

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. 17/08208

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

REVISED:

Date: 15/03/2022

In the matter between:

S[....] J[....] D[....]

Applicant

and

R[....] K[....] L[....]

Respondent

REASONS

MAHOMED, AJ

BACKGROUND

1. The applicant approached this court in a contempt of court application. She sought to recover arrear maintenance for the parties' two minor children. I granted the order ex tempore, and ordered that it be executed in 31 days and a committal for 10 days.

2. On 25 February 2019 Weiner J granted an order of divorce which incorporated a settlement agreement. In terms of the agreement between the parties their children would reside with the applicant and the respondent was to pay his 50% contribution toward maintenance for the minor children. It is noteworthy that the children are 6 and 8 years old and one of the children suffers from a muscular disease which is treated with medication, the costs are a recurring expense.

3. The evidence is that the respondent honoured his obligations for 11 months following the order but was often late with payments or would fail to pay the amounts due. In the application before me the applicant claimed a sum of R86 736.39 being arrears which has obviously increased over the subsequent months to date of this hearing.

4. The applicant seeks an order for incarceration of the respondent for his failure to comply with the order of court and for costs on an attorney client scale.

5. The respondent opposed the application and interestingly in his papers and in his heads of argument, he states:

“... the application is ill founded and without basis, the applicant is malicious and vexatious, this application is an abuse of court and is designed to put pressure on the Respondent to make payment of his maintenance obligations, alternatively to restrict contact with his children.”

6. It is common cause that he is in arrears with maintenance payments.

THE EVIDENCE

The Applicant's version

7. Advocate Kinghorn appeared for the applicant and submitted that her client had satisfied the requirements of the order sought, in that she has proven beyond reasonable doubt that:

7.1. an order was granted

7.2. the respondent knows of the order (obviously, as he has paid maintenance in the past in respect of the order),

7.3. the respondent has failed to pay maintenance since January 2020 and that he has accordingly acted wilfully and with mala fides.

8. Ms Kinghorn directed the court to correspondence dated 24 January 2020, from her attorney addressed to the respondent's attorney, and copied to the respondent, regarding his maintenance obligations and the consequences should he default with payments. The relevant paragraphs reads:

"4. Further, in breach of the court order, your client persistently makes late payment. As at the time of writing this letter, your client has not yet paid maintenance for January 2020. Please note that our client's leniency and forbearance in this regard are now at an end. As you are aware, failure to pay maintenance on time in terms of the court order is a criminal offence. Accordingly, any future late payment or non payment by your client will be dealt with as a criminal matter through the SAPS, obviously without detracting from our client's civil rights and remedies in this regard.

5. As far as the current month is concerned, in the event that payment of the amount of R10 600 is not received in our client's bank account, in full, by 5pm tomorrow 25 January 2020, our client shall pursue both her criminal and civil remedies without further notification and delay."

My underlining.

9. Ms Kinghorn advised the court that the attorney to whom this letter was addressed is the same attorney who represented the respondent at the finalisation of the divorce when the agreement on, inter alia, maintenance was concluded and made an order of court.

10. On 21 March 2021 the applicant caused a writ of execution, to be issued and served on the respondent's moveable property. However, the sheriff rendered a nulla

bona return, on being advised by the respondent's mother that the respondent lived with her, but did not own any property, which could be attached and sold in execution. The applicant disputes this and submitted that she knew he owned electronic equipment and a large television.

11. In further correspondence dated 30 March 2021, addressed to the respondent's attorney, the applicant's attorney again demanded payment of the arrears and advised him that the applicant will take further steps in the event of failure to pay.

12. The respondent ignored each of the events set out above.

13. He has not paid any monies in respect of maintenance for over two years.

14. Ms Kinghorn submitted that the respondent knew way back in January 2020 that he was unable to comply with the order, and failed to approach the Maintenance Court for a variation for a reduction in the amount to be paid.

14.1. He approached the court only after the launch of these proceedings.

14.2. He seeks a variation retrospective to January 2020, which effectively, if he succeeds, expunges the applicant's claim on behalf of their minor children.

15. Ms Kinghorn argued the applicant has the ability to pay and referred the court to a number of the respondent's bank statements which reflected income on various months in 2020 and 2021, sometimes up to R50 000, however he failed to pay any maintenance since January 2020.

15.1. Furthermore, counsel identified payments made by the respondent to himself from another account, which account he has failed to disclose.

15.2. By reference to the bank statements, Counsel demonstrated that the respondent, who claims poverty, has made several purchases over the two years which could be considered "unnecessary" and "indulgent" such as

computer equipment, monthly spends on gym fees, internet, home movies, food delivery services at additional charges and the like.

The Application for Variation

16. The evidence is that the respondent appears to have been jolted into action, only after this application was launched, when in July 2021, he applied for a variation.

16.1. The further evidence is that in his application for variation, under oath, the respondent overstated his expenses, for example he claimed R4000 for food whilst in the papers before this court he claimed to be living off food parcels.

16.2. He contradicted himself on material points and he generally misleads the Magistrates' court to bolster his variation application. I do not consider it necessary to set out the details as the application is annexed to the papers and a matter to be considered by another court.

The Respondent's version

17. Advocate Riley appeared for the respondent and submitted that the applicant failed to make out her case in her founding papers and sets out details only in her replying papers.

17.1. He submitted that his client has not had an opportunity to respond to the allegations in the reply and besides he is unable to afford legal fees to file further papers.

18. Mr Riley informed the court that he and his attorney act pro bono and that the respondent is forced to curtail litigation as he is unable to afford legal services.

19. He argued that this application must either be dismissed or stayed, in that his client has now applied for a variation of the order to be retrospective to January 2020.

20. He referred this court to the judgment in *Strime v Strime* 1983 (4) SA 850 (C) which held that a party cannot rely on the execution of a maintenance order whilst there is an application pending for variation of that order.

21. Mr Riley submitted that the Act provides for retrospective variation and that the relevant application is before the Magistrates' Court Randburg for a variation retrospective to January 2020, if successful his client will not owe the applicant any money at all and therefor his incarceration will be unlawful.

22. Counsel informed this court that the respondent earned his income from singing on a social media platform and that since the pandemic his earnings have declined significantly that he has in fact become destitute. He has no other skills or means to earn an income.

23. The respondent proffered that he relied on food parcels and the support of friends and family, to survive.

24. Furthermore, he submitted that he had injured his back and was almost bedridden ever since, that he is unable to work to earn an income.

25. In reply, Ms Kinghorn submitted that the respondent has done everything to avoid his responsibilities toward his children and knew all along the consequences of his failure to honour the court order. He was represented and is a person of reasonable intellect to have fully understood his position.

26. Ms Kinghorn submitted the respondent was a talented person, who when married to her client earned income as a financial planner, an actor and a singer and according to his bank statements, he was earning an income albeit it varied from month to month.

27. She further advised the court that the respondent has a sizeable following on his singing platform and earns in US dollars.

28. Counsel submitted that the court must reject his defence and bear in mind the constitutional rights of children and the respondent's disregard for the law and the court order.

29. She submitted this is a matter which warrants punitive costs, given:

29.1. the respondent's attitude toward the maintenance of his children,

29.2. his disregard and contempt for the court process and

29.3. his recent perjury before the Magistrates court on his application for variation.

THE LAW

30. Contempt is "the deliberate, intentional (i.e. wilful) disobedience of an order granted by a court.

31. An applicant is required to demonstrate beyond reasonable doubt that,

31.1. 18.1 An order for maintenance was granted,

31.2. 18.2 The respondent is aware of the order,

31.3. The respondent has failed to comply with the order; and

31.4. The respondent has been wilful and mala fides in this failure to comply with the order, beyond reasonable doubt. **See Erasmus, Superior Court Practice, Vol 1 Section 41 A2 p 169-170.**

32. Upon proof of the first three requirements set out above, the respondent bears an evidential burden and must place some doubt, in relation to the wilfulness and mala fides as alleged, regarding his failure to comply with the order granted.

33. If the respondent fails to do so, then contempt would have been established beyond reasonable doubt.

34. I considered the papers before me, the submissions made and am of the view that the respondent has failed to disprove wilfulness and mala fides in his attitude and behaviour to the order of court, his obligations to pay maintenance and his respect for the dignity of the court.

35. He concluded a settlement agreement, he understood his obligations and there is no evidence before this court that he suffered any prejudice when he signed that settlement agreement.

36. He understood the order and in fact paid monies following the order, he understood its purpose and complied with the order.

37. When he defaulted with payments a demand for payment followed.

37.1. The letter in paragraph 3 above was clear on the default, the consequences thereof, the manner of implementation and a date by which the respondent was to pay.

37.2. The respondent failed to respond to any of the demands and even ignored a visit by the sheriff.

37.3. He failed to help himself when he failed to approach the Maintenance Court earlier for a variation. It is common cause that he was legally represented.

37.4. The claim was pursued further via sheriff, via further correspondences, without success. The respondent remained complacent throughout.

38. It is clear to me that had this application not been launched and if it were without merit, as he alleged, he may have continued to ignore the applicant.

39. The applicant has acted within her legal right to demand payment and to follow the legal processes afforded to her in making this application.

40. The respondent's submission in his papers and in the heads of argument which I set out earlier are without merit and an indication of his poor attitude toward his obligations to pay maintenance and to an order of court. In fact, he continues to misrepresent his case to the Magistrate's Court at his next hearing for a variation.

41. The respondent is wilful, he knew all along that he was to make good on his debt and he remained complacent. He acted only when he was faced with the possibility of incarceration.

42. The evidence is that he has paid over R15 000 a few days before the hearing before this court.

43. He was also mala fides, when he applied for a variation only after he received the papers in this application.

44. His mala fides is further compounded by the objective evidence before this court, the variation application, in which he misrepresented his expenses to bolster his case. Again, a disregard for a court's position and honour, as he continues to manipulate the system.

44.1. I noted Mr Riley's reliance on *Fakie NO v CCII Systems Pty Ltd*, and am of the view that the respondent was not bona fides in his attitude toward his maintenance obligations and I again refer to his statement as set out in paragraph 5 above.

45. What is interesting is that he relies on that very system and this court's honour to somehow, now "excuse" his behaviour and assist him from being imprisoned.

46. Mr Riley's argument that his client did not get an opportunity to respond to the applicant's case which she set out only in the reply, is also without merit.

46.1. I noted that the applicant's reply was in relation to documents which were already in the respondent's possession.

46.2. The reply was based on his bank statements, which he already had and his application for a variation of maintenance was also in his possession.

46.3. Accordingly, I am of the view that he is not prejudiced and I agree that the applicant made out a case in her founding papers as is set out in paragraph 31 above.

47. Counsel's reliance on the Strime judgment is misplaced in that his client's actions are as Ms Kinghorn correctly argued, a case of "too little too late". His application for variation was launched only after this application was served on him.

48. The incarceration and deprivation of liberty of persons cannot be taken lightly and this court fully appreciates the impact of this order.

49. I have noted that he continues to maintain contact with his children, albeit that he accused the applicant of denying him access, which has been rejected. No evidence is placed before this court in that regard and in any event, he could have approached the Children's Court for the appropriate relief.

50. I am also cognisant of the impact of imprisonment on the person and the reputation of persons, in future job prospects. However, I cannot overlook his total disregard for the Honour of a court of law. The court's dignity and respect are integral to the success of any legal system.

51. The period of incarceration is at the discretion of a court, I considered the time periods in various matters, generally between 1 week and 3 months in maintenance matters. I also considered the amount that is in arrears.

52. Accordingly, I considered 31 days to be a fair period for the respondent to pay over the debt and 10 days a fair period for the term in imprisonment, as the respondent does need to maintain contact with his children.

53. The above are my reasons for the order granted as per the notice of motion.

S MAHOMED

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 15 March 2022

Date of application in terms of R49(1) (c): 3 March 2022

Appearances:

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