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

Case no. 2331/2017

Before: The Hon. Mr Justice Binns-Ward

Hearing: On written submissions
Judgment: 10 February 2020

In the matter between:

H. G. Applicant

And

A. G. Respondent

JUDGMENT

BINNS-WARD J:

[1] In this matter, the applicant sought an order that the respondent be held to have been in contempt of court for having been in default in various respects with the interim maintenance obligations imposed on him in terms of an order made in terms of rule 43 by Gamble J on 5 December 2017. The matter was argued before me on 11 September 2019. It became apparent then that part of the problem lay in a difference of opinion between the parties concerning the proper construction of some of the provisions of the order. There had also been a lamentable lack of sensible communication between them on various practical issues. In the circumstances, I handed down a judgment on 20 September 2020 in which, amongst other matters, I clarified the import of the rule 43 order and directed the parties to draw up a

reconciliation account in respect of the questions in issue in accordance with the declared meaning of the order.

[2] The respondent was directed to effect payment of the amount admitted in terms of the reconciliation statement to be due by him, and the parties were directed to set out on affidavit the bases of any remaining disagreement as to the effect of rule 43 order. In addition, the applicant was directed to furnish the respondent with an account of her expenditure in respect of the costs of holidays for herself and the parties' minor children so that the applicant could timeously be apprised of the amount he was required to advance in respect of paragraph B1.4 of the rule 43 order for the period December 2019 – December 2020.

[3] The earlier judgment is listed on SAFLII sub nom. *HG v AG; AG v HG and Another* [2019] ZAWCHC 125 (20 September 2019). The further hearing of the application was postponed to 3 February 2020 in order to enable compliance by the parties with the directions given in the judgment.

[4] It was apparent from the further affidavits delivered by the respective parties before the contemplated resumption of the hearing that the parties had succeeded on arriving at an agreed amount in respect of which the respondent had been in arrears or default in respect of his maintenance obligations, and that the amount had been settled. It was also evident, despite some residual disagreement concerning the ambit of the provision in the rule 43 order concerning the payment by the respondent of an annual amount in respect of providing for the holiday expenses of the applicant and the children in the forthcoming year, that payment in compliance with the provision (para. B1.4) has been effected, albeit well outside the period directed by me in the order made on 20 September 2019.

[5] In the circumstances, when it was apparent that the non-compliance with the rule 43 order had been completely remedied, I agreed to a request by the parties' counsel on 3 February 2020 that the outstanding matters (which seemed to me to be limited to costs) be determined on the basis of my consideration of their respective written submissions in the case, and that the scheduled hearing of further oral argument be foregone so that the time available on 3 February, when both parties were in Cape Town, rather be spent on attempting to resolve the pending divorce

proceedings. The respondent's counsel's written submissions were delivered on 3 February and those of the applicant's counsel on the following day.

[6] The main purpose of the contempt of court proceedings was to induce compliance by the respondent with the rule 43 order. But, as pointed out in my earlier judgment, they are also treated by the courts as proceedings directed to protect and uphold the dignity and authority of the court (or, as the Constitutional Court expressed the position in *Pheko v Ekurhuleni City II* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC), at para 28, '*vindicate its honour*'). Whilst it is apparent that the first object of the proceedings has been satisfied, it remains of concern that that has happened in circumstances in which it is evident that there was less than punctilious compliance with the directions given in the order made on 20 September 2019. It is appropriate that something be said about that now, so that account may be taken of it should the issue of non-compliance by the respondent with the court's orders arise again in the still pending matrimonial proceedings between the parties.

[7] The respondent has paid an amount totalling R474 335,52 subsequent to the directions given on 20 September. The total amount comprised of three components.

[8] An amount of R83 184 was paid on Thursday, 3 October 2019. It was paid in satisfaction of the direction given in terms of paragraph 1.i of the order made on 20 September. According to the tenor of the direction, it should have been paid within 5 days of the date of the order; that is by Friday, 27 September 2019.

[9] A further amount of R170 862,72 was paid on Tuesday, 5 November 2019. It was paid pursuant to the directions given in paragraphs 2 – 4 of the order made on 20 September. The order directed that payment had to be made by Thursday, 31 October 2019.

[10] A last payment in the sum of R220 288,80, in compliance with paragraph B1.4 of the rule 43 order, was made on Wednesday, 30 January 2020. In terms of paragraph 7 of the order made on 30 September 2019, the payment fell to be made on Monday, 16 December 2019 (which, allowing for the fact that day was a public holiday, fell to be construed as by Tuesday, 17 December 2019).

[11] The respondent has denied that the first two of the aforementioned late payments evidenced contemptuous conduct on his part. He describes the degree of non-compliance as a 'triviality'. He has failed, however, to offer any plausible explanation as to why he could not, and did not, comply with punctiliously with the terms of the order. In the circumstances he is liable to be held in contempt of the order. It is only because he has not been formally called upon to show cause why he should not be held in contempt of the order of 20 September 2019 that I am not going to make such an order.

[12] Non-compliance with a court order by a person who has knowledge of it is prima facie contemptuous. It is not open to a person to whom a court order is directed to decide the degree to which compliance will be made. If a time for compliance forms part of the order, it must be respected faithfully, not on a 'more or less' basis. Non-compliance of any degree is never a 'triviality'. If it cannot be respectably explained, it is an act of contempt, and liable to be punished as such. Wilful or reckless late payment does not purge contempt; at most it may be mitigatory.

[13] The late payment of the amount due in terms of paragraph B1.4 of the rule 43 order (the third of the aforementioned constituent payments) occurred in the context of the respondent having raised an issue of interpretation concerning the import of the provision. The paragraph in question reads as follows:

> 1. The respondent shall maintain the applicant and the parties' minor children *pendente lite* as follows:
>
> 4. Payment of the sum of R200 000.00 (Two Hundred Thousand Rand) per annum *pendente lite* towards the applicant's and the children's holiday costs with the applicant at a destination as determined by her. The amount shall be paid by the respondent annually in advance to the applicant by no later than 15 December of each year commencing in 2017. The applicant shall utilise the said contribution at her sole discretion towards her holiday costs with the children over the ensuing 12 month period

[14] The respondent contends that the provision allows for only one holiday per year and that the applicant is not permitted to expend the amount paid to her in terms of the interim maintenance order for more than one vacation with the children during each year. If the respondent had conscientiously held that view concerning the provision, I would have expected him to have raised it before now. I am sceptical about his bona fides in having done so only at this stage.

[15] Like other aspects of the rule 43 order, the provision might have been better phrased. Its meaning in the respect relevant is nevertheless clear enough in my view. The only part of it that lends support, if a strictly literalist approach is adopted, to the respondent's construction is the reference (in the singular) to the holiday being 'at a destination as determined by her'. But a literalist approach is not indicated, where its effect would be unbusinesslike having regard to the clearly intended object of the provision; namely, the establishment of a fund under the applicant's control to be used by her in her sole discretion over the ensuing 12 months to go on holiday with the children. If one approaches the interpretation of the provision in accordance with the trite principles restated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 (16 March 2012); [2012] 2 All SA 262 (SCA); 2012 (4) SA 593, at para. 18, a '*sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document*'. What possible reason could there be to limit the possibility of the family vacationing pending the ultimate determination of the divorce proceedings to a single destination on a single occasion in each 12-month period? A sensible answer does not suggest itself. The respondent's conduct in this connection strikes me as mischievous.

[16] I have dealt with these issues at greater length than I should have had to because it is clearly necessary to signal to the respondent that his standard of compliance with his court-ordered obligations falls short of what is expected and required. If it continues it is likely to result in further proceedings of a like nature. I warned both of the parties in the previous judgment that this matter has imposed on the court's time and resources to an extent that is not warranted. An apparent abundance of means affords no justification for treating litigation and litigious processes like a game. The court's patience and forbearance are not inexhaustible,

and it bears reiteration that direct committal for contempt of court is an available sanction even when, as here, non-compliance with a court order is belatedly rectified (see the reference at para. 41 of my previous judgment to *Pheko* supra, at paras. 30-31).

[17] The applicant has enjoyed substantial and substantive success in the current proceedings. If it had not been for areas of criticism directed at her conduct in the matter in the earlier judgment I would have been inclined to award her the costs on a punitive scale. In the circumstances she will be awarded her costs of suit on the party and party scale.

[18] The following order is made:

1. It being noted that, pursuant to the directions given in the order made on 20 September 2019, the respondent has settled his obligations in respect of interim maintenance under the order made in terms of rule 43 dated 5 December 2017 incurred up to 31 December 2019, no further order will be made in respect of the merits of the applicant's application dated 21 March 2019.
2. The respondent is ordered to pay the applicant's costs of suit in the application on the scale as between party and party.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**L. Buikman SC**
Applicant's attorneys:	**Cluver Markotter Inc** **Stellenbosch**
	Walkers Inc **Cape Town**

Respondent's counsel:	**B.K. Pincus SC**
	M. Holderness
Respondent's attorneys:	**Ulrich Roux & Associates**
	Johannesburg
	Marais Müller Hendricks Attorneys
	Cape Town