

IN THE HIGH COURT OF SOUTH AFRICA

(
WITWATERSRAND LOCAL DIVISION)
JOHANNESBURG

CASE NO: 3405/05 & 4050/05

DATE: 2007/03/09

In the matter between
BRUNI MARTIANO RICCARDO

Applicant

and

BRUNI EVANGELIA VALIA

Respondent

J U D G M E N T

BERGER, AJ:

[1] This judgment is given in respect of two applications that were argued before me jointly on 8 and 9 February 2007. The parties in both applications are married to one another although their marriage relationship has clearly reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. As a result, they are in the throes of a drawn out and acrimonious divorce, the husband having instituted the divorce proceedings during 2004.

[2] There are twin daughters born of the marriage, now aged four and half years. At the time when the divorce proceedings were instituted, the children

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were two years old. They are both in the interim custody of their mother, with whom they live in the former matrimonial home.

[3] Both applications before me have their roots in an order of this Court, made in terms of Rule 43. In terms of the order the husband was ordered to pay interim maintenance pending the resolution of the divorce action between the parties.

[4] The order, handed down by Khumalo AJ on 27 October 2004, reads as follows:

“It is ordered *pendente lite*:

1. The respondent [the husband] is to pay the applicant [the wife] the maintenance in respect of the sum of R23 000,00 per month.
2. The respondent is to pay the applicant maintenance in respect of the two minor children the sum of R25 500,00 per month.
3. In the event of the order granted in terms of the Family Violence Act 116 of 1998, issued out of the Magistrate’s Court Johannesburg on 12 August 2004 and relating to the respondent’s obligation to pay bond instalments, being set aside or becoming unenforceable, the respondent is ordered to pay to the applicant for onward paying by her to the bond holder the sum of R16 100,00 per month.
4. The maintenance referred to in paragraph 1 and 2 above shall be paid on or before the first of each

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consecutive month, commencing from 1 October 2004.

5. The respondent shall pay to the applicant, a contribution towards her costs in the sum of R20 000,00, which sum shall be paid within five days of this order.
6. The respondent is ordered to pay the costs of this application, it being directed that in terms of Rule 43(7) and (8) such costs not be limited as provided for in terms of Rule 43, and shall be taxable and payable on the scale as between attorney and own client”.

[5] The first application was instituted by the wife on 15 February 2005. The respondent in that application is her husband. The order sought in that application (“the contempt application”) reads as follows:

- “1. Declaring the respondent to be in contempt of the order of his lordship the honourable Mr Acting Justice Khumalo, delivered on 27 October 2004 under case number 2004/20845 issued out of the above honourable Court, a copy whereof is annexed to the founding affidavit marked “A”.

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2. Committing the respondent to prison for a period of 30 days, alternatively such period as the above honourable Court may deem just, for contempt of court by reason of the respondent's failure to obey and comply with the said order.

Alternatively to paragraph 2 above:

3. Committing the respondent to prison for a period of 30 days, alternatively such period as the above honourable Court may deem just for contempt of court by reason of the respondent's failure to obey and comply with the said order, and suspending same on condition that the respondent makes payment of all arrear maintenance within 24 hours of this order, and further complies in all respects with the order, Annexure "A" to the founding affidavit, and is not found not to have done so.
4. That the respondent be ordered to pay the costs of this application on the attorney and own client scale.
5. Further and/or alternative relief.

[6] One week later, on 22 February 2005, the husband instituted an application in terms of Rule 43(6), seeking a variation of the order of

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Khumalo AJ, to the extent that his interim maintenance obligations be reduced from R48 500,00 per month to R20 000,00 per month. The respondent in that application (“the Rule 43(6) application”) is the wife.

[7] In order to avoid confusion between the applicants and the respondents in the two applications, I shall continue to refer to the applicant in the contempt application as “the wife”, and to the applicant in the Rule 43(6) application as “the husband.”

[8] The papers in the two applications run to some 850 pages. Many of the documents have been duplicated. Both Mr Basslian, who appeared on behalf of the wife, and Ms Foulkes-Jones, who appeared on behalf of the husband, submitted that the facts of the two matters are inextricably linked and that the papers should be read as a whole. I agree.

[9] However, before considering the facts of the two matters, many of which are disputed, it is necessary for me to consider the issue of the onus, as in my view the incidence of the onus differs in the two applications.

[10] The High Court is empowered to commit a defaulter to prison for contempt of an order to pay maintenance. (See *Bannatyne v Bannatyne (Commission for Gender Equality as amicus curiae)* 2003 (2) SA 363 (CC) at 374, para [20]).

[11] In *Fakie N.O. v CCII Systems (Pty) Limited* 2006 (4) SA 326 (SCA) Cameron JA, writing for the majority of the Court, held that, in civil contempt proceedings, the applicant bears the onus of proving beyond reasonable doubt that the respondent has deliberately and *mala fide* refused to obey an order of court.

[12] One of the issues in *Fakie* was whether a respondent in civil contempt proceedings bears any burden of proof once the applicant has proved that an order has been granted and served on the respondent, and that the respondent has not complied with the order. At issue in that case was the effect of the Constitution on the burden of proof, viewed both from the position of the applicant and from the position of the respondent. At 334 to 335, para [12] Cameron JA stated:

“The pre-constitutional approach to proof was that, once the

enforcer established that the order had been granted, and

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served on or brought to the alleged contemnor's notice, an inference was drawn that non-compliance was wilful and *mala fide*, unless the non-complier established the contrary. The alleged contemnor bore the full legal burden of showing on a balance of probabilities that failure to comply was not wilful and *mala fide*." (Footnote omitted)

[18] Cameron JA held that the common law needed to be developed in accordance with the values of the Constitution, to the extent that the full legal burden on the respondent in civil contempt proceedings had to be ameliorated. At 344, para [41] Cameron JA stated:

"Finally, as pointed out earlier (in para [23]), this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether the non compliance was wilful and *mala fide*, the requisites of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and *mala fides* on a balance of probabilities, but need only lead evidence that

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establishes a reasonable doubt.”

[14] Cameron JA concluded the legal position as follows, at 344, para [42]:

“To sum up:

- 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 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

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have been established beyond reasonable doubt.

- e) *A declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”

[15] The issue in the contempt application before me is how to apply the test laid down by Cameron JA, given the significant disputes of fact between the parties. Both counsel submitted that I should apply the principles set out in *Plascon-Evans Paints Limited v Van Riebeek Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 E to 635 D. I agree that the principles articulated in *Plascon-Evans* are applicable in the matter before me. (See *Pennello v Pennello (Chief Family Advocate as amicus curiae)* 2004 (3) SA 117 (SCA) at 138 to 139, paras [39] and [40]).

[16] Mr Basslian, however, further submitted that where the evidential burden rests on the husband I should apply the *Plascon-Evans* principles in reverse. According to Mr Basslian, I should only find that a reasonable doubt has been established if the facts averred in the husband's affidavits, that have been admitted by the wife, together with the facts alleged by the wife, justify such a finding.

[17] I cannot agree with Mr Basslian's further submission. In *Pennello* at 139 A, van Heerden AJA (as she then was) noted that the rule in *Plascon-Evans* “has been held to apply even in cases where the onus of proving facts in a dispute rests on the respondent and not only where the onus rests on the applicant.”

[18] In *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541 J to 542 B, Nestadt JA stated:

“The rule (stated in *Plascon-Evans Paints Limited v Van Riebeek Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 -

5) to the broad effect that an application for final relief is

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generally decided on a respondent's version, applies even
where the *onus* of proof is on such respondent (*Ngqumba
en 'n Ander v Staatspresident en Andere; Damons N.O. en
Andere v Staatspresident en Andere; Jooste v
Staatspresident en Andere* 1988 (4) SA 224 (A) at 259 D -
E, and 262 B)."

[19] Finally, this approach was also followed in *Fakieat* 350, para [63] where
Cameron JA stated:

"The accepted approach requires that subject to 'robust'
elimination of denials and 'fictitious' disputes, 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."

[20] In my view, the disputes of fact in both applications are real. Accordingly,
unless the allegations or denials of the husband are so far-fetched or
clearly untenable, I am bound to decide all aspects of the contempt
application on the husband's version. I should add that both parties
disavowed any intention to seek the referral of any issues to the hearing of
oral evidence.

[21] As far as the Rule 43(6) application is concerned, counsel were agreed,
correctly in my view, that the husband bears the onus of proving, on a

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balance of probabilities, that there has been a material change in his circumstances since the hearing of the application before Khumalo AJ.

(See *Grauman v Grauman* 1984 (3) SA 477 (W) at 480 C).

[22] In *Andrade v Andrade* 1982 (4) SA 854 (O) at 855 F - H Erasmus J discussed the procedure to be followed in Rule 43(6) applications:

“Rule 43 regulates the procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters. The object of the Rule generally accepted by the Courts is that applications of this kind should be dealt with as inexpensively and expeditiously as possible. See *Colman v Colman* 1967 (1) SA 291 (C); *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W); *Mather v Mather* 1970 (4) SA 582 (E) and *Maree v Maree* 1972 (1) SA 261 (O). The cases cited above deal with Rule 43(1) but in my view they are equally applicable to Rule 43(6) and Rule 43(6) must be read subject to the provisions of Rule 43(1). Rule 43(6) explicitly says 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.”

(See also *Patmore v Patmore* 1997 (4) SA 785 (W)).

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[23] Despite these clear *dicta*, the Rule 43(6) application before me has not been dealt with either inexpensively or expeditiously. As I have already stated, the application was launched on 22 February 2005. The wife's replying affidavit was filed on 30 March 2005. For reasons that are not material to this judgment, the application was not disposed of shortly thereafter. Almost 18 months later, on 6 September 2006, the husband filed a supplementary affidavit. The purpose of the supplementary affidavit was twofold: (a) to explain the reason for the delay in setting down the application; and (b) to explain what had transpired regarding the payment of maintenance in the interim. That affidavit sparked a chain reaction, resulting in five further sets of affidavits.

[24] Mr Basslian submitted that the principles articulated in *Plascon-Evans* should apply to an analysis of the facts in the Rule 43(6) application. I do not agree. First, the *dicta* of Corbett JA (as he then was) in *Plascon-Evans* deal with proceedings where final relief is sought. Secondly, it is clear that the principles of *Plascon-Evans* do not apply to an analysis of the facts in Rule 43(1) applications. Given that the procedure is meant to be the same whether an application is brought in terms of Rule 43(1) or Rule 43(6), I can see no reason for adopting a procedure in terms of which Rule 43(6) applications are generally to be decided on the respondent's version. In my view, the issue in the Rule 43(6) application is simply whether the husband has made out a case, on a balance of probabilities, that there has been a material change in his circumstances since the hearing of the Rule 43 application before Khumalo AJ.

[25] Before considering the contempt application, it is necessary for me to set out the facts that are common cause or not disputed. Where there is a real dispute of fact, I will attempt to summarise the contentions of

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the parties.

[26] Khumalo AJ handed down his order on 27 October 2004. As far as maintenance was concerned, the husband was ordered to pay to the wife an amount of R48 500,00 per month. This order was backdated to 1 October 2004. Accordingly, as soon as the order was made, the husband was already in default unless payments already made by him were regarded by the parties as payments made in terms of the order.

[27] The amount of R48 500,00 awarded by Khumalo AJ was apparently linked to a list of expenses claimed by the wife in the Rule 43 application. Accordingly, for the month of October 2004, the parties attempted to set off the amounts paid by the husband in respect of the expenses claimed by the wife, against the husband's debt of R48 500,00.

[28] According to the wife, for the period October to November 2004, an amount of R7 000,00 remains owing by the husband in respect of his maintenance obligations. The issue of short payment for October 2004 was debated back and forth by the parties' attorneys in the correspondence before me. The husband contends that an amount paid by him at the end of September 2004 ought to have been taken into account in respect of his October 2004 maintenance obligations. The wife initially agreed with this but later retracted her agreement.

[29] During the period November 2004 to February 2005 the wife admittedly received an amount of R219 452,18 from the husband or from companies paying the wife on behalf of the husband. The husband's maintenance obligation for the four months (at R48 500,00 per month) totalled R194 000,00. An additional R20 000,00 was paid as a contribution towards the wife's costs in terms of paragraph 5 of the order of Khumalo AJ. A further R5 000,00 was paid on 31 December 2004 in respect of costs of the Rule 43 application. Accordingly, for the months of November 2004 to February 2005 the husband exceeded his maintenance obligations by R452,18.

[30] The wife contends that the maintenance payments were not paid on or before the first day of every month. The husband admits this, but states that he paid as soon as he was able to. The husband further admits that since March 2005 he has not paid the full amount of R48 500,00 per month to the wife. He states that he has paid whatever he was able to pay. In regard to the outstanding balance, he states that he simply does not possess the resources to comply with the order of Khumalo AJ.

[31] It is common cause that during the nine months from 1 March 2005 to 30 November 2005 the husband paid maintenance to the wife in the total amount of R172 000,00. On average, the husband paid approximately R19 000,00 per month. During the same period, the husband paid bond instalments of R183 619,17, being R20 402,13 per month. The wife disputes that the husband has

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paid the bond instalments. Considering that the wife has been living in the matrimonial home with her children and, at times, some of her extended family, since October 2004 without any apparent threat of eviction, I have no hesitation in rejecting the wife's speculation in this regard. The bond payments during the period October 2004 to February 2005 were approximately R16 100,00 per month, totalling just over R80 000,00 for the five month period.

[32] According to the wife, during the period December 2005 to September 2006, the husband paid maintenance in the total amount of R92 000,00. For that ten month period, the husbands' average monthly maintenance payment was R9 200,00. The husband contends that he paid an average of R17 268,49 in maintenance per month between March 2005 and July 2006. In addition, the husband paid the bond instalments on the matrimonial home of approximately R20 400,00 per month. Although the husband filed a supplementary answering affidavit in the contempt application on 15 December 2006, he did not mention his actual monthly maintenance payments after November 2005.

[33] I now turn to consider the contempt application. It is common cause

that an order was granted and that the husband was notified accordingly. There remains the issue of whether the order was complied with and, if not, whether such non-compliance was wilful and *mala fide*. To answer these questions, it is appropriate to split the time during which the husband is alleged to have been in contempt into two periods, namely October 2004 to February 2005 ("the first period") and March 2005 to September 2006 ("the second period").

The first period

[34] I have already referred to the amount of R7 000,00 which the wife contends was outstanding in respect of the October/November 2004 period. I cannot reject the husband's contention that his payment at the end of September 2004 ought to have been taken into account in respect of the order of Khumalo AJ that imposed certain obligations on

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the husband with retrospective effect. Even if I am wrong in this regard it seems to me, based on the correspondence between the parties' attorneys, that there was sufficient confusion between them as to raise a reasonable doubt in respect of the husband's motives. I therefore find that the wife has not proved beyond reasonable doubt that the husband was in default in respect of the October 2004 payment, whether wilful and *mala fide* or not.

[35] I have already referred to the R20 000,00 which the husband was ordered to pay as a contribution towards the wife's costs. In terms of the order of Khumalo AJ, that payment was required to be made on or before 3 November 2004. The payment was indeed made on that day. In addition, the husband made the following maintenance payments:

- (a) By 8 November 2004, a total of R48 533,72.
- (b) By 3 December 2004, a total of R48 918,46.
- (c) By 14 January 2005, a total of R48 500,00.
- (d) By 15 February 2005, a total of R48 500,00.

[36] The wife admits that these amounts were paid but points to the fact that the payments were late. That is indeed so, but the question remains whether the husband's late payments were wilful and *mala fide*. The husband states that his salary is paid on the 4th day of the month and that the company's salary administrator has standing instructions to pay the wife as soon as funds are available in full. He further states that his

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salary for January 2005 was only paid on or about 13 January 2005.

As for the February 2005 payment, he states that he was only able to settle the outstanding balance of R30 500,00 through a loan which he raised through his brother.

[37] The husband's brother has filed a confirmatory affidavit. So too has Ms Karen Alliers, the salary administrator referred to by the husband.

[38] In reply the wife put the husband's original bank statements into evidence. This was after the husband, in the Rule 43(6) application, had attached an internet extract of his bank statements, covering the period 29 December 2004 to 3 January 2005. I note that the extract from the internet relied upon by the husband is dated 14 February 2005, four days before the husband's affidavit was signed. It is clear that the husband elected not to access or attach an internet extract of his bank statements covering the period 4 January 2005 to 14 February 2005.

[39] The bank statements put up by the wife cover the period 3 December 2004 to 3 March 2005, and reveal the following:

(a) As at 3 December 2004 the husband's overdraft was standing at

R320 074,18. By 14 January 2005 the overdraft had increased to R357 799,10.

(b) On 17 January 2005 an amount of R399 439,24 was credited to the account. These were the proceeds of the second bond taken out by the husband over the matrimonial home.

(c) An amount of R50 000,00 was paid by cheque on 27 January 2005. On 2 February 2005 an amount of R100 000,00 was credited to the account. Further details relating to these two amounts are not known to the wife.

(d) As at 3 February 2005 the husband's bank account recorded a credit balance of R27 300,10.

(e) Instead of settling his maintenance obligations for February 2005 there and then, the husband paid R10 000,00 on 7 February, and a further R8 000,00 on 11 February, 2005. These payments do not appear in the bank records as they were paid by companies on the husband's behalf.

(f) The husband then waited until 15 February 2005 before securing a loan from his brother to pay the wife. Yet, on 18 February 2005, the husband paid his

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brother an amount of R30 000,00 and on the same day he paid his attorneys an amount of R100 000,00.

(g) By 3 March 2005 the husband's bank account had a debit balance of R111 939,76.

[40] The bank statements put up by the wife in reply certainly call for an explanation. Although the husband did not seek leave to file a further affidavit to answer what, in my view, are probing allegations in the wife's replying affidavit, I am nevertheless of the view that the evidence does establish a reasonable doubt as to whether his late payments were wilful and *mala fide*. Even if one were suspicious of the husband's motives, that is not enough in the circumstances of this case to harden into proof beyond reasonable doubt.

[41] In my view, there may well be a valid reason for the transaction between the husband and his brother. In addition, the husband may have felt caught between the financial demands of his attorneys and his obligation to settle the balance of the February maintenance payment. I must accept the husband's evidence that his salary was routinely paid after the first day of the month. On the probabilities, I do not think that a man who has paid approximately R343 000,00 in five months, in terms of an order of Court, is likely at the same time to wish to snub that Court.

[42] Accordingly, I find that the wife has not proved beyond reasonable doubt that the husband was in contempt of Court for the period October 2004 to February 2005.

The second period

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[43] The second period began on 1 March 2005. However, on 22 February 2005 the husband launched his Rule 43(6) application. That application has been incorporated, by reference, into the contempt application. In order to put the second period into its proper context, it is necessary for me to record certain further developments during the first period.

[44] On 5 November 2004 the husband's attorneys wrote to the wife's attorneys to record that the husband might have to further encumber the matrimonial property as his income was insufficient to meet the order of Khumalo AJ. On 9 November 2004 the husband's attorneys repeated this contention. In argument before me, Mr Basslian sought to defeat this contention by relying on a *dictum* of Khumalo AJ to the effect that the husband was able to pay the amount of maintenance claimed by the wife. In my view, the *dicta* of Khumalo AJ are, with respect, not findings of fact, regard being had to the nature and effect of proceedings in terms of Rule 43.

[45] On 1 February 2005 the husband's attorneys again wrote to the wife's attorneys:

“Our client has and continues to make every endeavour to discharge his extremely onerous maintenance obligations timeously, but you will no doubt appreciate that to raise R64 000,00 nett of tax each month for your

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client and the children (before he contributes to his own survival) is no easy task.”

[46] By that time the husband had already sold his Porsche motor vehicle, and his unit trusts, and had stopped payment of all his policies. He had also taken out a second bond over the matrimonial home.

[47] On 9 February 2005 the husband’s attorneys wrote to the wife’s attorneys to record that their client’s financial position had deteriorated substantially since October 2004 and that they had been instructed to launch an application in terms of Rule 43(6).

[48] The Rule 43(6) application was launched two weeks later. In it the husband states that he is a director of a company known as Hencetrade 8 (Pty) Limited (“the company”). The husband’s status in the company has long been a disputed issue between the parties. The wife contends that the husband is in fact the beneficial owner of the company and that the shares beneficially owned by him are held in the name of one or more nominees. She further contends that he derives financial benefits from other corporations, the details of which are unknown to her.

[49] In support of her contentions, the wife relies *inter alia* on a document produced by accountants Ben Engelbrecht and Associates, dated 13 July 2004. The essence of the document reads as follows:

“We hereby confirm that according to the information available to us the abovementioned individual [the husband] currently earns a gross monthly income of R120 000,00 (one hundred and twenty thousand Rand) from various sources.”

This document was also relied upon by Khumalo AJ during the course of his judgment. There is, however, nothing in the documents before

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(me to shed light on any one of the “various sources” referred to in the document.

[50] According to the husband, the company began to experience severe cash flow problems during 2004. These problems came to a head unexpectedly in November 2004. On 10 January 2005 Mr Ben Engelbrecht of Ben Engelbrecht and Associates wrote to the Board of Directors of the company. The letter was marked for the attention of the husband and his co-director, Mr Badimo. In the letter, the accountant pointed out that the situation of the company had become so critical that urgent attention was required.

[51] The husband telephoned the accountant upon receipt of the letter and requested him to make suggestions as to how the company could salvage its position. The accountant replied with a letter the following day in which he set out his recommendations, one of which was stated as follows:

“At this point I would consider it prudent that a minimum reduction of 50% in the remuneration to directors be made with immediate effect.”

A document signed by Mr Engelbrecht, purporting to be a verifying affidavit, was annexed to the husband’s affidavit.

[52] The husband states that he and his co-director, Mr Badimo, were called upon to repay their loan accounts to the company. His salary was also reduced to R55 000,00 per month before tax. After tax his reduced salary was R36 000,00 per month. In all the circumstances, he

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contends, he has no liquidity left and cannot meet his obligations in terms of the order of Khumalo AJ.

[53] The husband has tendered to pay maintenance to the wife and their two children in the amount of R20 000,00 per month. He says that the matrimonial home will have to be sold. In addition, he tenders to keep his two daughters on his medical scheme *pendente lite* and to pay for their reasonable excess medical, dental and related expenses.

[54] The wife disputes that there has been a material change in the husband's financial circumstances. Her principal contention is that the husband has not disclosed his true financial position, in particular his beneficial shareholding in the company and the "various sources" from which he earns a monthly income.

[55] Before I can assess the merits of the husband's version for the purposes of determining whether he has established a reasonable doubt, it is necessary for me to recap certain established facts and to consider certain others.

[56] During the period 1 March 2005 to 30 November 2005 the husband paid R172 000,00 in maintenance to the wife. The amount of R172 000,00 was broken down as follows:

- a) March 2005, R25 000,00.
- b) April 2005, R25 000,00.
- c) May 2005, R25 000,00.
- d) June 2005, R25 000,00.
- e) July 2005, nil.
- f) August 2005, R42 000,00.

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g) September 2005, R5 000,00.

h) October 2005, R20 000,00.

i) November 2005, R5 000,00.

[57] The husband explains his failure to pay timeously and in full as follows:

“I am not paid regularly on the 1st of each month. I get paid according to the company’s cash flow and this is the same with my co-director Mike Badimo. My instruction to the bookkeeper is that as soon as money is available to me it goes to the applicant. Given my drop in salary, the only amount I could afford in March to June 2005 was R25 000,00, which was transferred straight from one of the companies to applicant’s account when the company was able to transfer same. In July 2005 the company experienced severe cash flow and all the company paid was debit orders. I did not receive my salary for that month. I endeavoured to make up the payments in the next month, namely August 2005, where it will be seen that additional monies were paid. In September 2005 and November 2005 I was again not paid.”

[58] According to the wife, during the period 1 December 2005 to 30 September 2006, the husband paid maintenance to the wife in the amount

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of R92 000,00 as follows:

- a) December 2005, R15 000,00.
- b) January 2006, R17 000,00.
- c) February 2006, R10 000,00.
- d) March 2006, nil.
- e) April 2006, R10 000,00.
- f) May 2006, R20 000,00.
- g) June 2006, nil.
- h) July 2006, nil.
- i) August 2006, R10 000,00.
- j) September 2006, R10 000,00.

[59] As I have already stated, the husband had an opportunity to explain or to challenge these payments when he deposed to his supplementary answering affidavit in the contempt application on 15 December 2006. He did not do so. I am aware that the payments were mentioned in the wife's answering affidavit to the husband's supplementary affidavit in the Rule 43(6) application. Her affidavit was deposed to on 10 October 2006. Given the links between the two applications, I am of the view that the husband ought to have disclosed his actual monthly maintenance payments for the period December 2005 to September 2006 if he disputed the figures put up by the wife.

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[60] There is however, another aspect of the husband's affidavit of 15 December 2006 that requires consideration. He states:

"The effect of the order made against me was that I was to pay the sum of R64 000,00 per month nett. Since the order of his lordship Mr Justice Khumalo was made, my salary was reduced, as appears at page 159 of the paginated pages at paragraph 27. I received a nett amount of R36 000,00 per month. No performance bonus has been paid since I deposed to my answering affidavit. The only change in my personal circumstances since then is that I now drive a Porsche 4 X 4 motor vehicle, which belongs to my employer Hencetrade 8, and this is a perk made available to me. The vehicle does not belong to me and, other than that I drive same, I have no beneficial interest therein. Hencetrade 8 also pays the insurance in respect of the said vehicle. The fact that I have been given a luxury motor vehicle to use does not put more money in my pocket."

[61] The casual reference to the Porsche 4 X 4 motor vehicle obscures the exchange of five affidavits in the Rule 43(6) application, the last of which was deposed to by the husband, also on 15 December 2006.

[62] On 6 September 2006, just over two months earlier, the husband deposed to a supplementary affidavit in the Rule 43(6) application to explain *inter*

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aliawhat had transpired with regard to the payment of maintenance by him since 18 February 2005, when he had deposed to his founding affidavit. In the supplementary affidavit he states that the circumstances set out in his founding affidavit are largely unchanged. His employment situation has become more uncertain, and his income has remained unchanged. His income tax return for the year ended February 2006 is attached. It confirms that the husband's annual taxable income for that year was R660 000,00, that is, R55 000,00 per month. It also confirms the husband's tax deductions for the year, from which it follows that his average nett monthly income was approximately R36 000,00.

[63] The husband states that during the period March 2005 to July 2006 he paid an average of R37 670,62 per month in respect of the wife and his two daughters. That amount includes nursery school, medical aid, home loan and maintenance payments. The monthly home loan payments during this period were R20 402,13. The husband therefore claims to have paid an average of R17 268,49 per month towards his maintenance obligations during the second period. He also points out that the wife has since secured employment.

[64] No mention is made by the husband of the Porsche 4 X 4 motor vehicle in his affidavit of 6 September 2006. Instead, he states that he has had to borrow money for his own living expenses from his employer and his brother. He further states that he has been unable to liquidate or to reduce his bank overdraft.

[65] On 10 October 2006 the wife answered the husband's affidavit of 6 September 2006. In her affidavit she disputes that the husband has paid what he

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claims to have paid in respect of school fees. She also states that her employment is for a limited period, from 1 July 2006 to 28 February 2007. I am unable to determine the dispute relating to the payment of school fees on the papers before me. I must therefore accept, for the purposes of the contempt application, that the husband has paid school fees in the amount alleged by him.

[66] However, in my view, the dispute concerning the Porsche 4 X 4 motor vehicle falls to be decided differently. In her affidavit of 10 October 2006, the wife raises the dispute for the first time. She points out that the husband has failed to mention his purchase of the vehicle in his account of what transpired in the intervening 18 months. She states that the husband in fact purchased two new vehicles, both of which were registered in his name in January 2006. The first vehicle, a Porsche Cayman S, was registered on 3 January 2006 and the second, a Porsche Cayenne Tiptronic, was registered on 31 January 2006. In support of her allegations she attaches proof of registration from the relevant authorities as well as the listed prices of the two vehicles. The listed price of the Cayman S vehicle (a sports car) is R695 000,00 and that of the Cayenne Tiptronic (the 4 X 4 vehicle) is R630 000,00. If the vehicles are financed, the monthly repayments on the Cayman S is R14 892,00 and the monthly repayments on the Cayenne Tiptronic is R13 499,00. Insurance on the two vehicles is approximately R6 000,00 per month per vehicle. The total payment per month in respect of both vehicles is approximately R40 391,00.

[67] On 9 November 2006 the husband deposed to an affidavit in answer to the wife's allegations concerning the purchase of the two new Porsche vehicles. In that affidavit, the husband denies that he has purchased the two Porsche vehicles. He states that the vehicles are registered in the name of the company, and attaches copies of the official certificates of registration. He denies that the documents attached to the wife's affidavit of 10 October 2006 were obtained from the licensing department or any official authority. In my view, the innuendo here is that the documents relied upon by the wife are either fraudulent documents or documents that were obtained unlawfully.

[68] The husband states that he and Mr Badimo are allowed the use of the two company vehicles. He continues:

“Insofar as my name may appear on any documentation in

respect of the motor vehicle which I drive, this is because I

am the “responsible person” when it comes to any fines

issued in respect of the vehicle. It is a legal requirement,

where a motor vehicle is registered in the name of the

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company, to list the name of the person responsible for the payment of fines, i.e. the details of the person who primarily drives the motor vehicle.”

[69] It seems to have escaped the husband’s attention that his name and identity number appeared on the documents produced by the wife in respect of both vehicles. However, Mr Badimo’s name does not appear on any document in respect of either vehicle. Yet, according to the husband, Mr Badimo was to be the driver of one of the vehicles. Mr Badimo deposed to a confirmatory affidavit. So too did Ms Brenda Lyn Anderson, the company’s accountant.

[70] On 20 November 2006 the wife delivered another affidavit, this time in answer to the husband’s affidavit of 9 November 2006. In the affidavit she states that the husband is well aware that the two Porsche vehicles were initially purchased by him in his name, that they were financed in his name and that they were transferred from his name to the company’s name in September 2006. In support of her allegations the wife attaches further documents from the licensing department that indicate that ownership was transferred from the husband to the company in respect of the sports car on 7 September 2006 and in respect of the 4 X 4 vehicle on 8 September 2006. These documents also indicate that the husband initially acquired ownership of the sports car on 3 January 2006 and of the 4 X 4 vehicle on

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31 January 2006.

[71] On 15 December 2006 the husband deposed to his final affidavit in the Rule 43(6) application. His version of being the person responsible for the payment of fines is replaced with an admission that the two Porsche vehicles were indeed originally registered in his name but that they were never intended to be his vehicles. He states that the fortunes of the company improved towards the end of 2005. When it became apparent that the company had turned around financially, his co-director Mr Badimo, who is also a shareholder of the company, wanted to purchase new company vehicles to be used by Mr Badimo and the husband. The two of them visited the Porsche showrooms. Mr Badimo wanted the sports car and the husband preferred the 4 X 4 vehicle because of his children.

[72] According to the husband, the vehicles were to be purchased by the company. This was made known to the two finance companies that were to finance the purchase of each vehicle. However, the updated financial statements of the company were not available. The husband and Mr Badimo were told that either of them could have the vehicles registered in their name on an interim basis. The husband agreed to have both vehicles registered in his name until the financial statements of the company became available. The lease agreements were prepared with the husband being reflected as "the lessee" in one agreement and "the credit receiver" in the other. In both agreements the company's details were provided for payment purposes. The husband signed both lease agreements.

[73] The company's financial statements were eventually prepared. They were acceptable to the two financial institutions. New finance application forms were filled in and during September 2006 the two vehicles were transferred into the name of the company.

[74] Mr Dawid Crous, an employee of Wesbank, one of the financial institutions involved in the purchase of the two vehicles, deposed to an affidavit that was annexed to the husband's affidavit. He states that the original application for finance by the company was unsuccessful because audited financial statements and/or management accounts were not available. The husband's application for finance was successful. Mr Crous states:

"I permitted the transaction to proceed in this way because

at the time, I assumed that Mr Bruni was a shareholder of

the aforesaid company."

He confirms that it was agreed that the vehicles would be refinanced in the

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name of the company once the financial statements were available.

[75] Ms Chantalle Ten Napel, an employee in the Finance and Insurance Section of Porsche Centre SA, also deposed to a confirmatory affidavit. She states that she was aware of the circumstances of the Wesbank deal. With that knowledge, she applied for finance for the other vehicle in the husband's name through Alpheria Financial Services. A similar deal was concluded in respect of the second vehicle.

[76] I return to the final affidavit deposed to by the husband in the contempt application. As I have already noted that affidavit was also deposed to on 15 December 2006.

[77] The husband states that he was unable to keep his attorney engaged because of a lack of funds. He had to find another attorney who could accommodate him financially. It is common cause that the husband has indeed changed attorneys. The husband repeats that he is not able to pay the amounts ordered by Khumalo AJ. He concludes:

"I have no assets left other than the house which the applicant occupies, some furniture and household effects. I have no savings, no policies, no pension and no other assets of any nature that I can utilise for the purposes of raising money to pay up the arrears which currently exist."

[78] I have given this matter anxious consideration. On the one hand, I have a professional person, an accountant, who informs me that by January 2005 the company has reached such a state of financial crisis that urgent action is necessary to save it. Included in that action is the drastic reduction of the salaries of the directors. I also have an IRP5 tax certificate, in the

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accepted SARS format, that indicates that the husband's average monthly income from the company for the period 1 March 2005 to 28 February 2006 was R55 000,00 before tax and approximately R36 000,00 after tax.

[79] Then there is the evidence of the husband who states that he was not paid for the months of July, September and November 2005. Given the contents of the IRP5 tax certificate, the husband must have intended to convey that he did not receive his monthly salary before the end of July, September or November 2005, but that it was paid to him subsequently. After all, his declared taxable income for the year ended 28 February 2006 was R660 000,00.

[80] It is significant, in my view, that the husband did not pay any additional amounts to the wife in respect of his maintenance obligations for September and November 2005 after he eventually received his monthly salary for those two months. It will be recalled that the husband did increase his monthly payment for August 2005 from R25 000,00 to R42 000,00, having paid nothing in July 2005. There is also the evidence that the husband registered the second bond over the matrimonial home during December 2004 or January 2005.

[81] On the other hand, I have the evidence of the husband who states that the company suddenly experienced the effects of a turnaround in fortunes during December 2005. This is a company that operates a food and drink outlet at the OR Tambo International Airport. After not being able to pay the husband (and probably Mr Badimo) their salaries for September and November 2005, the company was suddenly so flush with cash in December 2005 that the two directors were able to purchase the two new Porsche vehicles and to put down a cash deposit of R150 000,00 for the one vehicle and R200 000,00 for the other. These deposits are apparent from the lease agreements that were signed by the husband.

[82] The decision to purchase the vehicles was a decision of the directors of the company. There is no suggestion from the husband that he disagreed with the decision, or that he suggested an increase in his salary, or their salaries, instead. Nor is it suggested that such expensive vehicles were necessary for the proper functioning of the company.

[83] Then there is the husband's attempt to deny that the two vehicles were initially purchased in his name. His version about his name being used to identify "the responsible person" for the payment of fines is, in my view, palpably false. Similarly, his attempt to suggest that the wife obtained proof from the licensing authorities either fraudulently or unlawfully is to be rejected.

[84] When the husband finally admitted that the vehicles had indeed been purchased in his name, he produced a version that has more questions than answers. How was the company suddenly able to find R350 000,00 in cash, and

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to support a monthly repayment in excess of R40 000,00, when it had been unable to pay salaries during the previous month? Why did Mr Badimo not purchase at least one of the vehicles in his name? Why did Mr Crous assume that the husband was a shareholder of the company? Most significantly, how was the husband, a man with no assets other than a heavily bonded house, no savings, no policies, no pension, no salary for September and November 2005, and no other assets of any nature that he could utilise for the purposes of raising money, able successfully to apply for finance for the purchase of two vehicles worth more than R1 300 000,00 when the company was declined finance due to the lack of financial statements? In addition, how could the husband have been considered creditworthy when his nett monthly salary was only R36 000,00, and the combined monthly repayments, excluding insurance, for the two vehicles exceeded R25 000,00. (The actual monthly repayments as reflected in the lease agreements were R12 950,00 and R12 767,00 respectively.)

[85] The husband has not disclosed copies of his written applications for finance for the purchase of the two vehicles. In my view, three possible scenarios exist. First, he might have lied in his applications as to his worth. In my view, that is not probable since he would have been required to disclose information and documentation similar to that which the company had been unable to furnish. Secondly, he might have disclosed assets and/or sources of income, which he has not disclosed to this Court. Thirdly, he might have revealed or implied that he was a shareholder of the company and persuaded the financial institutions, even without the company's financial statements, that the company had experienced a turnaround, that it was flush with cash and that future income was assured.

[86] It seems to me, having regard to the circumstances of this matter, that the third scenario is more probable than the second. In addition, Mr Crous states that the vehicles were always intended to be purchased by the company.

[87] There is no suggestion in the papers before me that the turnaround that was experienced in December 2005 has not been sustained. Nor is there sufficient evidence for me to conclude that the company is able to return to the level of the director's salaries that it was paying prior to the cut in January 2005.

[88] I am, however, of the view that it is highly improbable that the turnaround in the company's financial position could have been as sudden as the husband claims it was. In my view, it is simply not credible that a company that was allegedly unable to pay its directors in November 2005 could suddenly afford to put down a cash deposit of R350 000,00 for two luxury motor vehicles in December 2005.

[89] In any event, when the husband was paid his salary for September and November 2005 he chose not to pay the wife the difference between the R25 000,00 that he had previously been paying and the amounts he had paid during the period September to November 2005.

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[90] From December 2005 to September 2006, a period during which the company was apparently doing much better, when the directors were being paid their salaries regularly and when there was sufficient surplus cash to indulge the directors with expensive motor vehicles, the husband continued to pay maintenance to the wife that was well below the R25 000,00 he had previously paid, and even below the R20 000,00 that he now tenders. In March, June and July 2006, the husband paid no maintenance at all.

[91] In my view, the husband has not established a reasonable doubt that his failure to comply with the order of Khumalo AJ was entirely due to a lack of resources on his part. It may well have been that he could not afford to pay the full amount of R48 500,00 per month, but he certainly could have paid more than he did.

[92] I therefore find that the wife has proved beyond reasonable doubt that the husband was in contempt of the order of Khumalo AJ, at least during the period December 2005 to September 2006.

[93] Before I deal with an appropriate sentence, it is necessary for me to consider the Rule 43(6) application. In my view, the husband has proved, on a balance of probabilities, that there was a material change in his circumstances subsequent to the hearing of the application before Khumalo AJ. I am persuaded, on balance, that his salary was reduced as a result of the financial crisis described by Mr Engelbrecht.

[94] I am therefore entitled to vary the maintenance order of Khumalo AJ. In

doing so, I bear in mind that the husband's prospects of financial reward have increased since the turnaround in the fortunes of the company.

Having regard to the circumstances of this matter, I am of the view that the husband ought to be ordered to pay maintenance *pendente lite* in the amount of R25 000,00 per month. I am also of the view that it would just and equitable for my order to be made effective from 1 March 2005, regard being had to the date upon which the Rule 43(6) application was launched.

[95] As far as an appropriate sentence is concerned, I intend to sentence the husband to 30 days' imprisonment but I intend to suspend the operation of

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that sentence for a defined period on condition that he makes payment of all arrear maintenance calculated in accordance with the order of Khumalo AJ, as varied by me.

[96] I turn to the issue of costs. Both counsel have submitted that I should order that the costs should not be limited in terms of Rule 43. That seems appropriate. However, there is an issue that concerns me.

[97] On 3 August 2005 the husband's attorneys wrote to the Deputy Judge President of this Division to request that the divorce action be afforded precedence so that the matter could be set down for trial as soon as possible. The request was supported by a detailed motivation. It was pointed out that the protracted proceedings were prejudicial to both parties and that the children were caught in the middle of an emotionally charged battle between their parents.

[98] The wife's attorneys responded on 22 August 2005. In relation to the request for a preferential trial date, they left the matter in the hands of the Deputy Judge President. They said: "We make no comment with regard thereto."

[99] They then proceeded to list "certain factual inaccuracies" in the letter of 3 August 2005. Amongst them, the attorneys recorded that the children are "certainly ... not torn between the parties", that the husband could make a *bona fide* and reasonable settlement offer, that the Rule 43 order was not onerous for the husband and that the wife required a further contribution to costs before the matter could proceed to trial.

[100] As a result, the Deputy Judge President refused the request for a preferential trial date.

[101] In my view, the approach of the wife to the husband's request for a preferential trial date was ill considered. It cannot be in the best interests of the children to have their parents locked in a bitter and protracted divorce action. Much of the content of the contempt application could have been avoided if the interim position had been brought to an end by a determination of a trial court.

[102] Having regard to the conduct of both parties since the order of Khumalo AJ was handed down, I am of the view that each party should pay his or her own costs in both applications. I therefore make the following orders:

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Case number 05/3405 (the contempt application)

1. The respondent is declared to have been in contempt of the order of Khumalo AJ handed down on 27 October 2004 under case number 04/20845.
2. The respondent is committed to prison for a period of 30 days, which term of imprisonment is suspended on condition that the respondent makes payment of all arrear maintenance, calculated in accordance with the order of Khumalo AJ, as varied by the order in case number 05/4050.
3. The payment of all arrear maintenance referred to in paragraph 2 above shall be made within six months of the date of this order, failing which the suspension referred to in paragraph 2 above shall *ipso facto* be lifted.
4. Each party is ordered to pay his or her own costs.

Case number 05/4050 (the Rule 43(6) application)

1. The order of Khumalo AJ handed down on 27 October 2004 is varied, with effect from 1 March 2005, by the deletion of paragraphs 1, 2 and 4 thereof, and the substitution therefor of the following: "The respondent shall pay maintenance for the applicant and the two minor children in the sum of R25 000,00 per month, such payment to be made on or before the 7th day of each consecutive month."
2. Each party is ordered to pay his or her own costs, which costs shall not be

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limited in terms of Rule 43.