

**REPUBLIC OF SOUTH AFRICA
THE GAUTENG DIVISION, PRETORIA**

Case No: 5647/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 31/01/2023

SIGNATURE:

In the matter between:

J[...] M[...] M[...]

APPLICANT

and

S[...] T[...] N[...] M[...]

RESPONDENT

JUDGMENT

MALUNGANA AJ

[1] The applicant [the father] in this matter has approached the court seeking the following relief against the respondent [the mother].

“1. That the Respondent is in contempt of the order of this honourable court made on 19 November 2019 under the abovementioned case number.

2. That a fine, such as is deemed appropriate by this court, be imposed upon the Respondent regarding such contempt, alternatively.

3. That a period of imprisonment, such as is deemed appropriate by this court be imposed on the Respondent by this court, such period of imprisonment to be suspended on conditions deemed appropriate by this court.

4. Further that the Respondent be compelled to comply with the parenting plan incorporated within the Court order and /or settlement agreement in respect of care and contact with the minor children forthwith.

5. Further and /or alternative relief.

6. That the costs of this application be paid on a punitive scale.”

[2] It is common cause that the parties whose marriage relationship ended in November 2019, are the biological parents of two minor children (‘the minor children’), aged thirteen and eleven years old. In terms of the court order which incorporated a settlement agreement, the parties were awarded certain parental rights and responsibilities in respect of the minor children.

[3] Sadly, as is often the case in divorce matters the conflict generated by the breakdown of marital relationship has spilled over into parental relationship. In the current matter, the dispute involves contact and access and other parental issues pertaining to the minor children. The father alleges that the mother refuses him right of access and contact to the minor children in violation of the order issued by this court on 18 November 2019, which incorporated the settlement agreement dated 19 August 2019¹. It is against this background that he launched the current contempt of court proceedings against the mother.

[4] In his founding affidavit² the applicant sets out instances of the mother’s failure to comply with the court order. He contends that although the court order has granted him contact with the minor children, the mother has actively denied him access to exercise such contact since the commencement of lockdown in March

¹ Case lines 004-1 to 005-1

² Case lines 006-5

2020. He has made numerous requests to let him exercise contact with the minor children, but the mother turned them down.

[5] It is useful to have regard to the correspondence addressed by the father to the mother through his legal representatives dated the 11 May 2022³. The relevant portion of the correspondence reads as follows:

“We record that we act on behalf of Mr M[...].

It is our instructions that pursuant to the court order (Case No.5647/2019), you have refused and or failed to grant our client access to the minor children.

It is further our instructions that you have failed to respond to the below request. To this end, kindly may you advise our offices by close of business tomorrow, 12 May 2022 whether you amicable to releasing the children to attend our client’s wedding on 21 May 2022. Arrangements can be made to collect the children.”

[6] On 13 May 2022, the mother responded to the above correspondence. She stated *inter alia* that there was a pending case of domestic violence against the father in respect of which a protection order was issued against the latter on 03 February 2020. She alleged that the father had violated the said order and the children were traumatised by the father’s conduct.⁴

[7] Paragraph 2.1.2 reads:

“As a result, the court referred the children to be interviewed by by a Social Worker. Unfortunately, the Social Worker’s report will only be released once the Court has had sight of it and considered same. For your ease of reference, I attach hereto a copy of the Protection Order and Warrant of Arrest as Annexures “TNM2”.

[8] The mother also referred to an instance where the father had refused to assist in the application for passports of the minor children after she booked and paid for a

³ Case lines 006-27

⁴ Case lines 006-33

holiday trip in Bali and Singapore. In this regard she said that the father was wittingly uncooperative and obstructive to an extent that she was compelled to approach the High Court for the necessary consent.

[9] She also contends that the father sent WhatsApp messages to the minor children on their cell-phones hailing insults and wild accusations against her, and her 75 year old mother. According to the mother, the father's conduct has been emotionally and mentally damaging to the minor children to an extent that N[...] does not want her father to have her new contact numbers, while M[...] ignores his call. During their last visit to their father in September 2019, the father returned the minor children in an Uber transport without supervision, thereby endangering their safety.

[10] In paragraphs 2.2 and 2.3 of her answering affidavit, the mother states that initially they were able to co-parent until September 2019 when the father's behaviour changed dramatically. The first incident was when the father left the children at the filling station, called an Uber to transport them to her house without supervision. He fell into arrears with his maintenance obligations in the sum of about R329 000.00. He attacks the mother in various social media platforms and family gatherings.

[11] It is trite that in any matter concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance, must be applied [s 9 of the Children's Act). The Court is not adjudicating a dispute between antagonists with conflicting interests in order to resolve their discordance.⁵ This accords with the Constitution of the Republic of South Africa.

[12] Having regard to the summary of facts and background matrix set out rather extensively above, the background leading to the institution of application now before me, require particular close scrutiny. The same applies to the issues raised by the mother in response to the father's application. A close scrutiny of the application and the answer thereto, show that both parents have accused each of various forms of misdemeanours. It is not necessary for me to deal with each and every accusation in

⁵*McCall v McCall* [1994] 2 All SA 212 (C)

this judgment. Suffice to state that the father is aggrieved by the mother's refusal to let him have access and contact with the minor children as per court order based on what he regards as unfounded accusations. The mother's stance in this connection is stated in her letter of the 13th of May 2022, and amplified in the answering affidavit.

[13] There is evidence to the effect that the father was previously arrested by members of the SAPS for violating an interim domestic violence order which she obtained against him in July 2019. Although the applicant contends in his affidavit that the matter has since been finalised, the respondent insists that the matter is still pending. An excerpt from the respondent's affidavit⁶ in support of the application for a protection order reads:

"42. How are these persons affected?

Both minor children have witnessed the verbal and physical abuse. They are both extremely traumatized and highly anxious about their future.

M[...] has learning difficulties. He attends occupational therapist sessions, remedial sessions on a weekly basis. The current situation will only aggravate his condition".

[14] Under the heading "5. INFORMATION REGARDING ACTS OF DOMESTIC VIOLENCE", the relevant portion of the affidavit reads:

"...On 23 September 2018 he assaulted me so badly as per exhibit C-D attached herein. He always shouts at me on top of his voice, insults me in front of the children. I left the house with no belongings. He abuses me physically, emotionally, and psychologically.

I fear for my children's lives because is a violent person. He even chased away my two children from a previous relationship as a result of his violent behaviour."

⁶ Case lines 006-96

[15] The key issue that arises from this case is whether the requisites for contempt of court were established against the mother. The purpose of finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority.⁷ Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence.⁸

[16] Once the applicant has succeeded in proving the existence of court order and non-compliance, the respondent bears the evidentiary burden to adduce evidence to rebut the inference that her non-compliance was not wilful and *mala fide*.

[17] Not every court order warrants committal for contempt of court in civil proceedings.⁹

The relief can take variety of forms such as declaratory orders, *mandamus*, and structural interdicts.

[18] It follows that where the court finds *on a balance of probabilities*, as opposed to *beyond reasonable doubt* that an alleged contemnor acted *mala fide*, civil contempt remedies, other than committal, may still be employed.¹⁰

[19] In *Butchell supra*, the applicant sought the committal of her ex-husband for non-compliance with his maintenance order and associated obligations towards the minor children. Although the contemnor was not found to have acted in a wilful or *mala fide* manner, beyond a reasonable doubt, the court was of the view that the respondent was in contempt of court on a preponderance of probabilities. He was therefore declared in contempt and granted 10 days from the date of judgment to purge the contempt, failing which the applicant could set the matter down, calling

⁷ *S v Mamabolo* [2001] ZACC (3) SA 409 (CC); 2001 (5) BCLR (CC); *FAKIE N.O v CCII Systems (Pty) Ltd* [2006] ZASCA 52, 2006 (4) SA 326 (SCA)

⁸ *Pheko N.O v Ekurhuleni Metropolitan Municipality (No.2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711

⁹ *Butchell v Burchell* [2005] ZAECHC 35 at para 34

¹⁰ See *Pheko* above at para 37 “Where a court finds a recalcitrant litigant to be possessed with 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.”

upon the respondent to show cause why he should not be prohibited from proceeding in any other litigation in which he may be involved, while in contempt.

[20] The civil contempt of committal have material consequence on individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice.¹¹

[21] Turning from the general to specific – in the current case. The starting point is to determine whether the conduct of the mother in refusing the father access and contact to the minor children was wilful and *mala fide*. The applicant maintained throughout the proceeding that the respondent is in contempt of the court. In the written heads of argument at paragraph 21, the applicant argues that if the respondent, as a trained legal practitioner, believed that it was in the best interest of the minor children, why did she not approach the social worker, apply for a variation of the court order.¹² Whilst I agree with the submission of the applicant in relation to the procedure which the respondent ought to have followed, I am of the view that there are other issues arising from this case which require further investigations.

[22] The respondent submitted that the court is not primarily tasked with determining a dispute between antagonists with conflicting interests – the Court's concern is for the children. It does not look at the facts in isolation. The court is bound to take everything into account which has happened in the past, and is bound to take into account the possibility of what might happen in the future after a specific order¹³.

[23] It is apparent from the facts of this case that I am not only dealing with the issues that appertain the applicant and the respondent, but also the minor children who are vulnerable. The respondent's contention is that the applicant's violet

¹¹ *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhotto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35 at para 67

¹² Applicant's heads of argument, at para 21. "It is respectfully submitted that the conduct of the respondent was both wilful and *mala fide*. The Respondent did not advance a justification therefor or a basis to argue that they were not in wilful *mala fide* non-compliance with the order. It is accordingly submitted that the Applicant is entitled to the relief sought.

¹³ Respondent's heads of arguments, at para 14.

conduct is likely to threaten the safety of the minor children. In support of this averment she provided the court with evidence in the form of a protection order obtained against the applicant. As I understand the mother, the relevant court is still seized with the domestic violence application, and it is yet to be finalized.

[24] The question which still remains is whether the respondent's conduct was wilful and *mala fide*. The actual gravamen is whether the mother deliberately shield away from her obligation towards the court order. In *Readam SA (Pty) v BBS International Link CC and Others* [2017] 5 SA 184 (GJ), Sutherland J stated that as follows:

“[10] the word wilful is a dangerous one. It is a pejorative term. It embraces more than just the notion of ‘intentionally’ but also the mantle of rebuke; i.e the intention is unsavoury. In this sense the usual mantra which requires both ‘wilful’ conduct and ‘mala fide’ conduct seems to be tautologous. A negligent failure to perform can never be wilful. A mala fide failure is always wilful.”

[25] A point needs to be made that the best interests of the minor children loom large in the long standing dispute between the parties. As stated in the preceding paragraphs, once the best interests of the minor children are implicated the court is enjoined to overlook everything and consider this aspect, as failure to do so will detrimentally affect their interests.

[26] There are various legal instruments aimed at protecting the best interests of the minor child, including the Constitution. I interpose to state that one of the primary objects of the Children's Act, 38 of 2005 is to protect the children from discrimination, exploitation and other physical, emotional or moral harm or hazards¹⁴. Section 6(4) of the Children's Act provides that in any matter concerning a child-

‘(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and

¹⁴ Section 2(f) of the Children's Act 38 of 2005.

(b) a delay in any action or decision to be taken must be avoided as far as possible.'

[27] In light of the impending, unremitting enmity between the parents, this Court being the upper guardian of the minor children, should without delay step in to safeguard the interests of the minor children. Accordingly the allegations raised by the mother in regard to the manner in which the father exercises his rights of contact and access to the minor children need to be investigated before any finding on the merits of the application can be made. The outcome thereof will determine the future conduct of this matter.

[28] For all of the reasons set out above, I am not inclined to grant the relief sought by either of the parties at this stage, until such time that the investigation is conducted by a suitable qualified social worker or family advocate who should investigate the welfare of the children, and advise this court in the report of what is in the best interest of the minor children.

[29] In the premises, the following order is made.

1. The parties are directed to approach the office of the Family Advocate, who must appoint a social worker to investigate the welfare of the minor children and prepare the necessary report within 30 (thirty) days of the date of this order;
2. Upon receipt of the family advocate's report, the parties must approach the court on same papers duly supplemented for further hearing.
3. The costs of this application are reserved.

MALUNGANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

On behalf of Appellant:

Adv K, P.G. Mputle

Instructed by: RAMOKGADI ATTORNEYS

On behalf of Respondent: Adv S. M. Stadler

Instructed by: NT MALULEKE INC