REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED

CASE NO.: 89495/2016

20/12/2017

In the matter between:

M O **APPLICANT**

and

F L O **RESPONDENT**

Heard: **13 December 2017**

Delivered **20 December 2017**

JUDGMENT

VAN DER SCHYFF AJ

Introduction

[1] The Applicant in this matter seeks an order that the Respondent is found and declared to be in contempt of the court order issued on 16 May 2007; that

the Respondent be committed to imprisonment for a period of 30 (THIRTY) days and that a warrant for arrest be issued against the Respondent; that the order pertaining to the commitment to imprisonment be suspended for a period that the Court deems fit subject to the conditions that the overdue maintenance be paid before a date stipulated by the Court and that the Respondent be ordered to make continuous punctual monthly payments in terms of the court order dated 16 May 2007 to the Applicant on or before the first day of each and every consecutive month.

[2] The application was brought as an urgent application. Despite the application being brought on an urgent basis on 13 December 2017 I reserved judgment to scrutinise the existing body of case law dealing with applications of this nature.

Re urgency

[3] Rule 6(12)(b) requires an applicant for urgent relief to explicitly set forth in the founding affidavit the circumstances which render the matter urgent and the reasons why the applicant cannot be afforded substantial redress at a hearing in due course *(Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W)136H.

[4] In deciding whether this application merits to be heard as an urgent application I take the following into consideration:

4.1 The Respondent has displayed a tendency to fail to meet his maintenance obligations to his minor child and the Applicant promptly - the fact that a similar application was brought during November 2016 attests to this. On 26 November 2016 Raulinga J ordered that *'this Application be and is hereby* postponed sine die' and *'That in the event that the Applicant reasonably believes that the Respondent is in contemptuous default of his maintenance obligations, the Applicant shall be entitled to supplement her papers and re-enrol this application* ***on such time periods as the Applicant*** **may deem** ***fit*** (my emphasis);

4.2 A failure to pay maintenance in terms of an existing court order should not be viewed as a simple debtor-creditor type situation. The grant

of a maintenance order arises pursuant to a court finding the existence of an ongoing duty of support and in the case of child support the duty is further reinforced by the constitutional right of a child to parental or family care and that his or her best interests are of paramount importance (G *v* G 2017 (2) SA 409 (GJ) para [8]; Sections 28(1)(b) and (2) of the Constitution.);

4.3 This Court, has already in 2007 came to the conclusion that unless the Respondent pays a contribution to the Applicant's personal maintenance she would not be able to adequately support herself and ordered on 16 May 2007 that maintenance in the amount of R40 000.00 (Forty Thousand Rand) per month must be paid to the Applicant;

4.4 The Court also held that an amount of R7 500.00 should be contributed by the Respondent regarding the maintenance of each of his minor children (in addition to specific payments pertaining to medical aid benefits, and the responsibility to pay all educational related expenses of the minor children.);

4.4 The maintenance amounts have not escalated since the order was granted 10 years ago;

4.4 While not all applications for arrear maintenance founded on the contempt of court are urgent, urgency is self-evident in this case where the Applicant states in her affidavit that the Respondent has not made maintenance payments for November and December 2017 in a total amount of R87,500.00; that the Respondent persists in making payments in an erratic fashion that results in the Applicant not being in a position to know whether and if payments are going to be made; that the Applicant's own financial position is precarious due to *inter alia* the fact that she has still not being paid the accrual which the Respondent is obliged to pay in terms of the court order of May 2007; that the litigation in this regard has been long and protracted; that her own business (which she had to start in order to generate an income) has suffered due to her having to undergo a mastectomy in 2016; that additional medical expenses were occasioned by this medical procedure that she had to carry herself in a period when

the Respondent neglected to pay maintenance timeously; that her business is not yet self-sustainable; that she does not have any savings or assets to fall back on in periods that the Respondent does not pay maintenance; that she has already utilized her overdraft facilities to pay the rental for November/December 2017; and. that she will not be able to pay rent to her landlord for December 2017/January 2018 if the maintenance is not being paid timeously and that she and the minor child will *'again face possible eviction'* from their residence. In his answering affidavit the Respondent *'take note of the financial situation of the Applicant,* denies that the matter is urgent, but concedes *'that the financial position of the Applicant is one of the reasons why I have not* as *yet applied to the court to have* the *maintenance reduced.'*

[5] I accordingly find that this application can be adjudicated on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.

Contempt proceedings

[6] It is trite that compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure as far as possible with the provisions of section 35(3) of the Constitution - (JSO *v HWO (24384/2009)* (2014) ZAGPPHC 133 (19 February 2014)). I have been referred to *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) as the leading authority on contempt of court proceedings. In this decision the Supreme Court of Appeal describes the application for committal for contempt by a private party as a *'peculiar amalgam'* because *'it is a civil proceeding that invokes a criminal sanction or its threat.'* (para [8]). The Court continues in paragraph [9] *'The test for when the 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,...'.* However, in paragraph [41] the Court holds '... *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 .. ., unless the respondent provides evidence raising a *reasonable doubt* as *to whether non-compliance was wilful and* mala fide *the requisites of contempt would 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, but only need evidence that establishes a reasonable doubt.'*

[7] The Supreme Court of Appeal summarised its findings in paragraph [42]:

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 requiremen.t

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 have been established beyond reasonable doubt.*

[8] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015]ZACC 1O in a unanimous decision delivered by Nkabinde J, the Constitutional Court subsequently explained that:

'[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil

contempt is a *crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by* a *disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour....*

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a *sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the role of law.*

[32] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a *person or legal entity before it to do or not do something (ad* factum praestandum), *the following elements need to be established on a balance of probabilities: (a) the must order exist; (b) the order must have been duly served on, or brought* to *the notice* of, *the alleged contemnor; (c) there must have been non-compliance with the order; and (d) the non-compliance must have been wilful or ma/a fide'.*

[9] The Constitutional Court confirmed the decision by the Supreme Court of Appeal in *Fakie* (supra) and held in paragraph [36] that the decision creates a presumption in favour of the Applicant - *'Therefore the presumption rightly exists that when the first three elements of* the *test for contempt have been established, ma/a tides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.'*

[10] Nkabinde J continued in paragraph [37] - - *However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such* as *declaratory relief,* a *mandamus demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.'*

The current application

[11] It is common cause between the parties before the Court that the first three elements of the test for contempt have been established. The Respondent admits in paragraphs [2.1] and [2.2] of his answering affidavit that the maintenance order pertaining to this application was issued against him and that he was ordered to pay maintenance towards the Applicant and his minor child. He admits being in default [paragraphs 2.8, 3.9] but denies to be in contemptuous default.

[12] Since the first three elements of the test for contempt have been established, *mala tides* and wilfulness are presumed unless the Respondent is able to lead evidence sufficient to create reasonable doubt as to their existence. The Respondent thus need to rebut the presumption of *mala fides* and wilfulness.

[13] The meaning of the terms *mala tides* and wilfulness need to be determined. It was held in *Fakie (supra* paragraph [9]) that a deliberate (wilful!) disregard is not enough, *'since the non-complier may genuinely, albeit mistakenly, believe him of herself entitled to act in a way claimed to constitute 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).'*

[14] In light of the facts of this application the question would be whether (i) the Respondent indicates in his affidavit a factual inability to comply with the court order; (ii) and, if such a factual inability is evident from the documents before the Court, whether the Respondent honestly believed

that non-compliance with the court order due to a factual inability to pay is justified.

[15] The Applicant avers in both the founding and supplementary affidavits that the Respondent is *ma/a fide* and in wilful contempt of the Court order. It is evident from both the Applicant and Respondent's affidavits that the parties have been embroiled in extended litigation for nearly 10 years and that the relationship between the parties is acrimonious. The Applicant avers that the Respondent is vindictive and frustrates her through the late and/or non-payment of maintenance. However, in addressing the first question, namely, whether the Respondent indicates in his affidavit a factual inability to comply with the court order, it is imperative to take cognisance of the fact that the Court is not called now to adjudicate a maintenance dispute between the parties. Kirk-Cohen J stated unequivocally in *Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) at 6730-E- *'Contempt of court is not an issue* inter partes; *it is an issue between the court and the party who has not complied with a mandatory order of court.'*

[16] I am not convinced that the Respondent has discharged the evidentiary burden in creating reasonable doubt as to the wilfulness and *ma/a tides* of his default to perform in terms of the court order. I am not dealing with every aspect that concerns me, but highlight only a few. In dealing with these aspects I refer only to the instances admitted by the Respondent in terms whereof no factual dispute exist as far the Respondent's receipt of the amounts mentioned is concerned.

[17] The Respondent admits in paragraph 8.1.1 of his answering affidavit that *'it seems on average that an amount of R65789.00 is available for the use of creditors'* for the months of January 2017 to June 2017. However, in paragraph 8.1.2 and 8.1.3 he states *'Being an un..rehabilitated insolvent, and having fixed practice expenses, I need to attempt* to *build up an amount to carry me through periods when income is reduced.* As *the court is well aware, I am not in a position to obtain credit, and had to make*

provision for the months where income is Jess than expected.' The Respondent clearly regarded his own future expenses as more important that putting funds aside to ensure compliance with a court order. In addition, the Respondent never alleges that he was honestly and *bona fide* under the impression that it would be justifiable under these circumstances. not to make provision for future performance in terms of the court order.

[18] The Applicant avers that the Respondent sold one of his overseas properties on 20 May 2016 for an amount of R 1,630,961.45 and transferred the amount to a 'new Capitec Bank account'. She then indicates how the amount was further distributed. She avers that through this action, the Respondent acted in contempt of the provisional sequestration order in order to defraud his creditors. When the Respondent dealt with this averment in his answering affidavit he states the following - *'I admit that one of the overseas properties was in fact sold, and the income received. I would however like to point out that Mr Hegyi was the co-owner of this property, and that he was entitled to 50% of the proceeds of that property. The money that was transferred to my account was indeed paid, mostly towards creditors. A large sum of that money was in fact paid towards arrear taxes. ... I did nothing illegal, and* was *in fact entitled to that money. It also have no effect on my present financial position.'* It is not for this Court to determine whether the Respondent dealt in any illegal manner with these funds or whether he intentionally defrauded his creditors. What is important for this Court, is that the Respondent obtained a large amount of money, and yet did not set sufficient funds aside to ensure compliance with the Court order. In addition, one would expect from a Respondent on whom an evidentiary burden rests to utilise available evidence to indicate the existence of a reasonable doubt. However, no confirmatory affidavit of Mr Hegyi is attached to substantiate the submission that he was entitled to 50% of the amount. Once again it is evident that the Respondent regarded his own expenses as more important that putting funds aside to ensure (future) compliance with a court order. In addition, the Respondent never alleges

that he was honestly and *bona fide* under the impression that it would be justifiable under these circumstances, not to make provision for future performance in terms of the court order.

[19] The Respondent then avers that he fully discloses his income and expenses for the period July 2017 - November 2017. He attaches annexures 'LF0 2' - 'LF06 '. Irrespective of the fact that neither of these annexures are substantiated by confirmatory affidavits from third-parties, the following trend is evident that casts doubt as to the correctness and comprehensiveness of these records:

[19.1] The Respondent reimburses creditors and practice expenses on a monthly basis, but there is no consistent indication of contributions paid to office rent, it varies from R25, 000.00 (July '17), R6,000.00 (August'17;) R25,764.00(Nov 2017.)

[19.21 Expenses attributed to Fundamedical escalates without any explanation from R35, sn.28 (July'17) to R92, 625,00 (August '17), to R562,208.72 (September'17) and (no provision made for October '17), and R302,250.00(November '17).

[19.3] Additional doubt is casted on the correctness of these financial statements if it is considered that in the November 2017 statement the amount pertaining to the 'Income Protector Policy Insurance - Momentum Life' (R15 000) is deducted twice, once as an insurance expense under practice expenses and again as an expense pertaining to payments made obo Dr LF O under Fundamedical management. Another 'double' expense relates to accommodation. Despite the fact that an amount is monthly paid to Rent Debro Estates, provision is made for 'accommodation' under Cash/Card payments.

[19.4] In addition it is evident from the financial statements that the Respondent pays R 35 000.00 per month to Rent Debro Estates for his accommodation. Despite the knowledge that he has to perform in terms of a court order, the Respondent elects to lease a dwelling at an exorbitant price. If a person cannot meet his obligations to

perform in terms of a court order it might be regarded as an intentional and deliberate violation of such a court order if one prioritises expenses allocated to personal savings, servants' salaries (this does not refer to practice related salaries as the latter are already catered for) and DSTV.

[19.5] The monthly deduction of R 33, 407.76 pertaining to the motor vehicle and its insurance is, in light of the Respondent's financial responsibility towards this Court, exorbitant. Although I take cognisance of the fact that the Respondent states that the vehicle is provided to him by Fundamedical, he is still responsible for paying Fundamedical an amount of R33, 407.76 in circumstances where he cannot fulfil his obligations in terms of an order of this Court.

[20] If it is considered that the Respondent has been sequestrated, and that a trustee has been appointed for the insolvent estate, it would have been quite easy for the Respondent to create reasonable doubt and discharge the evidentiary burden by merely attaching a confirmatory affidavit from the trustee wherein the latter stated that the Respondent, being an un-rehabilitated insolvent, truly does not have the means to adhere to the court order. The absence of such an affidavit does not favour the Respondent.

[21] I take cognisance of the fact that the Respondent has to pay substantial amounts towards the maintenance of his previous spouses and his 5 children. However. except for respondent's counsel requesting me during argument from the bar to refer the matter to the Maintenance Court, the Respondent has not taken any positive steps to apply for a reduction of the existing maintenance order. (It should be considered that this maintenance order has not been adjusted during the last 10 years.) I also take into consideration that since this application was brought he Respondent has made two payments of R10 000,00 in lieu of the arrear amounts.

[22] Much is made in argument by the Respondent's counsel that the Applicant

'elected to sequestrate the estate of the Respondent', and that *' being the only proven creditor in the insolvent estate the applicant .. . is the author of her own demise'.* It is further argued that the Respondent's financial predicament is created by circumstances solely under the control of the Applicant, in addition to the statement made at the onset of this paragraph, Respondent avers that it is attributable to the Applicant that the trustee of his estate did not grant him permission to obtain a loan from his mother, and that the trustee disputed the Income Protector policy payment made directly to himself- had this happened he would have been in a better position to make payment of the arrear maintenance. The Respondent also states in his answering affidavit that the application *'forces me to employ the services of an attorney and an advocate at high cost. This is money which could have been better used to pay towards the arrear maintenance'.* These remarks clearly indicate that the Respondent regard the *lis* between himself and the Applicant as the 'issue' before the Court, while, as indicated above, contempt of court is not an issue *inter partes,* but an issue between the court and the party who has not complied with a mandatory order of the court.

[23] Although there is no *onus* on the Respondent, but merely an evidentiary burden to create a reasonable doubt as to the existence of wilfulness and *ma/a tides,* the vague and unsubstantiated statements contained in the Respondent's answering affidavit did not succeed in rebutting the presumption of wilfulness and *mala fides.* The Respondent did not once state, and neither was it offered in oral argument from the bar, that he honestly believed that the fact that he was, in his view, not able to pay the maintenance entitled him to unilaterally decide to make *pro* rata payments to the Applicant. In addition the financial statements attached to the Respondent's affidavit, for the reasons set out above, did not convince me that Respondent succeeded in creating a reasonable doubt as to his non-compliance with the court order dated 16 May 2007 being wilful and *ma/a fide.* The facts if the present application is distinguishable from the facts in *Dezius v Dezius* 2006 (6) SA 395 (T) where the Respondent had shown that there existed a reasonable possibility that, by reason of his poverty,

he had not intentionally failed to comply with the court order. On the Respondent's own submissions I adduced that he chose to incur certain expenses that cannot be categorised as necessary expenses instead of honouring the obligations contained in the court order of May 2007. The Respondent only pays lip service to the principle stated in *DeZius.*

[24] The final question is whether there are any alternative means through which the court can ensure compliance with the court order dated 16 May 2007 that would not entail committal. In the circumstances of this application, where the Respondent is already sequestrated, where Joffe J, acting as Arbitrator in an arbitration pertaining to the accrual that is due to the Applicant, has already held in 2015 that *'[t]he defendant* [the Respondent in this application] *was in possession of all the information and could have endeavoured to comply with the court order. Instead of assisting the determination of the accrual he did his utmost best to frustrate the determination of the accrual',* I am of the **view** that a mere declaratory order, a mandamus demanding the Respondent to behave in a particular manner, or a fine, would not have the desired result to coerce the Respondent to comply with the relevant court order.

ORDER:

IT IS THUS ORDERED THAT:

1. The Respondent is found to be in contempt of the court order issued out of this Court on 16 May 2007;
2. The Respondent be committed to imprisonment for a period of 10 days and that a warrant of arrest be issued against the Respondent;
3. The order granted in paragraph 2 above be suspended subject to the following condition:
   3.1 Payment of the amount of R 67 ,500 on or before 30 December 2017 by the Respondent to the Applicant;
4. All future payments must be made punctually on or before the 7th day of the month.

5. The Applicant may approach the court on an urgent basis if the Respondent defaults on any future payments;

6. The Respondent to pay the costs of this application.

EVAN DER SCHYFF
Acting Judge of the High Court