

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 52133/19

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

6 December 2022

In the matter between:

J[....] V[....]

Plaintiff

and

B[....] R[....] V[....]

Defendant

JUDGMENT

HF JACOBS, AJ:

[1] This is an application for contempt of court of an order of Rabie J dated 20 November 2019. The order was for, inter alia, the payment by the respondent to the applicant of maintenance *pendente lite* a divorce action. At the time this application was launched the respondent was in default of payment of R35 000.00 towards maintenance for the applicant and the minor children born of their marriage. At the time the replying affidavit was delivered he was alleged to be in default, and, therefore in contempt for failing to pay R85 000.00. The applicant applies for an order holding the respondent in contempt for failing to comply with the order. I was informed from the Bar that the respondent is in default of further payments due in terms of the court order of 28 November 2019, but that alleged default is not relevant and does not form part of this application. I cannot consider the evidence of the respondent's default and alleged contempt after the date of service of the founding papers. The founding papers were served on 21 April 2021. The respondent entered an appearance to oppose the application on 28 April 2021. He delivered his answering affidavit on or about 22 August 2021, two days before the allocated hearing date and four months after having been served with the founding papers. There is an application for the condonation of the late filing of that answering affidavit. I condone the late filing.

[2] The application was enrolled for the week of 21 November 2022. On allocation of the application to me by the senior judge I allocated the matter for hearing on Wednesday 23 November 2022 at 12h00. When the matter was called, I was informed by counsel for the respondent that the respondent would seek a postponement of the proceedings. A substantive application for that purpose was handed up. This was followed by a short adjournment to read the application. The application for postponement was then moved. I dismissed the application for postponement and indicated that my reasons for doing so will follow. Those reasons appear from this judgment.

[3] I am required to determine whether contempt for the order of Rabie J had been established on the papers. The first step is to determine whether the applicant has established breach of the order beyond a reasonable doubt. If the breach is found to exist, the question is whether there is sufficient explanation given for the breach, which raises reasonable doubt as to whether the order of

Rabie J was disobeyed wilfully and mala *fide*.¹ The first step mentioned does not seem to be in dispute, The wilfulness and mala *tides* require consideration.

[4] In considering the application I must remain mindful of the judicial pronouncements in *Bannatyne*² and *Matjhabeng*³.

[5] To do so I turn to the affidavits filed by the respondent (his answering affidavit of 22 August 2021 and his affidavit presented during the application for postponement). I measure the respondent's testimony found in the affidavits against the following facts in the founding papers. The notice of motion is dated 14 April 2021 and the founding affidavit 12 April 2021, one year and four months after the Rule 43 order of Rabie J. The order reads as follows:

"1.

2.

3.

4. *That the Respondent pay an amount of R12,500.00 per month per child maintenance in respect of the two minor children as from 1 OCTOBER 2019 and thereafter on or before the 1st day of each and every successive month.*

5. *That the Respondent pay an amount of R15,000.00 per month maintenance in respect of the Applicant from 1 OCTOBER 2019 and thereafter on or before the 1st day of each and every successive month.*

6. *That the Respondent retain the Applicant and the two minor children, at his costs, as dependents on the current medical scheme to*

¹ See *Samancor Chrome Ltd v Bila Civil Contractors (Pty) Ltd* [22] SASCA 163 (28 November 2022) at [68]

² *Bannatyne v Bannatyne* (Commission for Gender Equality, as amicus curia) 2003 (2) SA 363 (CC); *Purnell v Purnell* 1993 (2) SA 662 (AD); *S v Sand Another* 2019 (6) SA 1 (CC);

³ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC); *SH v GF and Others* 2013 (6) SA 621 (SCA);

which they belong or a scheme with analogous benefits and pay the monthly premiums (and any escalations) timeously and on due date and that the Respondent bear the costs of all reasonable expenditure in respect of medical, dental, surgical, hospital, orthodontic, ophthalmological treatment needed by the Applicant and the two minor children not covered by the medical aid scheme, including any sums payable to a physiotherapist, occupational therapist, speech therapist, psychiatrist, psychologist and chiropractor, the costs of medication and the provision, where necessary, of spectacles.

7. That the Respondent effect payment of the two minor children's educational costs, such costs to include without limiting the generality of the foregoing, all school fees, after care fees, tertiary fees, additional tuition fees as well as the costs of all books, stationary, equipment and attire relating to the two minor children's education expenses and schooling.

8.

[6] The respondent was obliged to pay R25 000.00 per month for the two children and R15 000.00 for the maintenance of the applicant. His cash payment obligations towards the applicant was, therefore, R40 000.00 per month. The evidence in paragraph 11.2 of the applicants founding affidavit which records the payments made by the respondent (which the respondent admits) show that the respondent paid the maintenance for September 2020, October 2020, November 2020, December 2020 and made a short payment of R15 000.00 for the months of both January and February. The respondent then paid R50 000.00 (five thousand more than he was obliged to for the month of March) and again made a short payment of R15 000.00 for the month of April when the application for contempt was brought. At the time the contempt proceedings were launched, the respondent was in arrears. He stated on oath in paragraph 3.8 *"Also, I undertake to ensure that my maintenance payments are up to date, as at the date of the hearing of the application."*

[7] The applicant says that the respondent was in default of payment of

maintenance. During October 2020 the applicant applied for a writ of execution. She alleged that the respondent was in arrears of payment in the sum of R70 313.70. The writ was executed by the sheriff on 22 October 2020 on the respondent personally. The respondent informed the sheriff that he was unable to satisfy the writ whereafter some movables were attached. Those movables are alleged not to belong to the respondent. The writ did not satisfy the judgment or any part thereof.

[8] The respondent made the following payments to the applicant on the dates mentioned between September 2020 and the time the contempt application was launched during April 2021:

- 8.1. 4 September 2020: R4,000.00;
- 8.2. 7 September 2020: R36,000.00;
- 8.3. 6 October 2020: R20,000.00;
- 8.4. 28 October 2020: R20,000.00;
- 8.5. 9 November 2020: R20,000.00;
- 8.6. 13 November 2020: R20,000.00;
- 8.7. 4 December 2020: R20,000.00;
- 8.8. 7 December 2020: R20,000.00;
- 8.9. 4 January 2021: R25,000.00;
- 8.10. 1 February 2021: R30,000.00;
- 8.11. 1 March 2021: R30,000.00;
- 8.12. 10 March 2021: R20,000.00;

8.13.6 April 2021: R25,000.00.

[9] The respondent's payment obligations continued beyond the date the contempt proceedings were launched during April 2021 and beyond the date of his answering affidavit. In the replying affidavit the applicant shows that the respondent continued to make short payments towards maintenance.⁴ He maintains that he cannot afford the payments.

[10] The respondent has a bank account. He has an interest in the business known as Mtati Projects CC. He draws money from the business. He produced no reliable evidence of his drawings, contractual entitlement to payments, his personal income and expenditure statements, balance sheet or tax returns. In his affidavit in support of the application for postponement under the rubric "*NEW INFORMATION*", he mentions that he lodged proceedings in the local Maintenance Court for the substitution of the order of Rabie J. This application has been pending for more than a year. It was lodged in response to the contempt proceedings. The date stamp on the maintenance court papers (annexure "Z1" to the affidavit) is 18 August 2021, four days before the respondent deposed to his answering affidavit in the contempt proceedings. It is, therefore, not new information but information that could and should have been contained in his answering papers. The respondent is less than frank in presenting evidence in support of an explanation for his contempt. In my view the respondent does not offer a sufficient explanation for his breach and the respondent fails to discharge the onus that he bears beyond a reasonable doubt, that he was unable to comply with the court order of 28 November 2019 by paying R35 000.00. The respondent knew he had the right in terms of rule 43(6) to apply to this court for the reconsideration of the order of 28 November 2019. The respondent knew that he could have the order reconsidered by the Maintenance Court. He followed that route but has not completed the process. He was at liberty to counter apply in these proceedings for the appropriate relief but failed to do so. He was at liberty to approach the urgent court for relief. Court orders are valid and must be obeyed until rescinded or varied in terms of due process. This has not happened. The respondent seems to hold the view that he

has, since the Rule 43 order was made, paid money in excess of the sum of R35 000.00 which shows that he has purged his contempt. The arithmetic the respondent applies loses sight of the fact that his obligations accumulate monthly. He cannot rely on what he pays short or in full during December to be taken into account for the previous months during which he defaulted in part.

[11] The respondent sought a postponement on the day of the hearing.

The applicant had to exhaust interlocutory proceedings to obtain a date for the hearing. The respondent supplies scant information about what he says kept him from being ready for the hearing. In my view the respondent was also *ma/a fide* in bringing an application for the postponement of the proceedings at the last moment. Under the circumstances I am of the view that the applicant must be fully indemnified for the costs she had to incur in these proceedings. That view will be reflected in the cost order that follows.

I make the following order:

- (1) The respondent is held in contempt of the order of this court of 28 November 2019 issued under case number 52133/2019;
- (2) The respondent is sentenced to imprisonment for 60 days;
- (3) The respondent's sentence is suspended for 60 days on condition that he pays to the applicant the sum of R35 000.00 within 60 days from the date of this order;
- (4) The respondent is ordered to pay the costs of this application on a scale as between attorney and client.

⁴ See replying affidavit paragraph 39

HF JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 6th December 2022.

APPERANCES

Applicant's counsel:	Adv A Van Der Merwe
Applicant's attorneys:	Farhan Cassim Attorneys
Respondent's counsel:	Adv Z Marx - Du Plessis
Respondent's attorneys:	Venter De Villiers Attorneys