

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

CASE NR: 49090/2021

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE: 12 January 2024

SIGNATURE:

In the matter between:

D[...] N[...] Q[...]

APPLICANT

and

P[...] Q[...]

RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 12 January 2024.

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

- [1] This application is yet another example of how expensive protracted divorce proceedings can be. It demonstrates how divorcing parties, at times, fail to resolve disputes that arise pending their divorce and are more than willing to spend money on unnecessary litigation. At the heart of the parties' latest dispute is the non-payment of the arrear municipal electricity bill that amounts to R 38 671.97. There is also a pending rule 43(6) matter between the parties.
- [2] This application is opposed, and both parties are represented by their respective law firms and Counsel. There is no order stating that any of the parties should contribute towards the legal costs of the other. This means that each party is responsible for the payment of its own legal representatives. This is a High Court litigation and the amount of money that is due to be paid or may have already been paid to the parties' respective legal teams in this application is likely to be way much higher than the disputed amount of the electricity bill that brought the parties to court.
- [3] Notwithstanding this, the parties decided that the best way to deal with the electricity bill issue at the place where the applicant and their children reside (hereafter 'matrimonial home') was not to meaningfully engage each other to find an amicable solution but to litigate their dispute. In their respective affidavits, both parties accuse each other of failing to respond to correspondences from their respective legal practitioners. This in my view, is an unfortunate reality of parties that call on the courts to dissolve their marital relationships without first seriously engaging each other in good faith.
- [4] The court is called upon to determine whether the respondent is in contempt of part of the order granted by Van der Schyff J dated 15 February 2022 (hereafter 'van der Schyff J's order'), by failing to comply with paragraph 8.1.3 of that order. Should it be found that the respondent is in contempt of this order, the court is also required to determine the circumstances under which the respondent should be sentenced.

B FACTS AND CONTENTIONS

- [5] Van der Schyff J, among others, ordered the respondent to pay the City of Tshwane's account directly to the service provider. The applicant contends that the respondent failed to make a sufficient payment toward the City of Tshwane's electricity account relating to the matrimonial home. This led to the City of Tshwane disconnecting the electricity supply. The respondent has made inconsistent payments towards this account and the applicant requires him to make payment of the full outstanding amount.
- [6] The applicant attempted, through her attorneys, to get the respondent to approach the City of Tshwane to make payment arrangements that can lead to the reconnection and/or restoration of the electricity supply at the matrimonial home. The applicant alleges that the respondent ignored her. She is of the view that this demonstrates that the respondent is in wilful contempt of Van der Schyff J's order.
- [7] The applicant is convinced that the respondent refuses to pay the electricity bill as ordered because he wants to have an upper hand in their divorce dispute. According to the applicant, the respondent has the financial means to make payments to the City of Tshwane because his financial position has not changed since the order was granted.
- [8] The applicant asked this court to sentence the respondent to prison for a period of 30 days but to suspend that order for a period of 14 days, within which the respondent can make payments if he does not want to go to prison. In the alternative, the applicant asked this court to sentence the respondent to prison for a period of 30 days but suspend that order for a period of one (1) year on condition that the respondent complies with the order dated 15 February 2022 within fourteen days of this judgment.
- [9] The respondent denies that he is in wilful default of the court order. He alleges that he has always partially complied with Van der Schyff J's order. He contends that he is making payments of as much maintenance every month as he possibly can. The respondent is of the view that this application is a frivolous draconian step meant to not only harass him but also delay the

finalisation of the divorce proceedings between them to force him to accede to her demands. The respondent alleges that the applicant failed to use debt enforcement mechanisms such as obtaining a writ of execution in this matter.

[10] The respondent further contends that the applicant in this application relies on broad, sweeping, and unsubstantiated allegations regarding the bill to the City of Tshwane without any reference to the other items on the Van der Schyff J's order. Further, the applicant unilaterally approached the City of Tshwane before Van der Schyff J's order was granted, to make payment arrangements for the arrear amount without consulting him.

[11] The respondent alleges that he proposed that an emergency joint family savings in the amount of R 150 000.00 held in the applicant's personal bank account should be used to settle the electricity bill. According to the respondent, initially, the applicant used the savings money to pay the City of Tshwane's adjusted fee account.

[12] It is also contended by the respondent that instead of responding to his proposal, the applicant lodged her contempt application. This led the respondent to institute an application in terms of section 43(6) to vary Van der Schyff J's order by deleting paragraph 8.1.3 thereto. This application is yet to be finalised. The applicant denies that such a proposal was made.

[13] The respondent alleges that several events impacted his income. In August 2021, the respondent moved out of the matrimonial home. He started staying with friends and eventually moved to his mother's house in the Free State. In January 2022, the respondent found a place of his own where he moved in without taking anything from the matrimonial home.

[14] The respondent is now paying for the expenses associated with his own place of residence and matrimonial home. He contends further that he is currently solely contributing towards the medical aid, mortgage bond, City of Tshwane's account, and the maintenance of the parties' children. The respondent alleges

that notwithstanding the rise in commodity prices, his income has not increased.

[15] The applicant alleges that she has never paid nor was she ever responsible for the payment of the City of Tshwane's account when the parties lived together. Further, in terms of Van der Schyff J's order, the respondent is liable to make full payment to the City of Tshwane and cannot dictate how this bill should be paid. Apart from her founding affidavit and replying affidavit, the applicant further filed a supplementary affidavit.

[16] The purpose of the supplementary affidavit was to indicate to the court that the applicant settled the amount of R 38 671.97. Further, she received a final demand from the City of Tshwane threatening to deactivate the electricity supply if the outstanding amount of R 12 313.72 was not paid. The applicant contends further that she is not in the financial position to pay this amount. She further states that the respondent also failed to pay child maintenance for October 2023.

[17] In the heads of arguments submitted on behalf of the applicant, it is recorded that in September and October 2023, the municipal bill was R 5 242.77 and R 6 553.84 respectively but the respondent only paid R 4 000 for each month. The respondent alleges that partial non-compliance with the payment of the City of Tshwane's account is due to issues of affordability, the ever-increasing cost of living, and hiked interest rates. This was not attributable to wilfulness and bad faith on his part.

C THE LEGAL POSITION

i) Civil Contempt

[18] In terms of section 165(1) of the Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution'), *'[t]he judicial authority of the Republic is vested in the courts'*. The Constitution further provides that *'[a]n order or decision*

issued by a court binds all persons to whom and organs of state to which it applies.¹

[19] Judicial authority can be referred to as the power vested in judicial officers to preside over disputes and independently decide the outcomes of such disputes without fear, favour, or prejudice through the application of the law. There is a constitutional expectation that once courts have determined disputes, the orders they grant will not only be respected but will also be carried out. Obeying court orders not only demonstrates unwavering respect for the important role played by the judiciary but also the commitment to the rule of law.

[20] It is a crime to disobey court orders unlawfully and intentionally.² This is a crime of contempt of court which amounts to failure to maintain the dignity and authority of the court that made an order. Such failure interferes with the courts' capacity to carry out their functions.³ There must first have been wilful and bad-faith non-compliance with an order. The Supreme Court of Appeal in *Compensation Solutions (Pty) Ltd v Compensation Commissioner*, held that to establish contempt there must be proof beyond a reasonable doubt of:

'... (a) the existence of a court order; (b) service or notice thereof; (c) non-compliance with the terms of the order; and (d) wilfulness and mala fides beyond reasonable doubt. But the respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that his non-compliance was not wilful and mala fide'.⁴

¹ Section 165(5) of the Constitution.

² *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 50.

³ *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* 1995 (10) BCLR 1382 (CC); 1995 (4) SA 631 (CC) para 61. See also *W[...] v W[...]* (17217/2019) [2020] ZAGPJHC 364 (10 December 2020) para 35, where it was held that '[a] contempt of court may be adequately defined as an injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated'.

⁴ (2016) 37 ILJ 1625 (SCA) para 15. See also *Mthimkulu & another v Mahomed & others* [2010] JOL 26546 (GSJ) para 16.

[21] The Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd*, held that:

'... 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'.⁵

ii) Imprisonment

[22] Contempt of a civil order involves the disobedience of that court order that attracts a criminal sanction. It should be noted however, that *'[n]ot every court order warrants committal for contempt of court in civil proceedings'*.⁶ The objective of civil contempt proceedings is to compel parties to comply with court orders.⁷

[23] In *Matjhabeng*, the Constitutional Court held that *'[i]n some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance'*.⁸ The Supreme Court of Appeal in *Fakie* held that:

'[i]n the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law'.⁹

[24] Where contempt is established, there might be a need to consider whether a punitive or coercive order would be appropriate. In *Secretary of the Judicial*

⁵ 2006 (4) SA 326 (SCA) para 42. This court also held that *'[t]he 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'*.

⁶ *Matjhabeng Local Municipality* (n 2 above) para 54.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) (CC) para 8.

Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others, the Constitutional Court stated that:

*‘[a] coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. ... [A] punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended ...’*¹⁰

D EVALUATION

- [25] It cannot be denied that the respondent was notified of Van der Schyff J’s order and is aware of its contents. It is also common cause that apart from the October 2023 maintenance and the City of Tshwane electricity bill, the respondent generally complied with Van der Schyff J’s order. While the applicant referred the court to the October 2023 maintenance matter, the main issue in this application is the alleged lack of payment of the City of Tshwane bill.
- [26] It is not true that the respondent failed to make payment. The evidence before the court illustrates that the respondent made payments inconsistently and not in full. There has not been a total disregard for the order to pay the City of Tshwane. There has been partial compliance with that part of the order. The respondent’s failure to pay the municipality bill in full led to the municipality disconnecting electricity at the matrimonial home. The applicant has since settled that bill and the electricity has been restored. Given the fact that it is the respondent’s responsibility to pay that bill, the applicant may have a claim to recover the settlement amount from the respondent. I doubt that it could be concluded that the respondent deliberately failed to fully comply with the order of the court. Partial payment may also be proof of financial difficulties.

¹⁰ 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) para 47.

- [27] The respondent must pay the municipality bill because he has been ordered to do so by the court. Court orders must be carried out and failure to do so amounts to contempt. For the respondent to be held to be in contempt, the applicant must demonstrate, beyond a reasonable doubt, that the respondent acted wilfully and in bad faith. This can be demonstrated by illustrating that the respondent has the means to pay and simply decided to stop making payments.
- [28] Beyond a reasonable doubt is a much higher standard than a preponderance of probabilities. With beyond a reasonable doubt, the applicant had a duty to place evidence before the court that would convince the court that there is no reasonable justification to question the respondent's guilt. If it is reasonably possible that the respondent's explanation might be true, the respondent cannot be held to be in contempt. Hence, the respondent must adduce evidence to rebut the inference that his 'partial' non-compliance was not wilful and *mala fide*.
- [29] The respondent claims that while his income has not increased, his expenses have increased which makes it difficult to make consistent payments towards the municipality. Apart from the mortgage loan, municipality account, home insurance, domestic worker salary, gardener's salary, ADT, and insurance in respect to the children's tablets that he was ordered to pay directly to the service providers of the matrimonial home where the applicant and the parties children are residing, the respondent also has to shoulder the expenses of the place where he is currently residing.
- [30] It is difficult to refuse to accept that generally income does not catch up with the continuing rise in the cost of living. Despite increased expenses, the respondent attempted to comply with Van der Schyff J's order by paying what he could afford to pay. Apart from the October 2023 maintenance non-payment, the applicant did not complain about the lack of payment or partial payment regarding all the other items that the respondent was ordered to pay.

- [31] The allegation is not that the respondent stopped making payments toward the municipality, but that payment has been inconsistent and not made in full. The applicant wants the court to disregard all the other payments and focus solely on the municipality bill. Unfortunately, this was not the only financial obligation placed on the respondent's shoulders. To establish whether the respondent wilfully and in bad faith failed to carry out the court order, he must be judged holistically regarding his commitment to the payment of all the items included in the order.
- [32] In my view, it cannot be said that the respondent acted wilfully and in bad faith merely because he only made partial payments to the municipality and failed to pay maintenance of the children for October 2023. This in my view, can be interpreted as proving the respondent's version that he is not coping with all the expenses that he was ordered to pay.
- [33] The respondent provided evidence of partial payment of the municipality bill. In the heads of arguments submitted on behalf of the applicant, it was conceded that the respondent made partial payments towards the municipality bill. In my view, the respondent advanced evidence that establishes a reasonable doubt whether non-compliance was wilful and *mala fide*. In this case, there was partial non-compliance. In my view, there is no evidence of bad faith on the part of the respondent in this case.
- [34] I accept the respondent's version that payments towards the increasing expenses of the matrimonial home where the applicant and their children are residing and those relating to his own place of residence contributed to his partial compliance with Van der Schyff J's order regarding the payment of the matrimonial home's municipal account.
- [35] If my reasoning is wrong, nonetheless, the respondent instituted Rule 43(6) proceedings which will provide the court with an opportunity to evaluate whether the respondent can fully comply with Van der Schyff J's order relating to the matrimonial home municipality account.

- [36] While a further high court interlocutory application between the parties is regrettable, Rule 43(6) proceedings may establish the respondent's true financial position and liabilities. I deliberately refrained from making any comments on the R 150 000.00 amount that the respondent alleges is held by the applicant. I think the status of this amount will be dealt with by the court that will decide the Rule 43(6) application.
- [37] I doubt whether this application was the most adequate route to pursue. I am of the view that a four-way collaborative approach where both sets of lawyers and the parties could meet in a structured environment to meaningfully engage each other to find a practical and less expensive solution would be ideal in these circumstances.
- [38] A collaborative approach to the resolution of legal disputes is one of the alternative dispute resolution mechanisms that can be used to resolve family disputes. Should the parties utilise this method, *'both spouses and their legal representatives pledge in a binding written agreement ... not to litigate while the process is pending, but to work together constructively and in a respectful manner to settle the case by way of consensus'*.¹¹ Alternatively, parties can also use mediation.¹²
- [39] I would be surprised if the parties' respective legal fees for this application alone do not exceed R 38 671.97 which the applicant claims to have already paid and the R 12 313.72 that she claims to be outstanding. Both parties are represented by their respective firms of attorneys and Counsel. Each party is responsible for covering the fees of their respective legal practitioners. Apart

¹¹ See South African Law Reform Commission 'Alternative dispute resolution in family matters' Discussion Paper 148: Project 100D (31 January 2019) 217.

¹² See *MB v NB* 2010 (3) SA 220 (GSJ) para 52, where it was stated that '[i]f mediation is appropriate in commercial cases, how much more apposite is it in family disputes. They engage the gamut of emotions, from greed through pain to vengefulness; they generally involve the rights of children, majors as well as minors, who can only experience fear and bewilderment at the breakdown of the structures of love and support on which they, as family members, have come to depend; and the division of the estates of the parties, intertwined as they invariably are, can be very complex and are frequently made the more so by the parties' bloody-mindedness and duplicity. Throughout the process, moreover, the legal costs come out of the common pot and, since they deplete the assets that can be used for the advancement of members of the family, must be the subject of continual concern and anxiety. Divorces proceedings are by their nature 'traumatic events'.

from the initial Rule 43 application and this application, the parties will be facing each other again in a further Rule 43(6) application before their divorce matter is heard. Is all this expensive litigation really necessary?

E CONCLUSION

[40] Finally, I am of the view that contempt has not been established and there is no need to deal with the issue of imprisonment. It is hoped that the parties will consider one of the alternative dispute resolutions and settle their divorce. I am of the view that every divorce can be settled. It is only when parties are extremely positional and do not pause to consider the reasonable interests of the other party that divorces become difficult to settle, particularly when emotions are still high. I am also of the view that there is no need to burden any party with the costs of this application.

[41] Both parties argue that the other should bear the costs of this application. Generally, the costs should follow the cause. However, given the fact that this is a contempt of court matter that arises from a Rule 43 order, the court that will hear the divorce action should deal with the issue of costs. By then, hopefully, the parties would have meaningfully engaged each other and settled their divorce dispute, including the issue of legal costs.

ORDER

[42] Consequently, I make the following order:

1. The application is dismissed.
2. Costs occasioned by this interlocutory application will be costs in the cause of the divorce action.

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Counsel for the applicant: Adv Y van der Laarse

Instructed by: VFV Attorneys

Counsel for the respondent: Adv Z Ndlovane

Instructed by: Jafta Z Attorneys

Date of the hearing: 16 October 2023

Date of judgment: 12 January 2024