

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case Number: 5034/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between: -

S[...] J[...] B[...]

First Applicant

and

F[...] J[...] B[...]

First Respondent

CORAM:

MBHELE, DJP

HEARD ON:

25 MAY 2023

DELIVERED ON:

18 JULY 2023

[1] This is an application to declare the respondent in contempt of an order granted by my brother Mhlambi, J on 05 November 2020.

[2] The parties were married to each other and their marriage was dissolved through divorce on 05 November 2020 with the order of court incorporating a deed of settlement. The relevant terms of the deed of settlement are stated below:

1.1 'The Defendant to pay maintenance to the Plaintiff in the amount of R6 000.00 (Six Thousand Rand) on/or before the 7th day of each and every

consecutive month starting on the 7th day of August 2020 until the Plaintiff's date of death or remarriage.

1.2 The Defendant to keep the Plaintiff on his medical aid until the Plaintiff's date of death or remarriage.

2.1 The Defendant will have contact with the major dependent child at all reasonable times.

2.2 The Defendant to pay maintenance in respect of the major dependent child to the Plaintiff in the amount of R 4 000.00 (Four Thousand Rand) on/or before the 7th day of each and every consecutive month starting on the 7th day of August 2020 until the major dependent child is self-supporting.

2.3 The Defendant will keep the major dependent child on his medical aid until such time that the major dependent child is self-supporting.

2.4 The Defendant will be liable for any and all medical cost including dental care and medication which is not covered by the medical on demand.

4.2 The Defendant will pay a cash amount of R200 000.00 (Two Hundred Thousand Rand) into the bank account of the Plaintiff without any deduction or set-off on or before the 30th of January 2021. Which cash amount not to be obtained by way of mortgage bond over the immovable property.

4.3 The Plaintiff will keep the following vehicles as her sole property:

a. Mazda with Vin Number: LR5[...], Engine Number: FE9[...] and Registration Number: BLB[...]. The Defendant will repair the abovementioned vehicle at his own cost within a reasonable time.

b. Jurgens Caravan with Vin Number: 090[...] with Registration Number: CLS[...].

c. BMW Vin Number: WBA[...], Engine Number: 501[...] and Registration Number: GKF[...]. The Defendant will repair the abovementioned vehicle at his own cost within a reasonable time. The Defendant will sign all necessary documents to effect transfer of ownership in the name of the Plaintiff within 7 days after date of divorce.

5.1 The Plaintiff shall keep as her sole property the immovable property situated at No [...] D[...] F[...] Street, Noodhoek, Bloemfontein, Free State Province (hereinafter “the immovable property”).

5.2 The Defendant is liable for all monthly mortgage payments in respect of the immovable property until the immovable property is paid in full.

5.3 The Defendant shall keep the immovable property insured until the immovable property has been paid in full and transferred and registered in the name of the Plaintiff.

5.4 The Defendant shall sign any and all necessary document to effect transfer and register of his 50% share in the immovable property into the name of the Plaintiff once the property is paid in full.

5.5 Should the immovable property be sold by the Plaintiff prior to settlement of the mortgage bond the Defendant shall sign any and all necessary document to effect transfer of the immovable property into the name of the purchaser.

5.6 All profits from any sale of the immovable property shall be for the Plaintiff.

7.1 The Defendant will be liable to pay the following debts until it is paid in full:

- a. The mortgage bond of the immovable property situated at No [...] D[...] F[...] Street, Noodhoek, Bloemfontein, Free State Province.
- b. The Ford Ranger with Vin Number: AFA[...]6, Engine Number: 4ES[...].
- c. The Ford Ranger Vin Number: AFA[...]5. Engine Number: QJ2[...].
- d. The Mangaung Metropolitan Municipality Account as at date 30 July 2020 in the amount of R6267.00.
- e. Any and all debts in the name of the Defendant.

7.2 The Plaintiff will be liable to pay the following debts until it is paid in full:

- a. Miladies.
- b. Mr Price.
- c. Markhams.'

[3] The non-compliance which the applicant alleges are partial payments of cash maintenance for the months of December 2021 up to the date of hearing this matter, cancellation of medical aid in which the applicant and the parties' son were members, an outstanding amount of R 159 284.98 being a balance of R200 000 which the respondent undertook to pay before 30 January 2021, failure to repair the BMW and Mazda vehicles and non-payment of bond on the property occupied by the applicant and their son. In October 2022 the arear maintenance was R 39370.00.

[4] Contempt of court is defined as "the deliberate, intentional disobedience of an order granted by a court of competent jurisdiction."¹ The respondent's knowledge of

¹ Consolidated Fish Distributors (Pty) Ltd v Zive 1968 (2) SA 517 (C) at 522C

the order, non-compliance thereof and that he operates a business as a mechanic are common cause. Once order, non-compliance and service have been established the next step is to determine whether the respondent's non-compliance was not wilful and *mala fide*. If the respondent fails to provide evidence raising a reasonable doubt as to whether noncompliance was wilful and *mala fide*, he has to be found guilty of contempt of the relevant court order. See **Fakie NO v CCII Systems (Pty) Ltd**²; **Matjhabeng Local Municipality v Eskom Holdings Ltd & others; Mkhonto & others v Compensation Solutions (Pty) Ltd**³

[5] Owing to the respondent's failure to comply with the court order the applicant had to pay R12 290 to prevent the bank from repossessing the Ford Ranger. Despite this payment the vehicle remains in arrears. The applicant has started working as an estate agent and she requires the vehicle to run her business. Foreclosure proceedings ensued during March 2022 which resulted in the applicant paying one hundred and twenty-one thousand (R 121 000.00) in full and final settlement of the Bond to prevent the bank from selling the house in foreclosure. Even after the respondent had no obligation to pay monthly instalment towards the Bond he failed to pay full maintenance amount towards the applicant and their son. The Sheriff attached the respondent's boat and sold it in execution for R40 000. The money was used to reduce the R200 000 debt owing to the applicant.

[6] The respondent attributes his failure to abide by the court order to drastic changes in his financial and personal position brought about by COVID. He submits that his business, which is his only source of income, was generating an income of about R40 000. 00 per month before COVID. The income post COVID, has since deteriorated to about R20 000 per month on average. As a result of reduced income he has failed to meet his rental obligations both for residential and business premises. His Ford Ranger motor vehicle has since been repossessed by the bank as a result of failure to repay monthly instalments. He has not been able to pay the monthly maintenance amount in full. He makes sporadic payments ranging

² 2006 (4) SA 326 (SCA) at para 14

³ [2017] ZACC 35; 2018 (1) SA 1 (CC) at par 67 and 85-88.

between R200- R1000 throughout the month. The payments are made in cash, sometimes in 13 instalments within a month. He cancelled the medical aid because he could no longer afford monthly premiums. He has however been paying for their son's medication ranging between R1 500 – R1 800 per month.

[7] The respondent's business bank statements show that the relevant account is overdrawn by R24 466.66 and that the average income is far less than R15 000 per month. The respondent's personal bank statements reflect an average monthly income of about R4 500.

[8] The applicant disputed that the bank statements are a true reflection of the respondent's earnings owing to her knowledge that the business used to generate a lot of cash payments. The respondent provided a copy of the business cash book which reflected that the cash payments received within 3 months' period was R22 296.00. He invited the applicant to inspect the original cash book. The applicant did not use this opportunity to inspect the cash book.

[9] The evidence before me shows that the respondent's income is not sufficient to cater for all his monthly obligations. The respondent stated that he has a registered Trust under his control. He, further, submitted that the Trust is not operating any business and does not have a bank account registered in its name. The applicant conceded in her founding affidavit that the respondent does not use the said trust to operate his business.

[10] In the replying affidavit the applicant lamented that the respondent prioritised his girlfriend's child's school fees over his maintenance obligations and the court order. The evidence presented before me shows that the said school fees has not been paid in months and remains in arrears. The applicant has not presented any documentary proof to rebut the respondent's version.

[11] These are motion proceedings for a final relief. The Plascon Evans rule finds application. The factual disputes must be decided on the respondent's version together with those facts that are undisputed and common cause. The respondent's

version should be rejected if it is untenable and far-fetched. See **Plascon-Evans Paints v Van Riebeeck Paints**.⁴

[12] In **Fakie**⁵ Cameron, JA asserted that it is a crime to unlawfully and intentionally disobey a court order. Flagrant disrespect of court orders threatens the rule of law. The rule of law is at the center of constitutional democracy and needs to be protected and advanced. Contempt proceedings serve as one of the tools to protect the authority and honour of the courts.

[13] In **Pheko and Others v Ekurhuleni Metropolitan Municipality**⁶ and others Nkabinde, J held as follows:

[1] 'The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.'

⁴ Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A) at 634H-635A)

⁵ 2006 (4) SA 326 (SCA)

'it is a crime unlawfully and intentionally to disobey a Court order. This type of contempt of Court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the Court. The offence had, in general terms, received a constitutional 'stamp of approval', since the rule of law — a founding value of the Constitution — 'requires that the dignity and authority of the Courts, as well as their capacity to carry out their functions, should always be maintained.'

⁶ ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015) at par. 1 -2

[2] Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord.'

[14] The respondent, without bringing a counter application, requests variation of the maintenance order and restructuring of the repayment term in which the arrear maintenance would be payable in 36 months. Maintenance matters are best dealt with at the Magistrate Court. Magistrate courts are equipped with Maintenance investigators who would comb through the parties' accounts and assets to help the court determine affordability. The information before me is inadequate for the purpose of entertaining the respondent's request,

[15] Having found that the respondent's income is insufficient to meet his financial obligations, the question to ask is whether there are assets available which can be sold to settle the arrear maintenance. The evidence at this stage does not show that there are such assets. In view of the above, I am not satisfied that the respondent's non-compliance with the order was wilful and malicious. The application to declare him in contempt ought to fail.

[16] Costs are in the discretion of the court. The respondent's non-compliance with the court order left the applicant with no option but to approach court for appropriate relief. The applicant was left out of pocket. The respondent has to bear the costs of this application.

[17] In view of the above, I make the following order

[18] **Order:**

1. The application to declare the respondent in contempt of court is dismissed.

2. Respondent to pay costs of this application, costs to include those incurred in the employment of Counsel.

N.M. MBHELE, DJP

Appearances:

For the Appellants:	Adv.
Instructed by	HJ Booysen Attorneys Bloemfontein
For the Respondents:	Adv.
Instructed by	Moruri Attorneys Incorporated Bloemfontein