

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORT ABLE: NO
(2) OFINTERESTTOOTHERJUDGES:NO

CASE NO: 2019/84161

18/5/2020

In the matter between:

M[....] : M[....] (Nee M[....])

Applicant

and

M[....] : T[....] N[....] J[....]

Respondent

JUDGMENT

MOKOSE J

[1] The applicant seeks an order placing the respondent in contempt of a Rule 43 order which was granted in the urgent court by Davis J on 21 January 2020.

[2] In terms of the Rule 43 order, the respondent was ordered to pay an aggregate amount of R26 755,00 to the applicant in respect of maintenance for the four minor children, *pendente lite*. Furthermore, the respondent was ordered to make a contribution towards the applicant's legal costs in the sum of R12 000,00 which amount was payable directly into the trust account of the applicant's attorneys of record in instalments of R1000,00 per month.

[3] The respondent failed to comply with the Rule 43 order in that he failed to make payment to the applicant as directed. In particular, he only paid the following amounts:

- (i) The full amount of R26 755,00 on 28 January 2020;
- (ii) The sum of R14 000,00 in February 2020;
- (iii) The sum of R4 000,00 in March 2020; and
- (iv) The sum of R4 000,00 in April 2020.

[4] The applicant launched the application on an urgent basis and sought condonation for the non-compliance with the time periods as prescribed in the Rules of Court and permitting this application to be brought by way of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

[5] The respondent was of the view that the applicant had failed to justify the hearing of this matter on an urgent basis and that the application was merely an abuse of the process.

[6] The test of urgency in applications of this nature is whether, if this application is brought in the normal course, the applicant will be able to achieve sufficient relief. The applicant submits that at the end of each month and without a contribution for maintenance by the respondent, she is left with a deficit of approximately R36 000,00. The money that she earns does not cover all the needs of the minor children. Furthermore, she submits that she is a business analyst at a major bank and can ill-afford a judgment against her. Should that occur, she would lose her job which would impact her ability to contribute to the upbringing and needs of the minor children.

[7] It is clear that the applicant would not be able to obtain substantial relief if the application were to be brought at a later date. As such, I am of the view that the matter is urgent and that non-compliance with the normal Rules of Court regarding service, form and time-periods as contemplated in Rule 6(12) of the Uniform Rules of court is condoned.

[8] Contempt of court was described by Cameron JA in the matter of **Fakie N.O. v CCIL Systems (Pty) Ltd**¹ as "*a crime unlawfully and intentionally to disobey a court order.*" All orders of court whether correctly or incorrectly granted must be obeyed

until set aside.² It is vital to the administration of justice that those affected by court orders obey them. Disregard for them cannot be tolerated. A litigant who has obtained a court order requiring an opponent to do or not to do something is able to approach a court, in the event of non-compliance, for a further order declaring the non-compliant litigant in contempt of court and impose a sanction. The sanction usually has the object of inducing the non-compliant litigant to fulfil the terms of the previous order.

[9] The test for when disobedience of a civil order constitutes contempt is the following and the applicant must show on a balance of probabilities:

- (i) that an order was granted against the respondent;
- (ii) that the respondent was either served or informed of the court order or its contents;
- (iii) that the respondent disobeyed or neglected to comply with the order;
- (iv) that the refusal was wilful or *mala fide*.

[10] It is trite that once an applicant has made out a case of wilfulness or *mala fide* non-compliance with the order, the respondent bears the onus of showing on a balance of probabilities that non-compliance was not wilful or *mala fide*.

[11] In the matter on hand, the applicant contends that the legal requirements for civil contempt have been fulfilled in that:

- (i) there is a court order;
- (ii) the court order has been brought to the respondent's attention;
- (iii) there has been non-compliance with the court order;

Accordingly, the respondent must show on a balance of probabilities, that non-compliance has not been wilful or *mala fide*.

[12] The first three elements of contempt proceedings, being the existence of a court order, that it had been brought to the respondent's attention and that there has

¹ (2006) ZASCA 52 at para [6]

² Lan v OR Tambo International Airport Dept of Home Affairs 2011(3) SA 641 (GNP)

been non-compliance with the order are not being contested. It is common cause between the parties and the facts are admitted on the papers. The respondent, however, contests that non-compliance with the order was wilful or *mala fide*.

[13] The applicant avers that the willfulness and *mala fides* of the respondent is evident from the fact that there was no new additional or extravagant financial obligation placed on him in terms of the Rule 43 order. At the Rule 43 hearing itself, the respondent, on his own version, admitted to have paid the maintenance requirement during the subsistence of the marriage. Furthermore, when it was brought to his attention that the amounts paid fell far short of the court order on several occasions, he indicated that he would not be effecting payment of the balance of R12 755,00 to the applicant. This was in respect of the February 2020 maintenance payment.

[14] After receipt of the application for contempt, the respondent applied to the Maintenance Court for an order of substitution of the Rule 43 order. The applicant is of the opinion that the respondent further attempts to abuse the provisions provided for in the Maintenance Court by means of the Maintenance Act 99 of 1998 in order to avoid complying with the Rule 43 order. This too is evidence of the fact that the respondent was *mala fides*.

[15] In his defence the respondent avers that he is paying maintenance for the minor children, albeit R4000,00. The applicant is not left without any payments whatsoever. The respondent further contends that the payments made to the applicant in lieu of maintenance were sufficient to cover the children's fees, groceries, electricity, clothing and medical care. Furthermore, at the Rule 43 hearing, he indicated to his legal representatives (who negotiated and agreed the terms of the agreement) that he cannot afford to pay the proposed amount of R26 755,00. He has subsequently launched an application to substitute the Rule 43 order. The respondent indicated in his answering affidavit that a financial enquiry into the parties' financial position was not done at the Rules 43 hearing, the applicant misrepresented various expenses and she did not disclose how she funds the shortfall.

[16] Counsel for the respondent brought to the court's attention the matter of **Dezius v Dezius**³ in which the court held that a plea of lack of means is a viable indicator of poverty and indigency. However, the court held that every matter must be

dealt with on its own merits. Furthermore, the power of committal even where an apparently strong *prima facie* case has arisen, must always be entirely within the discretion of the court.

[17] The respondent contends that he did not sit back but took steps necessary in order to reduce the order which was granted in January 2020. He could not afford to pay the maintenance as per the order. Moreover, he did not work in April 2020 and his salary was due to be reduced. As such, he was not *mala fides* in his actions and cannot be found guilty of contempt of court.

[18] The respondent's averments were considered but note that the respondent failed to give evidence of the fact that his salary was due to be reduced in the form of a letter or other document from his employer. Furthermore, a cursory reading of his bank statement annexed to the papers indicates that he received the sum of R41 985,94 being an amount similar to that received the month prior. The respondent has failed to approach the court with evidence that his circumstances have changed and that as a result, he is unable to comply with the court order. He has merely paid an amount which he believes suffices for the maintenance of his minor children after the court order had been granted.

[19] The Dezius matter referred to above, is distinguishable from the matter on hand. The respondent has failed to prove an inability to pay the amount as ordered. It is apparent that the respondent has a blatant disregard for the court order. Accordingly, I conclude that the respondent is in willful contempt of the court and is *mala fide*.

[20] The respondent lodged a counter application against the applicant for non-compliance of a court order which was granted by the Children's Court in Soshanguve on 19 December 2019 in respect of parental rights and responsibilities. The respondent failed to address urgency of the matter and as such, the court finds that the matter was not urgent and that the respondent was attempting to launch his counter application on the back of the contempt application by the applicant.

[21] Accordingly, the following order is granted:

- (i) the respondent is found to be in contempt by not honouring the provisions of the court order granted on 21 January 2020, granted by the Honourable Justice Davis under the abovementioned case number;

³ [2007] 1 All SA 483 (T) (21 August 2006) at para (24)

- (ii) the respondent is committed to imprisonment for contempt of court for a period of 30 (thirty) days, which committal is suspended on the condition that the respondent complies with the provisions of the Court Order dated 21 January 2020, within 7 (seven) days of date of this order;
- (iii) should the respondent fail and/or refuse to comply with this order within 7 (seven) days of date of this order, the applicant may approach this court on the same papers, duly supplemented if necessary, for an order for the committal of the respondent to imprisonment;
- (iv) the respondent to pay the costs of this application on an attorney and client scale; and
- (v) the respondent to pay the cost of the counter application on an attorney and client scale.

MOKOSE J

Judge of the High Court of South Africa
Gauteng Division, Pretoria

For the Applicant:

Adv ACJ Van Dyk

instructed by

Ross & Jacobsz Inc

For the Respondent:

Adv N Erasmus

instructed by

Shapiro & Ledwaba Attorneys

Date of Hearing: 12 May 2020

Handed down electronically on: 18 May 2020