard until such time that he purges his contempt. This approach is supported in **Byliefeldt v Redpath** 1982 (1) SA 702 (AD). It has been held authoritatively that this approach is especially of importance in matters involving the best interests of the minor children. See in this regard **Kotze v Kotze** 1953 (2) SA 184 (CPD). Indeed the respondent's failure to pay in terms of the court order has clearly left the minor children of the parties without maintenance support. I view the failure to pay maintenance in a

very serious light. In **Kotze v Kotze** *supra* the judge cited the following dicta of Romer, L. J. in **Hadkinson v Hadkinson** 1952 (2) A. E. R. at page 571:

'Disregard of an order of the court is a matter of sufficient gravity, whatever the order might be. Where, however, the order relates to a child, the court is, or should be, adamant on its due observance. Such an order is made in the interests of the welfare of the child and the court will not tolerate any interference with or disregard of its decisions on these matters.'

It is important to set out what Denning LJ stated in the same case:

'It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance…Applying this principle, I am of the opinion that the fact that a party to a cause has disobeyed an order of court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its decision refuse to hear him until the impediment is removed or good cause is shown why it should not be removed'.

Despite the aforegoing I have heard the respondent in his counter application.

[4] It remains of cardinal importance to note that no appeal lies against the court order. See Section 16 (3) of the Superior Courts Act 10 of 2013. The respondent's only recourse is an application in terms of Rule 43 (6) on condition that there has been a material change in circumstances subsequent to the applicant launching an application in terms of Rule 43 (1) under case number 11898/2015 ('the Rule 43 application') and the granting of the court order. I find it strange that the counter application is '*dressed up'* as a stand alone application. Clearly, the respondent has utilised the incorrect procedure. Indeed it is

abundantly clear that the counter application is in fact an application in terms of Rule 43 (6). It is just imperfectly styled totally contrary to how it should be. Why I say it is Rule 43 (6) is evident from the fact that the respondent seeks a complete discharge of his obligations as set out in the court order. In what the respondent defines as his *'Replying Affidavit'*, the respondent explicitly states, *'I have set out the reason why I delayed with an application in terms of Rule 43 (6).'*

[5] The ancillary relief sought by the respondent in the counter application does indeed amount to nothing more than what Mr McClarty described as *'smoke and mirror'*, which is clearly aimed and calculated at obfuscating the real issues in dispute in the present matter. The issue is that the applicant is in contempt of the court order and should be appropriately sanctioned. I deal fully with the contempt of court issue *infra* under the topic 'the main application'. I have been placed in a fortunate position in that the court file dealing with the Rule 43 proceedings prior and during the granting of the court order has been made available to me. I find that the respondent has rehashed the facts that were fully traversed in the Rule 43 application which culminated in the granting of the court order. On the respondent's own version the issues relating to Jetvest 1544 CC t/a Le Cap Foods's ('Jetvest') purported financial deterioration are conceded to have been addressed in the Replying Statement delivered by the respondent in the Rule 43 application. The issues relating to Jetvest (all of them) were raised and considered by the court that granted the court order. I find it completely strange

that those exact issues are again raised in this counter application. In my view, the matter is *res judicata*. The counter application does seem illegitimate and totally misconstrued.

[6] Rule 43 (6) is clear and it is unequivocal. It provides (in relevant parts) as follows:

'The Court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child…'

It is important that it be mentioned that the procedure that the respondent should have adopted in launching an application in terms of Rule 43 (6) (i.e the counter application) is set out in Rule 43 (2) and (3). The procedure is simply that (a) the respondent was to deliver a sworn statement in the nature of a declaration setting out the relief sought and the grounds for such relief; and (b) the applicant was to deliver a sworn reply in the nature of a plea. Contrary to what is set out by the relevant rule, the respondent has delivered a comprehensive founding affidavit in the counter application. I point out that the filing of lengthy and voluminous affidavits frustrates and defeats the purpose of Rule 43. It certainly amounts to an abuse of the court process. Time has arrived that courts should take charge and ensure that its process should not be abused by the litigants. In an appropriate case, the court may strike out the whole document or portion thereof. See **Zoutendijk v Zoutendijk** 1975 (3) SA 490 (T) and **Andrade v Andrade** 1982 (4) SA 854 (O). The lengthy affidavits filed by the respondent in which he has traversed issues that were addressed in the Rule 43 application is totally

unacceptable. The filing of lengthy affidavits by the respondent has culminated in a record exceeding 350 pages. Failure to adhere to the procedure set out in Rule 43 should not be overlooked or counternanced by the court. What the respondent has done is to adopt a procedure prescribed in Rule 6 of the Uniform Rules of court. The respondent is not permitted to institute an application in terms of Rule 6 in circumstances that require an application to be instituted in terms of Rule 43 (6). See **Van der Walt v Van der Walt** 1979 (4) SA 891 (T) and **Mather v Mather** 1970 (4) SA 582 (E). Accordingly I cannot blame Mr McClarty in submitting that the respondent's conduct amounts to an abuse of the court process and that his affidavit and annexures in the counter application should be struck out. I find that there has been no change in circumstances which give rise to an application to be launched in terms of Rule 43 (6) by the respondent.

[8] I have referred above to a lengthy founding affidavit. Upon receipt of the answering affidavit filed in response to the counter application, the respondent delivered a lengthy Replying affidavit. Rule 43 does not make provision for a Replying affidavit (or Statement) to be delivered by the respondent. The respondent may only deliver a Sworn Statement and the applicant may only deliver a Sworn Reply. I need to emphasise that the provisions of Rule 43 should be strictly complied with. The respondent's Replying affidavit stand to be struck out. See **Van der Walt v Van der Walt** 1979 (4) SA 891 (T) and **Mather v Mather** *supra*. I hereby strike down the Replying affidavit filed by the respondent

in the counter application. It is important also to mention that Rule 43 does not make provision for supporting affidavits deposed to by third parties to be delivered. I proceed to also strike out the supporting affidavits deposed to by Ms Muchabyeyo, Mr Gem, Mr Smith-Symms and Mr Pheiffer herein. It must be apparent from the above that the so-called counter application has no merits either and stands to be dismissed.

THE MAIN APPLICATION

[9] In the matter between **Fakkie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at 344, the Supreme Court of Appeal summed up the civil contempt procedure as follows:

(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 requirements. (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 fide*: 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. (e) A declaratory and other appropriate remedies remain available to a civil applicant on proof on a balance or probabilities.

[10] Mr Mouton also relied on **Fakie** judgment *supra*, particularly paragraph 9 and 38 thereof. These paragraphs read as follows:

'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 refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith' (para 9) and

'Given our very different constitutional setting, the approach of the English, Australian and Canadian Courts seem convincing to me. As they have found, there is no true dichotomy between proceedings in the public interest and proceedings in the interest of the individual, because even where the individual acts merely to secure compliance, the proceedings have an inevitable public dimension – to vindicate judicial authority. Kirk-Cohen J put it thus on behalf of the Full Court:

'Contempt of court is not an issue inter partes; it is an issue between the court and the party who has not complied with a mandatory order of court.'" (para 38)

Mr Mouton referred to other cases such as **Dezius v Dezius** 2006 (6) SA 395 (T) and others in order to bolster his contention that his client is not guilty of contempt of court. In Mr Mouton's submission, the respondent has discharged the evidential burden by raising a reasonable doubt as to his ability to pay the outstanding maintenance and contribution towards legal costs.

[11] It is trite that all that the applicant bears onus to prove is that (a) the court order was granted; (b) the respondent has knowledge thereof; and (c) the respondent has failed to comply with the court order. The respondent concedes that the court order was granted and that he had knowledge of the provisions of the order. The respondent also concedes that he had failed to make payment in terms of the court order to the applicant. Even in his Replying affidavit (which I have struck out) the respondent admits that he has failed to make payment to the Stellenbosch Municipality. On his version, the respondent has failed to make payment as required by the provisions of the court order.

EVIDENTIARY ONUS ON THE RESPONDENT

[12] It must be mentioned that because the applicant has satisfied the requirements referred to above, the evidentiary onus shifts (as it were) to the respondent who bears the onus to prove that his failure to comply with the Court Order is not wilful or mala fide. It was stated earlier in this judgment that the respondent has relied on facts that were fully traversed at the hearing of the Rule 43 application. What he specifically relied on is that (a) the applicant owns her own business from which she generates an income. (It remains of importance to note that the pictures from the internet that the respondent relies on date back to 4 August 2014); (b) he experienced financial hardship since Jetvest lost the business from Crown National in 2012 which made up approximately 65% of Jetvest's sales; (c) the applicant owns extensive assets, whereas the respondent does not.

[13] Having been supplied with the Rule 43 file, I am positioned to state that the reasons proffered by the respondent are but a regurgitation of the facts that were fully canvassed and traversed at the hearing of the Rule 43 application before Salie-Hlophe J. The fact is that the respondent is unable to rehash the same facts in order to persuade me to revisit the court order. Salie-Hlophe J heard argument on these facts. Therefore the matter is *res judicata*.

INSURANCE PAYMENT

[14] In order to bolster its case, the respondent relied on the fact that the applicant received the amount of R591 126.00 from an insurance claim paid out by Auto and General Insurance Co. Ltd. The answering papers make it clear that the insurance claim was paid to the applicant in order to enable her to replace goods that were stolen during the robbery and for no other purpose. Mention must be made of the fact that the parties signed a settlement agreement during February 2016 ('the settlement agreement'). This was after the parties instituted proceedings against each other in the Stellenbosch Magistrate's Court. It is telling that paragraph 7 of the settlement agreement stipulates that the respondent agreed to comply with the provisions of the Court Order. In the same month of February 2016 the respondent immediately reneged on the obligations set out in both the Court Order and the settlement agreement.

THE PROCEEDS FROM VERMONT PROPERTY

[15] The respondent is precluded from using the amount of R2 500 000 which the applicant received from the proceeds from the sale of the above property. The property concerned was owned and sold by Motifprops, an entity of which the applicant was the sole director and shareholder. The respondent himself received an amount of R2 700 000 from the proceeds of the sale of Vermont property. This he says was used to settle Jetvest's overdraft facility. It is common cause that the respondent is the sole member of Jetvest. He thus received a financial benefit from the proceeds from the sale of the Vermont property. Therefore both parties received a share in the proceeds from the sale of the Vermont property. In order to conclude this aspect it must be mentioned that the applicant is not required to utilise and deplete her personal resources for her and the minor child's maintenance requirements when the court order makes provision for the respondent to make payments to the applicant and/or on behalf of the applicant. See **AG v DG** 2017 (2) SA 409 (GJ) at 411H-I.

NON-DISCLOSURE OF FINANCIAL POSITION

[16] Notably, the respondent relies extensively on Jetvest's financial deterioration for his purported inability to comply with the provisions of the court order. There is, however, no documentary evidence setting out the respondent's financial position. The respondent adduces no evidence of his personal bank accounts,

investments, assets etc. I point out that in circumstances where the respondent seeks to excuse his contempt, the least that one would expect the respondent to do is to produce documentary evidence in support of his contentions. The court order was granted against the respondent and not Jetvest. It is the respondent who is obligated to comply with the court order. The respondent should have provided this court with comprehensive information of his financial position. This he failed to do.

THIRD PARTY ENTITIES

[17] Correspondence sent by the respondent's attorneys make it evident that the respondent and/or Jetvest has business dealings and/or relationships with several third-party entities. There is no full disclosure regarding the nature and extent of such business dealings and/or relationships. In the latter regard the respondent has been vague and somewhat evasive. One would have for instance expected that the respondent should have provided details regarding the *'…the profit sharing arrangement'* between Jetvest and Le Cap Food Enterprises (Pty) Ltd ('LC Enterprises'). Bank statements reveal that Jetvest paid large sums of money to LC Enterprises. For instance on 5 January 2017, Jetvest paid LC Enterprises the amount of R443 142.99. There is no explanation about all this. The respondent's failure to provide documentary evidence supports the applicant's assertion that the respondent has failed to make a full disclosure of his personal financial position. Mr McClarty submitted that the respondent's

clandestine approach to the disputed issues in the main application is evidence that the respondent's failure to comply with the court order is wilful and mala fide. This cannot be faulted.

ANCILLARY RELIEF IN COUNTER APPLICATION

[18] The ancillary relief sought in the counter application remains founded on bold and unsubstantiated grounds. Again the respondent adduces no documentary evidence in support of his assertions. There is not even an assertion that the respondent owns the movable assets claimed. Nor has he given any details on the information on which he relies in asserting that the applicant is disposing of the movables. The true position of the law is that the respondent is unable to remove the movable assets from the property while divorce action is pending. It is trite that the issue of the division of the movables shall be determined at the hearing of the divorce action. It would not be appropriate to determine the issues regarding the movable assets or the valuation of such assets at this stage.

[19] The applicant denied the existence of oral agreement or that she is disposing of assets. The point is that the facts alleged by the respondent (applicant in the counter application) in support of the ancillary relief that he seeks are disputed on *bona fide* grounds. The rule enunciated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) applies in this instance. The respondent is unable to obtain the relief that he seeks in paragraphs 2 to 4 in the

counter application. If the respondent wishes to inspect and value movable or immovable property, he should avail himself of the provisions of Rule 36 (6) of the Uniform Rules of Court. In an endeavour to remedy the defects in the counter application, the respondent alleges additional facts in his Replying affidavit. He is not permitted to make out a case in his Replying affidavit. Thus the new material raised in the Replying affidavit falls to be struck out or disregarded as I hereby do. See **Bayat v Hansa** 1955 (3) SA 547 (N) at 553C-E.

ORDER

[20] In the circumstances the following order is made:

(a) The main application is hereby granted and the counter-application is dismissed.

(b) The respondent shall pay costs incurred in connection with both the main and counter-application; the costs referred to herein shall include costs occasioned by the employment of two counsel.

(c) The respondent is hereby committed to undergo imprisonment for a period of thirty (30) days.

(d) The period of imprisonment imposed on the respondent mentioned in (c) above is suspended for a period of one (1) year on the following conditions:

(i) The respondent pays to the applicant the sum of R264 149.91 (the amended quantum calculation) within fourteen (14) days from date of this order.

(ii) The respondent complies with his obligations set out in the Court Order granted by Salie-Hlophe J.

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D V DLODLO

Judge of the High Court

APPEARANCES:

For the Applicant: Adv. RD McClarty (SC)
For the Respondent: Adv. S Mouton

COURT:	DLODLO, J
HEARD:	25 April 2017
DELIVERED:	31 May 2017
COUNSEL FOR APPLICANT:	Adv. RD McClarty (SC) Adv. K Felix
ATTORNEY FOR APPLICANT:	Heyns & Partners Inc. CS Van Heerden
COUNSEL FOR RESPONDENT:	Adv. S Mouton
ATTORNEY FOR RESPONDENT:	Smith-Symms & Associates Attorneys