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

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

CASE NO: 25820/2015

22/7/2019

In the matter between:

M[....] H[....]

APPLICANT

and

M[....] E[....] H[....]

RESPONDENT

JUDGMENT

VAN DER SCHYFF, AJ

Introduction

- [1] The applicant seeks an order that the respondent is held in contempt of court for failing to comply with a court order dated 11 December 2018; that the respondent be committed to goal for a period of 20 days, or such period and conditions at the court may determine; in the alternative that the respondent be ordered to comply fully with the court order 11

December 2018; and that the respondent is ordered to pay the costs of the application on a punitive scale.

- [2] The application was delivered to the respondent's attorneys via e-mail on 5 July 2019. In the notice of motion the respondent was required to inform the applicant's attorney of record if he intends to oppose the application on or before 8 July 2019 and to file an answering affidavit on or before 9 July 2019, which would afford the applicant time to file a replying affidavit on or before 11 July 2019.
- [3] The applicant filed a notice of intention to oppose on 9 July 2019. An answering affidavit was filed on 15 July 2019.
- [4] The respondent raises two points *in limine*: first, non-compliance with Rule 6(12)(b) and the practice directive in that the applicant does not substantiate why she will not be afforded substantial redress at a hearing in due course, and second, that the matter is not urgent.
- [5] In considering these points *in limine* it is necessary to set out the salient facts of the matter since urgency is determined on a case-by-case basis.

Background facts

- [6] The applicant instituted divorce proceedings against the respondent during April 2015.
- [7] She brought an application in terms of Rule 43 for maintenance *pendente lite*. A draft order was presented to the presiding judge, which was made an order of court on 15 September 2015.
- [8] As is indicated below, this term of the order has become contentious. The order reads: "That the Respondent retains the Applicant as a beneficiary on his medical aid for a period of six months from date of the divorce."
- [9] During September 2016 the respondent removed the applicant from the medical aid. The applicant approached the urgent court pursuant to which she was reinstated in October 2016.
- [10] During November 2018 the respondent again removed the applicant from the medical aid and she instituted a contempt application. On 11 December 2018 an order was granted by Sardiwalla J, ordering the

respondent to immediately reinstate the applicant as a beneficiary on his medical aid. This order reads: "... that the respondent be ordered to comply fully with the Court Order dated 15 September 2015 by reinstating the applicant as a beneficiary on his medical aid, with immediate effect."

- [11] On 29 May 2019 a further contempt application was set down for hearing, but the application was withdrawn. The applicant explains that the application was withdrawn to provide the respondent with a final opportunity to comply with the court order, whereas the respondent avers that the applicant conceded that the application was without merit and in any event, not urgent.

Urgency

- [12] The applicant states that she suffered a serious heart attack 7 years ago and underwent heart bypass surgery. Approximately 4 years ago she had a pace- maker inserted and 2 years ago a corrective heart valve operation. She takes chronic medication on a daily basis. Without medical cover she will not be admitted to a private hospital in the event of a further heart attack, and she cannot afford the chronic medication.
- [13] The respondent does not deny the extent of the applicant's medical condition but denies that it creates any urgency because these circumstances existed when the divorce action was instituted. In light of the applicant's medical condition I find the logic in the respondent's argument startling.
- [14] In light of the applicant's medical condition and the preceding litigation in this regard, I am of the view that this application indeed justifies a hearing in this court.

Merits

- [15] On 27 June 2019 the respondent's attorney forwarded correspondence to the applicant's attorney stating that the respondent's medical aid declined her application to be reinstated.
- [16] The applicant's attorney contacted the medical aid's representative and

obtained certain information, which is not confirmed under oath. The applicant therefore relies on hearsay evidence regarding this aspect.

- [17] However, in his answering affidavit the respondent confirms that **a Ms** Patty King was added as a beneficiary on his medical aid as from 1 November 2018.
- [18] The respondent maintains that he is in dire financial straits and cannot afford to subsidise the applicant on his medical aid. He states that he was declared medically unfit to work in 2007 but continued working on a freelance basis until 2016 when his health condition deteriorated to such an extent that he was incapable of doing any work.
- [19] He also avers that the order that was granted in September 2015 was erroneously formulated to provide for the applicant to remain on his medical aid for six months after finalisation of the divorce, whereas the true intention was that that she would remain for 6 months after finalisation of the Rule 43 proceedings. He contends that the order does not make sense in that Rule 43 provides for regulating the parties' maintenance obligations *pendente lite*.
- [20] The respondent also adds that the applicant is prolonging the divorce proceedings and not acting in good faith.
- [21] The applicant, however, avers that the September 2015 court order reflects the intention of the parties that she was to be retained on the applicant's medical aid *pendent lite* and an additional 6 months after the divorce was finalised. She denies that she is prolonging the divorce proceedings.

Contempt proceedings

- [22] It is trite that compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure as far as possible with the provisions of section 35(3) of the Constitution (*JSO v HWO* (24384/2009) [2014] ZAGPPHC 133 (19 February 2014)).

[23] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) is considered as the leading authority on contempt of court proceedings. In this matter the Supreme Court of Appeal describes the application for committal for contempt by a private party as a '*peculiar amalgam*' because '*it is a civil proceeding that invokes a criminal sanction or its threat.*' (para [8]). The Court continues in paragraph [9] '*The test for when the 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,...*' However, in paragraph [41] the Court held '*... this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites ..., unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide the requisites of contempt would have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but, but only need evidence that establishes a reasonable doubt.*'

[24] The Supreme Court of Appeal summarised its findings as follows in paragraph [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 requirement.*
- b) *The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.*
- c) *In particular the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*
- d) *But, 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.

[25] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* (2015] ZACC 10, in a unanimous decision delivered by Nkabinde J, the Constitutional Court subsequently explained that:

[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour....

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law.

[32] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (ad factum praestandum,) the following elements need to be established on a balance of probabilities: (a) the must order exist; (b) the order must have been duly served on, or brought to the notice of, the alleged contemnor; (c) there must have been non-compliance with the order;

and (d) the non-compliance must have been wilful or mala fide'.

- [26] The Constitutional Court confirmed the decision by the Supreme Court of Appeal in *Fakie* and held that the judgment creates a presumption in favour of the Applicant (para 36): *'Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.'*
- [27] Nkabinde J continued (para [37]) *' However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such as declaratory relief, a mandamus demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance. '*

The present application

- [28] Paragraph two of the September 2015 order reads as follows: "That the Respondent retains the Applicant as a beneficiary on his medical aid for a period of 6 (six) months from date of divorce."
- [29] The respondent argues that the court order as it currently stands, only obliges him to keep the applicant on his medical aid for a period of six months *from the date of divorce*. He avers that it was the parties' intention that the applicant was to be retained on the respondent's medical aid for a period of 6 months from the Rule 43 application. His legal representative argued that this is the only sensible and logical interpretation that can be afforded to the September 2015 order.
- [30] When the relevant paragraph of the September 2015 order is to be interpreted, the well-known principle as set out in *Natal Joint Municipal Pension Fund v Edumeni Municipality 2012 (4) SA 593 (SCA) 603G-604A*

finds application:

"Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax: the context in which the provision appears; ... "

[31] In interpreting the September 2015 order I take the following into consideration:

(i) The order was made in pre-divorce litigation to provide relief *pendent lite* to an applicant engaged in divorce proceedings; (ii) The purpose of Rule 43 is to provide maintenance *pendent lite*; (iii) Divorce proceedings are rarely concluded within 6 months; (iv) the respondent explicitly states in paragraph 5.4 of the opposing affidavit "The true intention of the parties during the settlement negotiations and the subsequent order was that the divorce is to be finalised before the end of 2015" - hence it is evident that it was the parties' intention that the respondent was to retain the applicant on his medical aid for the foreseen *pendent lite* period; (v) it is trite that as long as the marriage subsists a reciprocal duty to support exists between spouses.

[32] I am of the view that an interpretation of the September 2015 order against the background explained above, reflects the parties' intention to provide for the applicant to be retained on the respondent's medical aid *pendente lite* the finalisation of the divorce.

[33] This is clearly the way in which the order was interpreted not only by Sardiwalla J in the urgent court application in December 2018, but also by the respondent and his legal representatives, during October 2016 when the respondent reinstated the applicant as a beneficiary of his medical aid and kept her on the medical aid until November 2018. I pause to mention that it is significant that the respondent instituted a counter application in December 2018 that the September 2015 order be amended or varied to read that the respondent is obliged to retain the applicant on his medical aid fund until six months "from the date of the Rule 43 application". In light

hereof I am of the view that if any misunderstanding existed as to the interpretation of the September 2015 order, the order granted by Sardiwalla J have done away with it.

- [34] An aspect that has to be dealt with, however, is whether it is of any material concern to the success of this application that on face value the September 2015 order exceeds the scope of Rule 43. If it is accepted that a court cannot regulate the post-divorce responsibilities of parties in Rule 43 applications the question arises as to whether the September 2015 order is valid - and if not, whether the respondent can be held in contempt of an invalid court order.
- [35] I requested counsel specifically to provide me with additional heads of argument directed to this question. For purposes of the discussion that follows, it is (temporarily) assumed that the entire order pertaining to the respondent's obligation to retain the applicant on his medical aid is invalid.¹ Two questions then arise: (i) whether a party can choose to ignore the order and raise its invalidity as a defence in contempt proceedings, and (ii) whether a subsequent court can compel compliance with the order despite it lacking a legal basis.
- [36] The starting point of any discussion of this nature is section 165(5) of the Constitution of the Republic of South Africa, 1996 where it is provided that "An order or decision by a court binds all persons to whom and organs of state to which it applies".
- [37] The decision of the Supreme Court of Appeal in *Motala v Master of the High Court* 2012 (3) SA 325 (SCA) has been interpreted to mean that invalid court orders are not capable of being enforced, even where they have not been taken on appeal, and are nullities.² It is noteworthy, however, that the Honourable Jafta J in *Nkata v Firstrand Bank Limited and Others* 2016 (4) SA 257 (CC) stated at paragraph 187: "Unlike my

¹ I found a draft article by MN De Beer "Invalid Court Orders, Accountability and the authority of the judiciary" <https://www.wits.ac.za/.../wits...court.../MNDeBeer-Court%20ordersDraft.docx> of much assistance.

² Also see *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) and *Moraitis Investments (Pty) Ltd v Montie Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA).

colleagues I do not read Motala as laying a down the limited principle that a person is not compelled to obey an order made by a court that had no jurisdiction to make it".

- [38] Subsequently , in *Department of Transport v Tasima (Pty) Limited* 2017 (2) SA 622 (CC), hereinafter *Tasima*, the majority in the Constitutional Court held that invalid court orders are binding and are still capable of founding contempt where they are ignored. The Honourable Khampepe J, writing on behalf of the majority, stated in paragraph 180: *"The general rule is that orders that do not concern constitutional invalidity do have force from the moment they are issued. And in light of section 165(5) of the Constitution, the order is binding, irrespective of whether or not it is valid, until set aside."* In paragraph 182 she stated: *"This reading of section 165(5) accepts the Judiciary's fallibilities. As explained in the context of administrative decisions, "administrators may err, and even ... err grossly." Surely the authors of the Constitution viewed Judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, Judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences."* She continued in paragraph 183 *"... Allowing parties to ignore court orders would shake the foundations of the Jaw, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built."*, and in paragraph 186:

"... the legal consequence that flows from non-compliance with a court order is contempt. The "essence" of contempt "lies in violating the dignity, repute or authority of the court." By disobeying multiple orders issued by the High Court, the Department and the Corporation repeatedly violated that Court's dignity, repute and authority and the dignity, repute and authority of the Judiciary in general. That the underlying order may have been invalid does not erase the injury. Therefore, while a court may, in the correct circumstances, find an underlying court order null and void and set

it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt." (references omitted).

- [39] When the Tasima judgment is interpreted, the judgment is to be interpreted against the backdrop of the facts underpinning the Tasima matter. As De Beer explains in his draft article - *"A latter court deciding whether to enforce the Interim Order would need to have asked: 'Can a High Court grant an interim order preserving the terms of a contract, pending the outcome of dispute resolution proceedings into the validity of the contract?' The answer is of course 'Yes'. Therefore, the order was binding, unless overturned on appeal, or as it was only of an interim nature, until the contractual dispute was resolved. ... factually the Interim Order was disregarded time and time again by the Department, and any non-compliance - before it fell away after the extension was declared unlawful and invalid - resulted in contempt."* In Tasima the court *a quo* had the authority to deal with the subject matter. Although it was later held by a higher court that the agreement was indeed *ab initio* void, the court *a quo*'s "error" occurred within a jurisdictional setting within which the court was empowered to act and it is within this context that the Tasima judgment was handed down.
- [40] Section 170 of the Constitution provides that *"All courts other than those referred to in s 167, 168 and 169 may decide any matter determined by an Act of Parliament."* Sections 167, 168, and 169 respectively provides that the Constitutional Court may only decide constitutional matters and arguable points of law of general public import and has exclusive jurisdiction over certain matters, the Supreme Court of Appeal may only decide appeals from the High Court, and no competition or labour matters, and the High Court may decide (i) constitutional matters unless the

Constitutional Court has agreed to hear the matter directly or the matter has been assigned to another court of similar status by legislation, and (ii) any other matter not assigned in an Act to another court. As a result there are limits to judicial power.

- [41] I am of the view that Rule 43 inherently limits a court's power when it deals with relief *pendent lite*. An order which exceeds the court's empowerment to deal with such matter would be *ab initio* void. And herein lies the distinction between the Tasima matter and a Rule 43 order that is aimed at regulating parties' relationship and responsibilities post-divorce. Where the court *a quo* in Tasima had the necessary subject matter jurisdiction to decide the questions before it, a court in a Rule 43 application does not have the subject matter jurisdiction to regulate the parties' post-divorce rights and responsibilities.
- [42] As stated above, however, the September 2015 order has been found to by Sardiwalla J to have *pendente lite* application. I have set out above the grounds on which I interpret the September 2015 order to have *pendent lite* application. If, on any interpretation, the said orders are capable of extending the ambit of the Rule 43 order beyond the existence of the marriage, that part of the order that would attempt to regulate the post-divorce scenario would be void *ab initio* and of no effect. The rule 43 order will lapse when the decree of divorce is granted.
- [43] The respondent's conduct to remove the applicant, twice, as a beneficiary from his medical aid constitutes nothing less than self-help. The fact that he disregarded the Sardiwalla-order indicates a blatant disregard for the rule of law and the dignity of the court. The question remains as to why the respondent never approached the court with an application in terms of Rule 43(6) to vary the order when it became apparent that the divorce would not be finalised in six months (a change in circumstances), but reverted to self-help. On the basis of the principle laid down by the Constitutional Court in Tasima, the respondent is in contempt of the September 2015 order. However, this question intensifies after the Sardiwalla-order was granted in December 2018 despite a counter-

application being launched by the respondent for the amendment of the September 2015 order to bring it in line with what he contends the parties' true intention was in September 2015.

- [44] I am of the view that it is evident from the papers that the first three elements of the test for contempt have been established. There is an existing order, the order was brought to the attention of the respondent and the respondent is in non-compliance.
- [45] Since the first three elements of the test for contempt have been established, *ma/la fides* and wilfulness are presumed unless the respondent is able to lead evidence sufficient to create reasonable doubt as to their existence. The respondent thus needs to rebut the presumption of *mala fides* and wilfulness.
- [46] The respondent submits that he is in dire financial straits with no means to comply with the court order. However, in direct contradiction thereto, he admits that Ms Patty King was added as a beneficiary on his medical aid as from 1 November 2018. November 2018, coincidentally is the period when the applicant's membership was terminated. He was in the position to add another beneficiary on his medical aid when he had an obligation to retain the applicant. Since he is still married to the applicant she has the strongest right in law to be maintained by the respondent. It is trite that marriage brings about a reciprocal duty of support that subsists for the duration of the marriage. This duty of support was confirmed and entrenched in the court order granted in September 2015 and re-confirmed in December 2018.
- [47] The respondent does not provide any factual basis for a finding that his refusal to comply with the order of Sardiwalla J, was in any way *bona fide*.

ORDER

In the result it is ordered:

1. The Respondent is held to be in contempt of the order of this Court, dated 11 December 2018.
2. The Respondent is committed to imprisonment for a period of 30 days,

which is wholly suspended for a period of 12 months, on condition:

- 2.1 That the respondent adds the applicant as a beneficiary on his medical aid fund within 15 days of this order.
3. The respondent shall pay the costs of this application.

E VAN DER SCHYFF

Acting Judge of the High Court

<u>Heard on:</u>	16 July 2019
<u>For the Plaintiff/Applicant:</u>	D M de Bruyn
<u>Instructed by:</u>	De Bruyn Attorneys
<u>For the Defendant/Respondent:</u>	Adv J H Lerm
<u>Instructed by:</u>	Waldick Jansen Van Rensburg Inc
<u>Date of Judgment:</u>	_22 July 2019