



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 13899/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
	
SIGNATURE	16/04/2021 DATE

In the matter between:

JOANELL BRITZ

Applicant

v

HENDRIK SCHOEMAN BRITZ

Respondent

JUDGEMENT

MOSOPA, J

1. This is a civil contempt of court application brought in terms of Rule 6(12) of the Uniform Rules of Court, in respect of the respondent's non-compliance with the maintenance court order issued at the Pretoria Magistrate's Court on 26 October 2016. The applicant seeks an order that the respondent be imprisoned for a period of 30 days or periodical imprisonment of 60 days, all

of which are to be suspended on condition that the respondent complies with the maintenance order and ancillary relief.

URGENCY

2. The maintenance order stems back to 2016, however it must be noted that there were times since the issuance of the maintenance order when the respondent complied with such an order. From May 2018, there was a particular pattern in the compliance with the maintenance order, where the respondent did not pay the full maintenance amount (partial compliance) and there were some instances where there was complete non-compliance with the maintenance order by the respondent.
3. The respondent contends that this matter is not urgent as the applicant, in her own version, avers that maintenance has not been paid since May 2018.
4. In urgent applications, the applicant must show that he or she will not be afforded substantial redress at a hearing in due course (*see Rule 6(12)(b); Luna Meubel Vervaardigers (Edms) Bpk v Makin t/a Makin Furnitures Manufacturers 1977 (4) SA 135 (W) at 137F*).
5. A warrant of execution was issued in the Pretoria Magistrates' Court against the respondent, however there was a change in legal representation for the applicant, due to her financial constraints and the warrant of execution was effected, which resulted in the respondent's bank account being frozen. The current legal representative is acting on *pro bono* basis on behalf of the applicant.
6. The applicant avers that she is currently earning R1 000,00 per month and her current boyfriend takes care of her financially. This clearly shows that the applicant's finances are extremely depleted and this therefore makes this matter urgent. It is trite that not all arrear maintenance contempt applications are urgent, but if prejudice is suffered by the applicant, more especially by the minor children, as is the case *in casu*, the matter becomes more urgent.

JURISDICTION

7. A point-in-limine was raised by the respondent that this court lacks jurisdiction as the maintenance order was issued by the Pretoria Magistrates Court. The Magistrates Court does not have jurisdiction to entertain applications for contempt of court in civil matters, including the contempt of court application (see **MC v MJ (GJ) (unreported case no A3076/2016)**).

LEGAL PRINCIPLE

8. Nkabinde J, writing for the majority in the matter of ***Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC)** at para 1, observed;

“(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.”

9. Before the Supreme Court of Appeal decision of ***Fakkie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326**, which I will refer to again at a later stage, the requirements of the civil contempt were the following;

- 9.1. There must be a court order;
- 9.2. The order must have been duly served on, or brought to the notice of, the alleged contemnor;
- 9.3. There must have been non-compliance with the order; and
- 9.4. The non-compliance must have been willful or *mala fide*

All these elements must be established on a balance of probabilities.

10. In terms of section 165 of the Constitution of South Africa, the judicial authority of the Republic vests in the courts. The organs of state are enjoined through legislative and other measures, to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. Further, it provides that no person or organ of state may interfere with the functioning of the courts and that an order or decision issued by a court binds all persons.

11. Following the constitutional protection as espoused by section 165 (*supra*), the court in the matter of **Fakkie** (*supra*), observed;

"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed "deliberately and mala fide". A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

[10] These requirements – that the refusal to obey should be both willful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader depiction of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the courts' dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

12. The **Fakkie** matter also found that the onus of proof in civil contempt for committal is proof beyond reasonable doubt (criminal standard of proof).

DISCUSSION

13. The defense raised by the respondent *in casu* is twofold in that;

13.1. That he is unable to honour the maintenance order due to a change in his salary. This fact was communicated to the applicant in a round-table discussion where her attorney was present; and

13.2. That the applicant will be prejudiced, in his disregard of the court order.

14. An application to vary the maintenance court order was brought by the respondent in the Pretoria Magistrates Court, but this application was removed on 5 March 2021 for the application which was enrolled for hearing on 10 March 2021. The only reason provided by the respondent for this removal of the application, is that it was done on the advice of his legal representative.

15. As of now, the maintenance order is not varied and remains effective. It is not the respondent's case that he wants the maintenance order to be suspended pending the finalization of the variation application.

16. The respondent's financial circumstances changed when the following happened;

16.1. In February 2018, the respondent was informed that, with effect 1 April 2018, he was offered the position in the Mederac Division, which is in the same employment but a different division. Further, that his total cost to company per month will be increased to R30 000,00. The respondent interpreted this to mean that there will be a 50% reduction in his salary.

16.2. In March 2020, he was informed that, because of the Covid-19 pandemic, the company has lost 30% of its revenue, as there is an international ban on air flight and that their salaries will be reduced by 30%.

- 16.3. That he is currently paying an amount of R58 613,00 towards his medical aid fund, which is used by himself and his children, in terms of the maintenance order.
17. The respondent's bank statement dated 1 January 2018, which did not initially form part of the respondent's papers because of the volume thereof and which was only uploaded to Caselines the day before the hearing of this matter, indicates that the respondent was earning a salary of R44 078,75 and an additional income of R7 666,00 – the source of which is not apparent from a proper reading of the bank statement. I decided to consider this bank statement because it was referred to in argument by the applicant.
18. On the bank statement dated 2 May 2018, the salary deposited into the respondent's bank account was an amount of R15 700,35 and an additional payment of R2 500,00, thus amounting to R18 200,35 in total. This clearly demonstrates that there was a reduction in the respondent's salary.
19. Despite the 30% reduction, as averred, of the respondent's salary from March 2020, the respondent's bank showed a remarkable increase in his salary after that period. In March 2020, the respondent earned a salary of R29 109,10. In April 2020, his salary amounted to R24 147,20; in May 2020, it amounted to R35 919,74 and in November 2020, it was R29 281,58. The closing balance of the respondent's account in March 2021 was an amount of R73 745,01 because his account was frozen as a result of a warrant of execution obtained by the applicant.
20. From the respondent's bank statements, it can be established that the respondent's salary varied from month to month. The applicant does not say what salary he earns as a result of his current employment as a pilot, in the Mederac Division. This basically means that for the purposes of determination of this application, I am going to solely rely on the respondent's bank statements, as his salary was paid into this bank account.

21. Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses – willful disobedience and resistance to lawful court orders. This matter concerns the latter – a failure or refusal to comply with an order of court. Willful disobedience of a court order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty which will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order (see ***Pheko (supra) at para 28***).

22. I am satisfied that the respondent *in casu*, was aware of the existence of the maintenance order and that it was served on him. This is borne out of the fact that the maintenance order made by the divorce court was increased when the respondent approached the magistrates court for the variation of the maintenance order. Also, given that the respondent initially complied with the maintenance order until his financial circumstances changed. I am further satisfied that the respondent did not act willfully and *mala fide* in not complying with the maintenance order. The change in his financial circumstance, as borne out by the bank statements, allowed him to comply with the court order.

23. I am of the view that in this matter there is no need to commit the respondent to a term of imprisonment, as this will have the following dire consequences;

23.1. That the respondent's right to liberty will be infringed and once committed, he will also lose his employment; and

23.2. The respondent's children will suffer prejudice as the respondent will be without income and thus will not be able to further contribute to their maintenance.

24. As I already indicated elsewhere in my judgment, the maintenance order remains effective until such time as it is set aside or varied. The respondent earns a salary and he must contribute towards the maintenance of his

children, but it is apparent that he cannot comply with the maintenance order. In the interim, pending the final determination of the variation of the maintenance order of 26 October 2016, I am of the view that the respondent must be compelled to make contributions towards the maintenance of his children.

ORDER

25. I therefore make the following order;

1. The respondent is not held in contempt of the Pretoria Magistrates maintenance order dated 26 October 2016.
2. The respondent is ordered to pay a once-off payment of R10 000,00 with immediate effect of this order towards the arrear maintenance.
3. From 1 May 2021, pending the final determination of the variation application, the respondent is ordered to pay an amount of R5 000,00 towards both the arrear maintenance and his monthly maintenance obligations.
4. In the event that the variation application is not successful or not reinstated within 15 days of this order, the respondent is ordered to proceed with honouring his maintenance obligations, according to the maintenance order of 26 October 2016 issued by the Pretoria Magistrates' Court.
5. The respondent is ordered to pay the costs of the applicant.



MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant: Adv MJ Kleyn
Instructed by: Rianie Strijdom Attorneys

For the respondent: Adv N Gaffoor
Instructed by: Froneman, Roux and Streicher Attorneys

Date of hearing: 7 April 2021
Date of judgment: Electronically transmitted