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

Case number: 10837/2016

Case number: 19689/2016

In the matter between:

**S[....] J[....] C[....]**

Applicant/Defendant

and

**T[....] R[....] C[....]**

Respondent/Plaintiff

**JUDGMENT DELIVERED ON 12 MAY 2022**

**VAN ZYL AJ:**

**Introduction**

1. The parties are embroiled in a long-running divorce action instituted in June 2016 under case number 10837/2016, in which the applicant in this application is the defendant, and the respondent is the plaintiff. The parties were married on 7 January 2006. The divorce has not been finalised. They have two minor children, the eldest of whom suffers from diabetes, pervasive developmental disorder and other chronic conditions.

2. I shall refer to the parties as, respectively, the “applicant” and the “respondent”.

3. When the matter was called, there were essentially five opposed applications

before me:

3.1. An application instituted by the applicant for the provisional sequestration of the respondent's estate under case number 17728/2021.

3.2. An application brought in September 2021 under case number 19689/2016 by the respondent in terms of Rule 43(6), seeking a variation of an order made in terms of Rule 43 on 4 April 2017.

3.3. A counter-application to the respondent's Rule 43(6) application under the same case number, in which the applicant seeks an order holding the respondent in contempt for failure to comply with the Rule 43 order granted on 4 April 2017 and the directions made for the purposes of trial preparation by the relevant case management judge (the Honourable Justice Dolamo) during October 2020 and November 2020.

3.4. A procedural complaint raised by the respondent that the applicant may not raise the respondent's contempt by way of a counter-application.

3.5. An application by the respondent for the setting aside of a writ of execution obtained by the respondent on 8 November 2021 under case number 19689/2016.

4. I have dealt with the first, second and fifth applications in a judgment delivered on 11 May 2022. What remains is the applicant's contempt application, together with the respondent's objection as to the competence thereof.

5. Both parties had delivered certain affidavits late, and they both applied for condonation in respect thereof. Condonation was duly granted.

**The application for contempt of court, and the respondent's objection that such an application is not competently brought as a counter-application to a Rule 43(6) application**

6. Is the respondent in contempt of court in relation to his maintenance payments under the Rule 43 order granted on 4 July 2017, and the directions given by Justice Dolamo in the course of the pretrial proceedings?

7. The pretrial directions in question are those issued on 7 October 2020 and 26 November 2020. (The allegation that the respondent was also in contempt of a pretrial directive dated 6 February 2018 was not persisted with at the hearing of the application.) Those directions were issued requiring the respondent to provide a detailed reply to the reconciliation of the maintenance arrears in dispute by 20 November 2020 and, on extension, by 4 December 2020. The respondent was further required to “*finalise*” his views regarding the alleged loan liabilities owed by the applicant to the respondent, providing full details, quantification, and supporting evidence by 20 November 2020, and on 4 December 2020, after an extension to comply had been given.

#### The Rule 30 notice

8. The applicant brought the contempt application as a counter-application to the respondent’s Rule 43(6) application. In response, the respondent delivered a notice in terms of Rule 30(2)(b), objecting (insofar as relevant for present purposes) on the basis that a contempt application is not contemplated or envisaged in terms of Rule 43.

9. The Rule 30(2)(b) notice was not followed up by an application as contemplated in Rule 30(2)(c), and there is thus no Rule 30 application before me. As the issue was, however, raised in argument, I address it briefly.

10. It seems to me that the objection is without merit. The issues invariably being intertwined, there cannot be a bar against a respondent (in this case the applicant) in an application under Rule 43(6) raising the fact that the applicant for the variation (the respondent in the present case) is in contempt of his existing obligations. In fact, it often happens that an applicant armed with a Rule 43 order will bring a contempt application, which is then met by the respondent with an application under section 43(6) (see, for example, *S v S* (12496/2019) [2021] ZAGPJHC 7 (8 February

2021)). There is no reason why the converse should not be allowed.

11. Requiring the applicant to launch a separate contempt application is unnecessarily formalistic, and would lead to the piecemeal adjudication of issues that should properly be considered together. The rules of court are not an end in themselves to be observed for their own sake, but are there to secure the expeditious completion of litigation before the Court (*Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654C- F). The respondent's objection is unnecessarily procedural and not truly required for justice to be done in the circumstances.

12. In any event, the argument that Rule 43 itself does not contemplate contempt proceedings is misplaced. The applicant is not seeking relief under Rule 43; she is seeking contempt relief based upon the respondent's alleged non-compliance with, *inter alia*, his obligations under the Rule 43 order.

#### The contempt application

13. Returning to the contempt application: the common law test for whether disobedience of a civil order constitutes contempt is that (1) an order must exist, (2) the order must have been duly served on the contemnor, (3) there must have been non-compliance, and (4) the non-compliance must have been deliberate and *mala fide*. The onus lies on the applicant to prove beyond a reasonable doubt that all these elements are present (see *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)).

14. The onus then shifts to the respondent to prove, on the balance of probabilities, that his non-compliance was not wilful or *mala fide*. Failing such proof, the requirements for a declaration of contempt will have been established beyond a reasonable doubt.

15. The object of contempt proceedings is not only to punish, but also to compel compliance (*Protea Holdings Ltd v Wriwt and another* 1978 (3) SA 865 (W) at 868H).

16. It is common cause that the Rule 43 order and the pre-trial directions exist

and that the respondent was aware of them. The issues are whether the respondent complied with them and whether he has displaced the presumption of wilfulness or bad faith.

### The Rule 43 order

17. In relation to the allegations of contempt for disobedience of the Rule 43 order, the failure to pay maintenance is viewed in a very serious light, especially where minor children are involved. In *N v N* (5245/2017) [2017] ZAWCHC 63 (31 May 2017) at para [3] this Court stated as follows:

*“[3] ... 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. ... 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). ... 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.’”*

18. The court’s intention in granting the Rule 43 order in the terms it did is to be ascertained primarily from the language of the order in accordance with the well-

known rules relating to the interpretation of documents. When interpreting the order, the circumstances attendant upon its coming into existence must be taken into account along with the language used, in light of the ordinary rules of grammar and syntax and the apparent purpose to which it is directed, and the material known to those responsible for its production (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]).

19. The applicant alleges that the respondent is indebted to her in the amount of R334,998.02 in respect of arrear maintenance. This amount is in excess of the sum of R360,000 unilaterally paid by the respondent in an attempt to meet what he claimed, when making payment, was due on account of the arrear maintenance. I deal with this aspect of the respondent's defence later.

20. In support of her claim, the applicant provides lists and attaches documentation to her affidavit which show the following:

20.1. The respondent's obligations as they appear in paragraphs 1.1 and 1.2 of the Rule 43 order;

20.2. The payments made by the respondent in part settlement of his obligations under those paragraphs;

20.3. The expenses incurred by the applicant pursuant to paragraphs 1.3 and 1.4 of the order;

20.4. The documentary evidence tendered by the applicant in support of the expenses so incurred; and

20.5. The four payments made by the respondent in part settlement of his obligations under those paragraphs.

21. I shall deal with the obligations arising from paragraphs 1.1 to 1.4 of the Rule 43 order in the course of the discussion below.

### The cash contributions

22. Paragraphs 1.1 and 1.2 of the Rule 43 order oblige the respondent to pay to the applicant a total cash maintenance amount of R53,750 consisting of R44,715 per month as maintenance and R9,000 a month in respect of the salaries of the applicant's domestic assistants or their successors.

23. Paragraph 1.1 states that the date on which the first maintenance payment had to be made was 1 April 2017. In the absence of wording to the contrary, common sense and general practice dictate that all subsequent maintenance payments in terms of these paragraphs were to be made on or before the first day of the months following April 2017. This has never been denied by the respondent (in relation to parties' conduct as an aid in the interpretation of a document, see *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* (759/2011) [2012] ZASCA 126 (21 September 2012) at para [15]). The respondent has, over the period November 2019 to October 2021, failed to make these payments by the due date, or at all in certain instances.

24. The R9,000 payment came about as follows: at the hearing of the Rule 43 application the respondent's counsel told the court that one of the applicant's domestic workers, Ms Maria Buwu, was earning a salary of R5,600, whilst the other, Ms Farai Zinyemba, was earning R3,200 per month. His counsel therefore suggested that R9,000 in total be paid to the applicant to settle those salaries. The facts disclosed to the court which resulted in the order that the applicant make payment of R9,000 in total in relation to salaries, and not R4,500 per domestic assistant, means that the respondent cannot unilaterally decide to pay an amount of R4,500 even if the applicant only employed Ms Buwu. He knows, and his counsel disclosed to the court, that her monthly salary alone exceeded R4500. The purpose of paragraph 1.2 of the order was thus to ensure that her monthly salary was paid in full and to leave a balance so that the applicant could employ a second assistant, as she currently does (Ms Zinyemba has since been replaced by other assistants from time to time).

25. The respondent claims that he is only liable to pay R4,500 (whether on the

persistent contention that only Ms Buwu is currently employed he does not say). But that cannot be a correct interpretation of the order, given the fact that he knows that Ms Buwu's salary is more than that, and moreover that the applicant employs more than one assistant (the respondent does not deny this fact). In addition, his own counsel offered that he would pay R9,000, and R4,500, per month.

26. In the circumstances, the respondent must pay (and should have paid) to the applicant the total amount of R53,750.02 on the first day of every month following 1 April 2017. He has not done so.

27. As to wilfulness and mala fides, the Supreme Court of Appeal held as follows in *Fakie supra* at 333D-F in relation to the necessity for the court hearing contempt proceedings to be satisfied that the party in default had intentionally disobeyed the order:

*"[9] 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 ... 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).*

*[10] These requirements — that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt — accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."*

28. The applicant has given full details of the monthly cash maintenance amount that the respondent has failed to pay her in terms of these paragraphs. In the course of 2020 and 2021 the respondent indicated, by email and through his attorneys, that



he was not in a position to pay all of the maintenance because of a cash flow problem. He also alleged that, because Ms Zinyemba had left the applicant's employ, he was not obliged to make payment of R9,000 to her, and therefore only paid R4,500.

29. The respondent delayed, however, until 23 September 2021, to make application for a reduction of the amount that he was obliged to pay in terms of paragraphs 1.1 and 1.2 of the order. No order has yet been granted in that application, and he had in any event not applied for the variation to be implemented with retrospective effect (see *Gobel v Gobel* (6935/13) [2013] ZAWCHC 91 (28 June 2013)). He therefore remains liable for payment of the full amount as stipulated in the Rule 43 order. Insofar as he has unilaterally reduced the amounts payable, he has acted wilfully and, given his delay in applying for a variation coupled with his patently unsustainable interpretation of the Rule 43 order, the inference may be drawn that his failure to pay was done in bad faith. He could not have harboured the honest belief that non-compliance was proper and justified.

### *The medical expenses*

30. Paragraph 1.3 of the Rule 43 order directs the respondent to pay all reasonable medical, dental, surgical, hospital, orthodontic, ophthalmological, pharmaceutical (on prescription), psychological, psychiatric and related medical expenses, reasonably incurred by and on behalf of the applicant and the minor children, including the provision, where necessary, of spectacles and/or contact lenses.

31. The respondent interprets this paragraph to mean that, before the applicant will be reimbursed for those expenses, she must enquire from the respondent's medical aid whether the specialists' and hospitals' bills will be fully covered by the medical aid. If she does not do so, she is not entitled to be reimbursed. He alleges that he is entitled to withhold such funds because he has downgraded his medical aid plan, and because, in his view, the applicant has abused that plan.

32. The order, however, plainly does not oblige the respondent to retain the

applicant and the children on a medical aid. It only obliges him to settle the applicant's and the children's reasonable medical expenses. If the respondent makes use of a medical aid plan to assist him in settling those expenses, that is a matter between him and the medical aid in question. He cannot dictate to the applicant to make use only of practitioners covered by his medical aid.

33. The respondent further argues that “reasonable” means that the applicant must agree the expenses in question with him before making purchases, and invoices evidencing pharmacy expenses must be signed by the pharmacist prior to being presented by the applicant to the respondent. This contention is not correct, as the order clearly does not oblige the applicant first to consult with the respondent before a medical expense is incurred, and to obtain his approval to incur such expense. Where trained medical professionals have indicated that medical costs should be incurred, it is not for the respondent to allege that because his medical aid does not cover those expenses, they are unreasonable and unreasonably incurred.

34. The purpose of the order in relation to medical expenses was to ensure that the applicant and the children receive the medical treatment they require. The respondent was found to be able to do so. The Court knew at the time when it made the order that the parties' eldest child suffered from various chronic medical conditions. When that child requires urgent medical attention, the respondent's medical aid covered practitioners are not necessarily available. On the respondent's interpretation, the costs that the applicant would incur in those instances are not reasonable and he is not required to settle those expenses. Such an interpretation is clearly incorrect.

#### Educational costs

35. Paragraph 1.4 of the Rule 43 order obliges the respondent to pay to the applicant the minor children's schooling expenses (at private schools), including the costs of school fees, school uniforms, books, additional tuition fees, camps, outings, extramural activities, and equipment and attire relating to the sport and extramural activities reasonably required by the minor children, as well as computer equipment, including printer cartridges.

36. On the respondent's interpretation of this paragraph, the applicant must send her credit card statements to him showing that the amounts claimed in respect of school and sports clothes purchased from the school are reflected thereon. He contends that the applicant is obliged to prove that she personally incurred the relevant expenses.

37. The applicant is, however, not wealthy, and she has told the Court that she has had to borrow money and sell second-hand furniture to meet her and the children's maintenance needs. The loans are repayable. Where she has incurred loans to purchase the children's school and sports clothes, the relevant expense will not necessarily show on her credit card statement. But she has nevertheless delivered to the respondent invoices and proof of payment that she has made to acquire clothes for the children.

38. The respondent disputes that the applicant incurred those expenses and alleges that his legal advisers have advised him that he is not obliged to make payment to her unless she proves, by submitting her credit card statements to him, that she personally incurred those expenses. Given the evidence of those expenses already provided to the respondent, the advice is clearly incorrect.

39. Another example of the respondent's interpretation of paragraph 1.4 is in relation to the applicant's purchase of a junior blazer and three pairs of school shoes during the period July 2018 to May 2021. The respondent alleges that school blazers and shoes are to be purchased in the new year only. He therefore refuses to reimburse the applicant for those expenses. He has not explained why he has not reimbursed the applicant for the other items purchased from the school shop.

40. Again, the respondent's interpretation of paragraph 1.4 is manifestly unsustainable. All that the applicant is required to prove when incurring these expenses is that they were reasonably incurred. The respondent has not stated why he is of the view that the expenses incurred by the applicant are not reasonable, except for contending that the school clothing should only be purchased once a year, and that the children are not required to have iPads at school.

41. The respondent disputes that the amounts claimed by the applicant in respect of paragraphs 1.3 and 1.4 of the order are payable to her. He contends that some of the expenses included in her reconciliation are duplicated and not reasonable, and that the applicant has abused his medical aid. In March 2020 the applicant produced a lever arch file, updated in October 2020, containing the supporting vouchers for every unpaid expense. The file has been tendered to the respondent and his attorneys, who have to date failed to examine it and to indicate which expenses on the reconciliation the respondent does not agree with. Given the respondent's apparently nonchalant attitude in this respect coupled with his unsustainable interpretation of the relevant paragraphs of the Rule 43 order, I am of the view that the inference may be drawn that his non-payment of the relevant expenses is not only wilful but also persisted with in bad faith. In the words of *Fakie*, the respondent could not honestly have believed that his non-compliance was justified or proper in the circumstances.

*The alleged compromise of the applicant's arrear maintenance claim*

42. Apart from his interpretation of the Rule 43 order, the respondent has another string to his bow. This is that the applicant's claim in respect of arrear maintenance has been compromised. He raises this argument without having indicated yet, on the direction issued by Justice Dolamo, which of the items on the applicant's reconciliation he disputes, and why.

43. A compromise is an agreement in terms of which the parties to an obligation settle a dispute about the obligation, Only when they reach consensus is the original obligation discharged. Then a new obligation, based on the terms of the settlement, arises. As a compromise constitutes a contract, the principles concerning contractual consensus apply to establish whether an order of compromise has been made and accepted (*Absa Bank v Van de Vyver* 2002 (4) SA 397 (SCA) at para 17]; and see the discussion in Christie's *Law of Contract in South Africa* (7ed) at 528ff).

44. The onus is on the party alleging that a compromise has been effected, and because it is a form of novation and involves the waiver of rights, it must be clearly

and unambiguously proved (*Marendaz v Marendaz* 1953 (4) SA 218 (C) at 226H-227A).

45. The respondent says that on 29 July 2021 he made a payment to the applicant in the sum of R360,000. The payment was not accompanied by correspondence in which the respondent explained that he had made the payment in full and final settlement of his Rule 43 indebtedness to the applicant. There was therefore no indication to the applicant that the respondent intended his payment to constitute a compromise. If he had seriously intended that such payment be regarded as a compromise (and had he sought appropriate advice) he would have been advised to obtain a bank check and deliver it under cover of a letter detailing the terms of the compromise, which is the ordinary practice in such situations.

46. The context for the payment of 29 July 2021 is noteworthy (see Zeffert “Payments ‘In Full Settlement’” SALJ 89 (1972) 35 at 48 to the effect that context is everything). On 7 July 2021 the applicant’s attorneys addressed an email to the respondent’s attorneys, enclosing a comprehensive draft settlement agreement. The closing paragraph of the email read as follows: “...*our client has instructed us to attempt to settle the divorce proceedings in its entirety, without the need of becoming embroiled in further litigation with your client and as a consequence we enclose here with a draft settlement agreement for you and your client’s consideration, which is available for acceptance until Friday, 16 July 2021.*”

47. In terms of the draft settlement proposal the applicant would accept as part of the composite settlement a sum of R350,000 in respect of the arrear maintenance owing to her as at 11 June 2021 in terms of the existing Rule 43 order.

48. The respondent did not accept the applicant’s proposal to settle the divorce in its entirety, and the deadline for acceptance came and went.

49. On 28 July 2021 the applicant’s attorneys sent an email to the respondent’s attorneys. The email stated, *inter alia*, as follows: “*I enclose here with a detailed statement reflecting the amounts owing by your client in respect of the outstanding maintenance and disbursements for which your client remains liable. ...*

*Furthermore, our client instructs that your client remains in contempt of the existing rule 43 order in that he has failed to effect payment of the maintenance due in the sum of R53 750 payable on 1 July 2021 in terms of clause 1.1 and 1.2 of the rule 43 order.”*

50. The statement attached to the email reflected the balance owing to the applicant in the sum of R547,106.20. No response was received to the email.

51. I agree with the applicant's counsel's submission that if the respondent had at that stage believed that the parties had compromised the applicant's arrear maintenance claim as a result of the provision of the draft settlement agreement, the email of 28 July 2021 called for a firm and immediate denial that the respondent was indebted to the applicant in the sum claimed. This did not occur. The only inference to be drawn from the respondent's silence is that he admitted the truth of the assertions contained in the applicant's attorneys' email. He did not address the veracity of the email in his answering affidavit in these proceedings.

52. What the emails of 7 July 2021 and 28 July 2021 indicate is that the respondent was offered an opportunity to compromise the divorce in its entirety, including the arrear maintenance claim. That offer was open for acceptance only until 16 July 2021. It lapsed thereafter.

53. The respondent, with the knowledge that the offer of compromise had lapsed and that the applicant had subsequently delivered a demand for payment of the arrear maintenance, nevertheless elected on 29 July 2021 to make a payment to the applicant in the sum of R360,000. Notably, this was not R350,000 as was the proposal made in the draft settlement agreement. As mentioned before, the payment was not accompanied by correspondence containing any indication that it was made in full and final settlement of the applicant's claim. There was also no explanation for the additional payment of R10,000.

54. On 2 August- 2021 the respondent's attorneys wrote to the applicant's attorneys, as follows: *“We record that our client has settled all the arrear maintenance owing in terms of the rule 43 Order by making payment to your client of*

*the sum of R360 000 on Thursday, 29 July 2021”.*

55. On 6 August 2021 the applicant’s attorneys replied, denying that the respondent’s payment was in settlement of his maintenance obligations. They recorded that on 28 July 2021 they had provided the respondent’s attorneys with a detailed statement of the amounts owing to the applicant. They indicated further that they were confused as to how the respondent had arrived at R360,000 when paying that sum to the applicant purportedly in settlement of his obligation, and indicated that the amount had been accepted on account and in reduction of the total amount owing.

56. On 23 August 2021 the respondent’s attorneys responded that: *“In the settlement agreement received under the cover of your letter dated 7 July 2021 your client claimed arrear maintenance of R350 000.00. Our client effected payment of a sum of R360 000,00 which included maintenance for July and the arrears owing according to his calculations.”*

57. Given that the onus to prove compromise is on the respondent, he had to place evidence before this Court to prove that it was his and the applicant’s common intention to be bound by a R350,000 arrear maintenance compromise.

58. The correspondence referred to above proves nothing of the sort, and the respondent has adduced no other evidence to further his case. At no stage prior to the making of the R360,000 payment on 29 July 2021 was there a meeting of the parties’ minds in relation to the settlement of the divorce in its entirety, as was the purpose of the provision of the draft settlement agreement to the respondent. The terms of the email of 7 July 2021 were clear and unambiguous. Only if the parties were to settle the divorce in its entirety in accordance with the provisions of the settlement agreement would the applicant compromise her maintenance claim by accepting payment of the sum of R350,000.

59. The applicant was therefore entitled to retain a payment of R360,000 in reduction of the entire sum owed to her as set out in her reconciliation. That left her with her current claim of R334,998.02.

60. In the light of the discussion set out above, I am satisfied that the respondent is in contempt of the Rule 43 order.

The practice directions issued by the Honourable Justice Dolamo on 7 October 2020 and 26 November 2020

61. In *MT v CT* 2016 (4) SA 193 (WCC) this Court discussed whether contempt proceedings were apposite in the context of the failure to adhere to practice directions. At para [19] the Court stated:

*“... the court requested Ms Holderness to address it on the question as to whether it was appropriate to hold proceedings for contempt of court against a person who had disobeyed a direction given in terms of rule 37(8), as opposed to a court order per se. Ms Holderness submitted that such a direction was not an order and that contempt proceedings were accordingly not appropriate. She referred the court to the express wording of rule 37(8)(c) in which the judge presiding at a rule 37(8) conference may only give a direction when there is agreement between the parties in relation thereto. Counsel fairly submitted that if a practice direction were given pursuant to such agreement it would be appropriate for contempt proceedings to follow in the event of non-compliance therewith ...”*

62. Following a discussion of various authorities regarding the nature of contempt, which at common law “*may adequately be defined as an injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated*” (see Melius de Villiers *The Roman and Roman Dutch Law of Injuries* (1899) at 166), the Court proceeded with a discussion of the nature and purpose of Rule 37(8) procedures in this division:

*“[26] In terms of a directive issued by the Judge President, the judges of this division preside over pre-trial conferences in open court on a regular basis during term time. The purpose of these hearings is to expedite the speedy*



*resolution of matters in which the pleadings have closed and which have therefore been enrolled for trial with the registrar. Judges preside over such matters on a roster-basis at hearings conducted before the commencement of the court day, and they do not robe, although the proceedings are held in open court. ....*

*[27] The parties are represented by attorneys, and sometimes counsel. The legal representatives inform the judge of the status of the trial preparation in the case and usually ask for an agreed timetable, for the filing of any further pleadings or notices in terms of the rules, to be authorised by the presiding judge. In the event that a party is in default of a procedural step, eg has failed to file a reply to a request for trial particulars, or claims that certain documents are not discoverable, the pre-trial procedure is held in abeyance while the parties take the dispute to the motion court for resolution there: the rule 37(8) procedure is not geared to the resolution of pre-trial disputes which invariably require the filing of affidavits and heads of argument.*

*[28] The intervention of the judge at a rule 37(8) conference is fairly limited. For example, if the time sought for a postponement is considered to be unduly lengthy, or the parties cannot agree on such a date, the judge may fix a date unilaterally. Furthermore, in the event that the parties are unable to agree on a date, or a step to be taken, the judge may be asked by one of the parties to direct accordingly. The function of rule 37(8) procedures in this division is to speed up the pre-trial process and to ensure that when a matter is allocated a trial date, that it is indeed trial ready. To this end the practice is for the rule 37(8) judge to issue a compliance certificate when all pre-trial steps have been completed.”*

63. The Court concluded as follows in this respect:

*“[33] In my respectful view it does not matter that the direction which was given on 6 November 2015 was not a court order per se. Disregarding the fact that the plaintiff consented to the order being made, I am of the view that the practice direction in question falls within the broad ambit of instructions which a court may issue to litigants to ensure that efficient and speedy steps are taken to enable the court to properly discharge its functions to the*

*litigants before it. It falls within the purview of the 'curiosities and anomalies' referred to by Milton supra, since, as Cameron JA remarked in Fakie, ... , contempt of court 'is part of a broader offence, which can take many forms'. After carefully considering all the facts, I am left with little doubt that the failure of the plaintiff to adhere to this court's directions in terms of rule 37(8) has led to the undermining of the efficiency, dignity and authority of 'the fount of justice'.*

*[34] In the circumstances I am persuaded that, subject to that which is set out below in relation to wilfulness, the plaintiff's failure to adhere to the direction given on 6 November 2015 is capable of being addressed through contempt proceedings."* (Emphasis supplied.)

64. (The case was referred to in *CT v MT and others* 2020 (3) SA 409 (WCC) with reference to the finding of contempt, which was not criticised, albeit that the *CT v MT* matter dealt with another issue arising from the parties' divorce proceedings).

65. I agree with this finding. The failure to comply with a direction issued by a court seems to me to be no different from the failure to obey a formal court order. Both lead to the undermining of the efficiency dignity and authority of the court.

66. There does not seem to me to be any reason why, as the respondent's counsel suggests, Justice Dolamo himself needs to deal with the issue of contempt of the directions issued by him. The directions are in themselves documents to be interpreted by a court in accordance with the applicable principles; their interpretation is not subject to that of the judge who granted them. Whether they have been obeyed and in what circumstances the disobedience occurred are factual issues and inferences drawn therefrom not tied to the judge who granted the directions.

67. The respondent was directed in terms of the relevant pre-trial directions to provide a detailed reply to the reconciliation of the maintenance arrears in dispute by the 20th of November 2020. This direction was issued at a pretrial meeting on 7 October 2020. He was further, in the same meeting, directed to finalise his views regarding the alleged loan liability is owned by the applicant to the respondent, providing full details, quantification, and supporting evidence by 20 November 2020.

At a pretrial meeting held on 26 November 2020, the respondent was granted an extension of time to deliver the information by 4 December 2020. In terms of these directions, therefore, the respondent had to consider the reconciliation prepared by the applicant together with the lever arch file containing her supporting vouchers, and indicate which expenses he did not agree with, and why. He also had to produce a document containing the liabilities he alleged the applicant owed him, which document was to contain full details of the alleged loans, a quantification of amounts paid, and supporting documentation.

68. The respondent did not expressly deal with the allegations as regards his contempt of the pretrial directions in his answering affidavit in the contempt application. He alleges in his answering affidavit in the sequestration proceedings (dealt with in a judgment delivered on 11 May 2022) that certain annexures (SR1 to SR3) to that affidavit constitute vouchers or justification for the loans he alleges that the applicant owes him. He has however still not complied with the relevant direction.

69. Those annexures do not constitute proof of the loans allegedly made to the applicant. They are not contemporaneous documents but have been compiled for the specific purpose of these proceedings. In addition, the bank statements attached to the affidavit do not serve to prove the loans. They merely record payments made to a conveyancing attorney.

70. In the light of what has been stated regarding the respondent's defence of compromise in relation to the arrear maintenance, the respondent has also not complied with the direction that he should indicate which items of the applicant's reconciliation he disputed. He has, in fact, not even considered the applicant's lever arch file containing the supporting vouchers.

## **Conclusion**

71. The onus is on the respondent to prove that he has not acted in wilful and bad faith disregard of the Rule 43 order and the directions. He has clearly made no attempt to comply with the pre-trial directions and, as far as the Rule 43 order is concerned, there has not been any compromise. He remains liable to pay the

amounts stipulated in the Rule 43 order, which he has failed to do to the extent set out in the applicant's reconciliation.

72. I agree with the applicant's counsel's submission that the respondent cannot escape the inference of wilful non-compliance with the Rule 43 order by alleging that he received advice that he could pay R360,000 to the applicant and that that would constitute a compromise. He did not plead that he sought this advice before he made the payment, or from whom he received such advice. His attorneys did not depose to a confirmatory affidavit indicating that they gave him such advice. In any event, the correspondence exchanged during the period July 2021 to August 2021 indicates that the respondent's attorneys could not have given this advice to the respondent.

73. Insofar as the respondent disputes the entries on the applicant's reconciliation he was required by 4 December 2020 to have explained what expenses were, in his view, not reasonable. Had he done so, Justice Dolamo could have made a determination on the disputed items. The same applies to the respondent's defence to the applicant's claim of R4,5 million against him in relation to the sale of the former common home: he alleges that the applicant owes him almost double that amount as a result of various loans concluded since 2009. He was required to provide evidencing supporting his claim. He did not do so, and thus hampered the efficiency of the administration of justice, whilst affecting the dignity and authority of the court. In these circumstances, the respondent has failed to discharge the presumption that he acted wilfully and in bad faith.

### **Costs**

74. Punitive costs orders are generally reserved for litigants who are guilty of dishonesty or fraud or some other conduct which is to be frowned upon by the Court: *"The scale of attorney and client is an extra-ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium"* (Plastic Converters Association of South Africa (PCASA) Obo Members v National Union of Metalworkers Union of South Africa and Others (JA112/14) [2016] ZALAC 37 (6 July

2016) at para [46]).

75. The present matter is such a case. The respondent has acted in blatant contempt of his obligations under the Rule 43 order and the pretrial directions. His opposition to the contempt application was alarmingly sparse and unsustainable. In these circumstances, I think that his conduct should be visited with an order of costs on the scale as between attorney and client.

### **Order**

76. In the circumstances, it is ordered as follows:

76.1. The respondent is in contempt of the court order made in terms of Rule 43 on 4 July 2017 and the pretrial directions made on 7 October 2020 and 26 November 2020.

76.2. The respondent is committed to prison for a period of 30 (thirty) days.

76.3. The sanction imposed in paragraph 76.2 is suspended for a period of 1 (one) year, provided that the respondent has, within 90 (ninety) days of the date of this order:

76.3.1. Made payment to the applicant, by way of transfer to the applicant's attorneys' trust account, of the amount of R334 998.02, together with interest thereon at the prescribed rate from 5 October 2021 to date of payment; and

76.3.2. Delivered full details of the alleged loan liabilities of the applicant to the respondent, including the provision of full details in relation to such loan agreements, quantification, and supporting evidence.

76.4. In the event of the respondent failing to comply with the provisions of paragraph 76.3, the applicant may approach the Court on the same papers,

duly supplemented and on not less than 5 (five) court days' notice to the respondent, for an order that the respondent be committed to prison.

76.5. The respondent shall bear the costs of the contempt application on the scale as between attorney and client.

**P. S. VAN ZYL**  
**Acting judge of the High Court**

**Appearances:**

**For the applicant:** R. G. Patrick (with him H. Beviss-Challinor), instructed by Werksmans

**For the respondent:** P. C. Eia, instructed by Fairbridges Wertheim Becker