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

Case number: 3350/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

H[....]1 S[....] E[....] Applicant

And

H[....]2 A[....] E[....] Respondent

HEARD ON: 20 & 28 APRIL 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 15 August 2023 at 09h30.

[1] The parties are biological parents of two minor children H[....]3 and H[....]4 born from their marriage which was dissolved on 02 May 2017 pursuant to a decree of divorce ("the divorce order") incorporating a deed of settlement which made provision for the parties' parental responsibilities and rights in respect of the minor children on the basis that: primary residence of the children was awarded to the respondent subject to the applicant's right to contact. The applicant was ordered to

pay maintenance in respect of the minor children to the respondent in the amount of R4000.00 per month per child.

[2] Despite the provisions of the deed of settlement, the parties have continued to be embroiled in acrimonious litigation over their children. During March 2020 the respondent successfully launched an urgent application for the return of the children after the applicant defied the divorce order by failing to return the minor children to the respondent's care after a visit. On 13 October 2021 the applicant's urgent application for primary residence was struck from the roll. The respondent was awarded costs in respect of both the applications (cost orders).

[3] Yet again, these proceedings involve the residency and maintenance of the minor children. The applicant seeks variation of the divorce order (the main application). The purport is for primary residence of the minor children to be awarded to him subject to the respondent's rights of contact and an assessment of the minor children by clinical and educational psychologists regarding the change of the children's circumstances. The basis of the main application is an alleged curtailment of the applicant's contact rights resulting from parental alienation by the respondent.

[4] In addition to opposing the main application, the respondent launched a counter-application seeking an order on the following terms:

"1

a) That the Family Advocate, Bloemfontein, be authorized and directed to investigate the circumstances, care, placement and contact of the minor children H[...]1 Erasmus and Hellen Erasmus and to furnish this Honourable Court with a report and a recommendation regarding the best interests of the minor children;

b) That the Applicant and Respondent be granted leave to supplement their papers and to approach the Honourable Court on the same papers duly amplified (if so advised) for any order which they may require regarding the

care and contact of the minor children once the Family Advocate's report and recommendation are received.

2.

a) That a rule nisi be issued, calling on the Applicant to give reasons, if any, on a date as determined by the Court why;

i) The Applicant should not be found guilty of contempt of Court;

ii) The Applicant should not be ordered to pay a fine, the amount of which is to be determined by the above Honourable Court in the event of the Applicant being found guilty of contempt of Court;

iii) The Applicant should not be sentenced to direct imprisonment for a period of 6 months, aforementioned period to be suspended for a period of three years, subject to the conditions that the Applicant pay a fine, the amount of which is to be determined by the above Honourable Court, the Applicant purge his contempt within thirty (30) days from date of this order and subject to the condition that the Applicant not be found guilty of contempt of Court for a period of 3 years from the date that this order is granted.

3. That the Applicant's application be stayed pending the adjudication of the relief sought in prayers 1 and 2 above;

4. In the event that the Applicant is found guilty of contempt of Court, that the Applicant's application be stayed until such time as the Applicant has purged his contempt.

5. That the Applicant pay the costs of the Respondent's opposition of the Applicant's application as well as the cost of the counter-application..."

[5] Having regard to the relief sought by the respondent, the respondent is not opposed to investigation of the circumstances of the children except that the investigation must be carried out by a family advocate and it must be in relation to the issue of primary residence and contact. The remainder of the relief is a declaratory order that the applicant is in contempt of court for failing to comply with

both the divorce and cost orders and that he is prohibited from ...until he has purged his contempt ("the contempt application").

[6] At the commencement of the proceedings, it was submitted by counsel for the applicant that the parties were *ad idem* that the main application could not be adjudicated together with the counter-application must be stayed pending the outcome of the investigation by the family advocate and the respondent's counter-application. Counsel for the respondent countered that no agreement had been reached by the parties in that regard however, having regard to the fact that the referral to the family advocate is not opposed the main application ought to be stayed pending the outcome of investigation and report by the family advocate.

[7] Following the parties' submissions, I made the following order:

"1. The main application is stayed pending an investigation by the family advocate to investigate the circumstances of the children and provide a report in relation to their primary residence and contact.

2. The family advocate is ordered to file the report within thirty (30) days from the date of this order.

3. The parties are granted leave to supplement their papers (if necessary) and to approach this court on the same papers duly amplified for the relief that they may respectively require or seek regarding primary residence and contact in respect of the children once the family advocate's report is received.

4. The costs shall stand over for later adjudication..."

[8] Accordingly, what remained to be determined was the contempt application and in the event that I find in favour of the respondent in that respect, the issue that must be determined is whether the applicant ought to be prohibited from proceeding with the main application until he has purged his contempt.

[9] Contempt of court has been described by Cameron, JA in *Fakie NO v CCII Systems (Pty) Ltd*¹ as an act of violation of the dignity, repute or authority of a court or judicial officer. It is also a deliberate affront to the rule of law and the Constitution itself.²

[10] It was pointed out in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Other*³ that:

“As set out by the Supreme Court of Appeal in Fakie, and approved by this court in Pheko II, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.”

[11] It is the respondent's case that the applicant has defied both the court orders by defaulting on his maintenance payment obligations and for failing to pay the costs as ordered. As at the date of the hearing, the applicant is in arrears with his maintenance payments in an amount of R268 635.35 and has also neglected to pay to the respondent her legal costs as ordered in the total amount of R166 659.29.

[12] According to the respondent, the applicant's failure to adhere to the court orders is wilful and merely motivated by malice and not lack of financial means. As the sole member of an entity known as Vrugtefontein Boerdery which owns several farms, the respondent sold the farms and received about R8 million which he in turn loaned to a Trust known as Siberia Trust in which he is a sole beneficiary. The loan

¹ **[2006] ZASCA 52; 2006 (4) SA 326** (SCA).

² *Pheko and Others v Ekurhuleni City* **2015 (5) SA 600** (CC) para 1; **2015 (6) BCLR 711** (CC).

³ **[2021] ZACC 18; 2021 (9) BCLR 992** (CC); **2021 (5) SA 327** (CC) para 37 quoting with approval *Fakie N.O. v CCII Systems (Pty) Ltd* **[2006] ZASCA 52; 2006 (4) SA 326** (SCA) and (*Pheko II*).

is repayable to the applicant on demand and since the court orders were issued, he has been spending money on attorneys and experts instead of maintaining his children and paying the debt due to the respondent. In his further attempt to avoid his responsibilities, in January 2021 the applicant lodged an application for reduction of maintenance with the maintenance court at that time, his maintenance arrears had already escalated to R118 997.87 and the writ of execution issued by the maintenance court in that regard was returned unsatisfied by the sheriff. The fact that the applicant has since approached the maintenance court for variation of maintenance is not a defence therefore, the applicant must be found in contempt of court for disobeying the orders granted by the court.

[13] Relying on *SS v VV-S* **2018 (6) BCLR 671** (CC) para 31 and *J v J* **(67591/13) [2019] ZAGPPHC 434** (20 September 2019), it was contended counsel for the respondent that due to the applicant's contemptuous disregard of the court orders essentially, his maintenance obligations the applicant is not entitled to be heard in his main application until he has purged his contempt. The court must also express its disapproval with the applicant's conduct by way of an appropriate order of costs on attorney and client scale.

[14] It is common cause that the court orders which are subject of this counter-application are extant, the applicant is also aware of their provisions he actually complied with the terms of the divorce order until he fell into arrears and fail to make any payments in relation to the respondent's costs thereby contravening the court orders. It is also indisputable that the applicant then bears the evidential burden to create a reasonable doubt as to existence of wilfulness and *mala fides* in his failure to comply with the court orders.

[15] The counter-application is resisted on the basis that the applicant's failure to adhere to the court orders was neither wilful nor *mala fide* but due to a change in financial circumstances occasioned by the costs of the divorce, the onerous interim maintenance, litigation costs and the costs that he incurs in order to exercise contact while his income has reduced to R6 000.00 per month due to the effects of drought on his farming activities.

[16] It is the applicant's case that he can only afford R3000.00 per month per child and it is in that regard that in January 2021 he approached the maintenance court and lodged an application for variation for the maintenance to be reduced from R4000.00 to R3000.00. The application has still not been heard, it has been postponed for several times due to issues beyond his control and to avoid a duplication of the issues the full details of his financial position will be presented at the maintenance court when the application for variation is ultimately heard.

[17] The applicant further states that due to the fact that the issue with regard to his ability to maintenance as per the divorce order currently serves before the maintenance court. If he succeeds in the maintenance court to show that he is not able to comply with his current maintenance obligations then he would have shown good cause for variation of the maintenance payment and for his failure to adhere to the divorce order for that reason, these contempt of court proceedings are also *lis pendens*, as they involve the same cause of action to be determined at the maintenance court.

[18] As regards the cost orders, the applicant contends that there was no need for contempt proceedings, the respondent could have followed the normal execution steps. The counter-application has been opportunistically pursued and designed to either delay or prevent the ventilation of the main application which alludes to *prima facie* evidence of parental alienation on the part of the respondent. The counter-application must thus fail and the respondent be ordered to pay the costs on a punitive scale.

[19] The applicant has raised unmeritorious defences to the respondent's counter-application. It is trite and it has been accepted that the obligation to prove the absence wilfulness and *mala fides* for his failure to adhere to the court orders is on the applicant.

[20] Except to fleetingly attribute his failure to adhere to the court orders the applicant has provided no evidence in relation to his alleged material change in his financial circumstances. He told the court that he will address that issue at the maintenance court therefore, at a *prima facie* level the respondent's contention that

the applicant's failure to comply with the court orders is not due to lack of means has not been gainsaid. It is also important to note that it took the applicant approximately over three years since the divorce order to seek the variation of the order. Another six years lapsed from the date he launched the variation application to the date on which these proceedings were heard. The arrears are substantial and the delay is extreme, this points to maliciousness, a total disregard of his parental responsibilities and an affront to an order of court aimed at protecting the minor children's best interests.

[21] In any event, the applicant's inability to comply with the terms of the court orders does not absolve him from complying with the orders of court. A court order must be respected until set aside. It was stated in *Minister of Home Affairs and Others v Somali Association of South Africa EC and Another*⁴ that:

"...after all there is an unqualified obligation on every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. It cannot be left to the litigants to themselves judge whether or not an order of court should be obeyed."

[22] This matter is also *not lis pendens*. It is trite that the underlying principle of the doctrine of *lis alibi pendens* is that where a dispute involving the same parties based on the same cause of action and in respect of the same subject matter is litigated elsewhere, it must be finalized in that forum and not replicated in another forum as that may result in different courts pronouncing on the same issue with the risk that they may reach differing conclusions.⁵ Except for the fact that this matter involves the same parties and the dispute arises from their respective obligations and rights relating to their minor children, the determinative issue in these proceedings is whether the applicant's failure to comply with the court orders is/not wilful and *mala fide* whereas in the proceedings which serve before the maintenance court the determinative issue is whether there has been a change in the applicant's financial

⁴ **[2015] 2 All SA 294** para 35.

⁵ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite CC* **2013 (6) SA 499** (SCA) paras 18-30.

circumstances warranting a reduction of maintenance. The cause of action is accordingly not the same.

[23] There is also no merit to the applicant's contention that the respondent is required to have employed other means of collecting the debt relating to the unpaid cost orders instead of launching the contempt application. In *Fakie* it was held that:

"[42] (a) The 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."

[24] On the facts germane to this matter, I hold that the applicant has failed to discharge his burden of disproving that he has been wilful and *mala fide* in this failure to comply with the court orders, contempt of court has been established beyond a reasonable doubt.

[25] I am not persuaded that the respondent has made out a case for the stay of the main application until the applicant has purged his contempt. The respondent's reliance on *SS v VV-S* and *J v J* is misplaced. For the reason that, in *SS v VV-S* the contemnor was prohibited from proceeding with an appeal on the basis that the appeal was directed at the order in terms which a warrant of execution against the contemnor's immovable property was authorised in respect of his failure to adhere to his maintenance obligations. In this matter, the main application is intended to terminate the respondent's rights to provide the children with primary residence. Furthermore, in *J v J* the court was seized with a dispute involving spousal maintenance whereas in this matter child maintenance is at issue and a child's right to receive maintenance from a parent is not linked to parental rights to seek primary residence and contact. The matter is deliberated in consonant with the best interest interests of the child as provided for in section 28(2) of the Constitution Act⁶ and section 9 of the Children's Act.⁷

⁶ The Constitution of the Republic of South Africa, Act No, 108 of 1996.

⁷ Act No, 38 of 2005. Section 9 provides: "*In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.*"

[26] With regard to costs, I have come to the conclusion that the respondent has substantially succeeded with the counter-application. She is accordingly entitled to costs. I have alluded to the applicant's flagrant disobedience of the orders of the court, para [19] supra. The applicant's conduct is not only prejudicial to the minor children's best interest it is also criminal.⁸ A cost order on a punitive scale is thus warranted.

Order

[27] In the circumstances, I make the following order:

1. A rule nisi is issued calling upon the Applicant to give reasons, if any, on **14 September 2023** why an order should not be made on a final basis:

2.1. Declaring that the Applicant is in contempt of the court orders issued on 02 May 2017 and 13 October 2021;

2.2. Ordering the Applicant to pay a fine, the amount of which amount is to be determined by this Court; and

2.3. Sentencing the Applicant to direct imprisonment for a period of 6 months, aforementioned period to be suspended for a period of three years, subject to the conditions that the Applicant pay a fine, the amount of which is to be determined by this Court, the Applicant purge his contempt within thirty (30) days from date of this order and subject to the condition that the Applicant not be found guilty of contempt of Court for a period of 3 years from the date that this order is granted.

3. The applicant shall pay the costs of the counter-application on attorney and client scale.

⁸Section 31 (1) of the Maintenance Act 99 of 1998, *Bannatyne v Bannatyne and Another* (**CCT18/02**) [**2002**] **ZACC 31**; **2003 (2) BCLR 111**; **2003 (2) SA 363** (CC) (20 December 2002) para 4.

N.S. DANISO, J

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