



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: YES/NO

Case No: 1274/2019

In the matter between:

ZJ

Applicant

and

LL

Respondent

Coram: Opperman, J

Heard: 10 October 2019

Delivered: 29 November 2019

Judgment: Opperman, J

Summary: Contempt of court – Shifren-principle in maintenance matters where minors involved – evaluation of applications for contempt of court orders in maintenance matters

JUDGMENT

I CONTEXT

[1] The case revolves, at its core, around the financial maintenance and care of a minor child.¹ It concerns the responsibility of the courts to ensure that maintenance orders are observed within the intricacies that often tarnish and complicate these cases.²

¹ “U”.

² The Maintenance Act 99 of 1998 declares among others:

“Preamble.—WHEREAS the Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted so as to establish a society based on democratic values, social and economic justice,

[2] The Maintenance Act 99 of 1998³ and the law that developed around it were specifically designed to deal with the topic of the case.⁴ Notwithstanding these statutory remedies and legal recourse available to the applicant she elected to seek an order by way of an opposed motion in the High Court to declare the respondent in contempt of a court order. The order followed a deed of settlement that formed part of an order for divorce that was issued in this court.

[3] The application is for the following:

1. Directing the respondent to advance reasons why the respondent should not be found to be in contempt of the court order dated 21 October 2010 under case 4839/2010 and be committed to imprisonment for a period not exceeding 90 days for such contempt;
2. That the respondent be ordered to pay the costs of this application on an attorney client scale;
3. Further or alternative relief.

[4] On 21 October 2010 the court assigned primary residence of the then seven-year-old minor son to the applicant subject to the respondent's reasonable rights of access to the child. Related herewith and to the dispute *in casu*, the court ordered:

equality and fundamental human rights and to improve the quality of life of all citizens and to free the potential of all persons by every means possible, including, amongst others, by the establishment of a fair and equitable maintenance system;...

³ "Maintenance Act"

⁴ *Bannatyne v Bannatyne and Another* (CCT18/02) [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) (20 December 2002) at paragraphs [4] to [6]:

"Civil and criminal remedies against defaulters of maintenance for minors in terms of legislation:

Chapter 5 of the Act makes provision for maintenance orders to be enforced by civil execution. This includes execution against property, the attachment of emoluments and the attachment of debts. A failure to comply with a maintenance order is also a criminal offence for which a defaulter can be sentenced to imprisonment or ordered to pay a fine. Chapter 6 of the Act makes provision for a court to convict a person for failing to pay maintenance. Section 40 of the Act specifically deals with the recovery of arrear maintenance. Provision is also made for criminal proceedings in respect of the non-payment of maintenance to be converted into a maintenance enquiry. This must be done if: "... it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests . . ." Chapter 3 of the Act governs the functions and powers of maintenance officers in the enforcement of maintenance orders. Section 6 requires the maintenance officer to take steps to investigate a maintenance complaint and thereafter institute a maintenance enquiry. The investigation of a complaint includes obtaining statements under oath from persons with information regarding the complaint; investigating the identity or whereabouts of the alleged defaulter and any other relevant information for the purposes of the maintenance enquiry. A maintenance officer is also empowered to enlist the assistance of a maintenance investigator to assist in the performance of such functions. At the maintenance inquiry, the maintenance officer is entitled to subpoena witnesses to give evidence or to produce documentary evidence relating to the financial position of the parties."

- 2.1 That the respondent shall pay maintenance for the minor child in the amount of R9000,00 per month; the first payment to be on the 1st of October 2010⁵ and thereafter before or on the 1st of each successive month. In addition to the above the respondent shall also be responsible for:
- 2.1.1 All reasonable medical, dentist and eye care expenditures of the minor child.
- 2.1.2 The tertiary education of the minor child.
- 2.2 The maintenance in paragraph 2.1 will escalate yearly in accordance with the consumer price index rate. First escalation to be on or before the 1st of October 2011 and thereafter on the 1st of October of each subsequent year.

[5] Pertinent to the dispute is a Shifren-clause⁶ in the deed of settlement. It prescribes that no variation of the agreement shall be of any force or effect unless reduced to writing and signed by the parties to this agreement. The clause does not demand confirmation by way of a court order. In other words, the parties agreed that the court order may be varied by consensus and reduction to writing *inter partes*.⁷

[6] It is the case for the respondent that he is not in arrears with the maintenance payments. As a matter of fact; he has over-paid in the amount of R86 465.70. He admits that the method of payment was not in accordance with the letter of the court order but substantively so. His first argument is that the order did not state payment of the R9000 directly to the applicant. The respondent assumed it to be payment to address the needs of the minor; either to the applicant directly or to third parties such as service providers and for that matter; the minor himself. He also relies on consensual extra-curial variations of the maintenance order between him and the applicant to justify the manner of payment.

[7] The applicant denies the above and claims that the respondent is contemptuous towards her and the court order and was so from the very beginning in 2010. He paid whenever and however he deemed proper. He would demand cash slips as prove of the expenditures for the minor before any payment. She explained in so many words

⁵ The date seems to be wrong since the divorce was only granted on 21 October 2010.

⁶ *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) (Shifren). In Shifren the court held that where a non-variation clause is entrenched against an oral variation of all the terms in the contract, subject to compliance with the party-imposed formality, this formality must be executed to give effect to the oral variation. Often, the formality prescribed is that the variation must be reduced to writing and signed by the parties. This finding of the Appellate Division has been commonly referred to as the Shifren principle.

⁷ See the discussion by Hoctor, Cowling & Milton in *South African Criminal Law and Procedure*, Volume III: Statutory Offences, CD-Rom and Intranet: ISSN 2218–Jutastat, e-publications at RS 23, 2013 chF2-p13 to page 18 on *ex lege* and *ex contractu* maintenance obligations.

that she was held hostage by the situation and communication with respondent was challenging. Since the divorce she had on numerous occasions attempted to enforce the settlement agreement, but to no avail. The respondent was well aware of the fact that he had to pay directly to her. Her case is that there were never any consensual variations of the court order. She relies on the Shifren-clause in paragraph 5 of the settlement agreement. She alleges that the respondent is in arrears with the maintenance in the estimated amount of R344 618.70.

II ISSUES

[8] The following came to the fore:

1. The application of the Shifren-principle in maintenance matters must be established and pinioned.
2. The law pronounced in the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017) in regard to the requisites for contempt and the standard of proof in contempt proceedings will be depicted.
4. Unique to this case is that the judgement of the contempt entails two aspects to be decided separately; the method of payment and the amount due in terms of the order.
5. If the oral variation agreement scenario passes legal muster the next task of the court will be to establish the factual situation of the case in this regard. Were there or were there not any variations of the settlement agreement and what did it entail? The vehicle that brought the matter before court is motion proceedings and the Placon Evans-principle will apply. The next leg of this aspect will be to ascertain whether the respondent is in arrears with the payments or not.

[9] I pause to deal with the notion of the respondent that the R9000 was not to be paid to the applicant directly. It is rejected. The words of the court order and circumstances that it addressed negates such inference. The respondent was represented by counsel at all times. They would have made the terms of the court order clear and his claim

is preposterous. The dichotomy of his version is stressed by the alleged variations he claims. As result of and on his own admission, he did not comply with the court order by not adhering to the method of payment.

III MOTION PROCEEDINGS AND NON-COMPLIANCE WITH MAINTENANCE ORDERS

- [10] The applicant sought relief by way of motion that was opposed. For this reason, counsel for the respondent argued that by virtue of the *Plascon Evans* Paints-rule, the version of the respondent must be accepted and the application dismissed.

Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

It is accordingly generally undesirable to endeavour to decide an application upon affidavit where the material facts are in dispute. In such a case it is preferable that oral evidence be led to enable the court to see and hear the witnesses before coming to a conclusion. On the other hand, it is equally undesirable for a court to take all disputes of fact at their face value. If this were done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant. In every case the court should examine the alleged disputes of fact and determine whether in truth there is a real issue of fact that cannot be satisfactorily resolved without the aid of oral evidence. Whether a factual dispute exists is not a discretionary decision; it is a question of fact and a jurisdictional pre-requisite for the exercise of the discretion given by the rule.⁸

- [11] The Legislator in the Maintenance Act⁹ and the Constitutional Court in *Bannatyne v Bannatyne and Another* (CCT18/02) [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) (20 December 2002) declared the failure to comply with a maintenance order a criminal offence and a contravention of section 28(2) of the Constitution of the Republic of South Africa, 1996.

⁸ Derek Harms, *Civil Procedure in the Superior Courts*, Last Updated: June 2019 - SI 65 at 6.42 to 6.52.

⁹ Section 31. Offences relating to maintenance orders.—(1) Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine. [Sub-s. (1) substituted by s. 13 (a) of Act No. 9 of 2015.]

[12] The Constitutional Court also concluded that the maintenance court is the most appropriate forum to inquire into changed circumstances surrounding the maintenance of minors and decide a matter.¹⁰ I agree and specifically because the system was developed for the uniqueness of maintenance matters. Motion proceedings applying the contempt of court remedies often leave more questions than answers in these instances. It might be the case here.

1. The veracity of evidence cannot be tested by cross examination. The courts are restricted by the Plascon Evans-principle. The inquiries in terms of the Maintenance Act are inquisitorial in nature and the presiding officer may convert criminal proceedings into inquiries. In effective maintenance courts with good legal and administrative infrastructure the child's interest is strengthened by maintenance officers and maintenance investigators that can detach themselves from the parental feuds that more often than not cloud the real facts. It is also a cheaper method to compel compliance. *Mero moto* referral to the Children's Court and the Office of the Family Advocate are also on the table.
2. The threat of incarceration may encourage the respondent to comply with the order but it is difficult to establish on paper; as is the case here, what the amount in arrears is. If he is found in contempt because he failed to pay the monies on or before the 1st of each month and directly to the applicant, it will not remedy the arrears effectively.
3. The prayer to the court in the notice of motion is that the respondent be committed to imprisonment for a period not exceeding ninety days for the contempt. During the hearing suspension of the sentence for three years was suggested. The condition of the suspension was not proposed and did not include the payment of any amounts in arrears. It is trite that conditions of suspension must be clear and unambiguous.
4. Imprisonment, constitutionally so, is the last resort; it will also cause the respondent in this instance to lose income and to the detriment of the minor. There seems to be a strong bond between the parties and their son and the litigation that includes a threat of imprisonment of his father is traumatic.

¹⁰ In terms of the Maintenance Act: "maintenance order" means any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person;

IV THE “SHIFREN-SCHAKLE”

[13] The facts here resemble the *GF v SH* 2011 (3) SA 25 (GNP) (“GF”) and *SH v GF* 2013 (6) SA 621 (SCA) (November 9, 2017) (“SH”) scenario. I am in full agreement with Kollapen, AJ in her finding that it is crucial that non-variation clauses may be relaxed in maintenance matters but for it to be interpreted and applied restrictively and with utmost care.

[18] While the Shifren principle was not articulated as being confined to contracts of a commercial nature, and on the face of it would have general application, it must also be evident that, in matters that relate to the rights and obligations (in the context of family law), different considerations, distinguishable from those applying in the world of commercial contracts, may well warrant consideration.

[19] Those considerations include:

[19.1] The constitutional imperative that in all matters concerning children the principle of the best interests of the child must apply as a guiding and paramount principle.

[19.2] The obligation of parents to maintain their children in accordance with their ability, as well as the needs of the minor children. It should follow that it is indeed a matter of public policy to ensure that those guiding principles, insofar as they relate to the reciprocal and mutual reinforcing obligations of parents, are maintained and are not sacrificed, as it were, at the altar of ensuring certainty at all times.

[19.3] The fact that in the real-world parents, entrusted with the responsibility of ensuring that the best interests of their minor children are advanced, must invariably make decisions that may warrant a departure from, or a variation of, the express terms of a settlement agreement. It would be impractical and inconvenient to suggest that, in all such instances, and in the face of a non-variation-except-in-writing clause, parents should then be constrained in their ability to take decisions and to do things, even by mutual agreement that would advance the interests and the wellbeing of such minor children.

[20] Certainly, and for the considerations alluded to above, there must be instances where public policy may justify a departure from the Shifren principle in the area of family law. Without suggesting that such departure should be easily justified or readily countenanced, there must be due regard to the context within which parenting takes place, and within which decisions that may on the face of it vary an express obligation, are arrived at to attain some other socially desirable objective — the best interests of the child. In all the circumstances the demands and the consideration of public policy, in the context of ensuring the development of family law, that are consistent with the values of the Constitution, including the values of equality and non-discrimination, as well as ensuring the advancement of the best interests of the child, would in my view, in appropriate instances and where a proper case is made out, certainly justify a departure from what has become known as the Shifren principle.

[14] What further discerns the legal issue linked to minors is the fact that the High Court is the Upper Guardian of all minors within its jurisdiction; it is the constitutionally mandated duty of courts to ensure that archaic rigid manacles do not affect the best interest of children.

[15] Much has been written and debated by esteemed academia and courts.¹¹ I will not reiterate the contemplations; suffice to find that the words of Davis J set the standard when he remarked in *Mort NO v Henry Shield-Chiat* 2001 (1) SA 464 (C) at 475: “[t]he task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution.” The primary principle to consider in maintenance matters that involve minors is whether it would have been in the best interests of the children to enforce the non-variation clause, had there been an actual variation. The Bill of Rights is instructive that in every matter pertaining to a child, the best interests of a child are of paramount importance. Based on the public policy enquiry it is the yardstick to justify overcoming the strictures of the Shifren-principle. As Kohn¹² put it:

In this article I have sought to illustrate how the recent efforts of our high courts reveal that although Shifren remains part of our law, it is no longer an insuperable obstacle to ensuring equity in contractual relations. The trilogy of cases I have discussed shows how recourse to the flexible and evolving doctrine of public policy – particularly through the second leg of the public policy test – can, through a nuanced and reflective analysis, ensure that Shifren is relaxed where the circumstances so demand and in a manner which strikes the right balance between the interests of the parties.

[16] All said; this court is bound by the *maxim stare decisis et non quite movere* (Stare decisis-rule).¹³ The Supreme Court of Appeals in a unanimous judgment¹⁴ in the SH-case decreed that:

¹¹ See Ismail, Riaz, *Non-Variation Clauses, Public Policy and Fairness* GF v SH 2011 3 SA 25 (GNP) and SH v GF 2013 6 SA 621 (SCA) (November 9, 2017). Journal of Contemporary Roman-Dutch Law, Vol. 80, p. 683-694, 2017. Available at SSRN: <https://ssrn.com/abstract=3175800>, Posted: 22 May 2018 and Kohn, L. ‘*Escaping the “Shifren shackle” through the application of public policy: An analysis of three recent cases shows Shifren is not so immutable after all*’ (2014) 1 Speculum Juris 74. In ER v LB unreported case no 2237/2013 [2013] ZAWCHC 161 (11 September 2013) para 27, which was handed down shortly before De Haas, the court quoted with approval from GF and thereby highlighted the importance of the „best interests of the child“ criterion in tipping the public policy scales in favour of a departure from Shifren in the family law context.

¹² At footnote 246 and 247 in the text of the article referred to above.

¹³ Malcolm Wallis, Judge of the Supreme Court of Appeal: *Whose decisis must we stare?* 2018 SALJ 1-17.

¹⁴ Van der Merwe AJA (Mthiyane AP, Theron JA, Petse JA and Zondi AJA concurring).

[16] In any event the view of Kollapen AJ that in the light of the oral agreement of variation of the maintenance order it would offend against public policy to enforce the non-variation clause, cannot be endorsed. This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of public policy, and this is now rooted in the Constitution. See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767A – C and *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363) paras 7, 8, 90 and 91. Despite the disavowal by the learned judge, the policy considerations that he relied upon are precisely those that were weighed up in *Shifren*. In *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd and Others as Amici Curiae)* 2011 (5) SA 329 (SCA) para 35 Brand JA said:

'As explained in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (para 8), when this court has taken a policy decision, we cannot change it just because we would have decided the matter differently. We must live with that policy decision, bearing in mind that litigants and legal practitioners have arranged their affairs in accordance with that decision. Unless we are therefore satisfied that there are good reasons for change, we should confirm the status quo.'

[17] Working on the law that the non-variation clause is not surmountable the inevitable outcome on the legal principles is to reject the variation alleged. In any event; the facts point to the same outcome. Consensus, on the evidence, is highly improbable between the parties. The decisions taken by the respondent was unilateral and did not comply with the deed of settlement. This brings me to the matter of the arrears.

V THE ARREARS

[18] The evidence shows that the relationship between the parties in this case is vile and obstructive. Tragically it is the norm in cases such as these; it is the root of perpetual litigation and obstruction of the administration of justice and justice for children.

[19] Preller¹⁵ said it as it is:

The goal for divorced or separated parents should always be to maintain the best co-parenting relationships possible by moving past previous relationship issues and focusing on children's well-beings. A great percentage of parents that divorce or separate see conflict as an inevitable part of the process and are determined to fight battles in court despite this not necessarily being in the best interest of their children.

A great percentage of parents that divorce or separate see conflict as an inevitable part of the process and are determined to fight battles in court. From time to time one comes across an intransigent

¹⁵*Everyone's Guide to Divorce and Separation*, EAN: 9781770225299, <http://zebra.bookslive.co.za/blog/2013/06/07/bertus-preller-childrens-needs-should-be-put-first-during-divorces-or-separations> accessed 25 October 2019.

parent who is incapable of objectivity when considering what is best for the child. It may well be that you do not like your partner, but the child's view of the parent is different. He or she will have love and trust for that person, capable of transcending even the most dreadful scenes that may have been witnessed.

[20] In addition to the above I add that apart from dragging innocent children into immature battles and power games;¹⁶ it is expected from courts to sift through voluminous allegations slung to and from the litigants on paper. The respondent gave an extensive computation of the maintenance payments. It is also a reality that the order was made in 2010 and the case only lies before the court 9 years later. Evidence was destroyed and is not available anymore. It affects the cases of both parties. The record of the respondent's case consists of a 32-page statement and 526 pages of financial statements. It does not solve or proof the question of whether or not the respondent is in contempt of court pertaining to the arrears.

[21] The evidence shows that the bond between father and son has strengthened and "U" spent more time with the respondent. The increase in time spent with the respondent had the effect that he had to spend more money on him. The allegation by the respondent is that there was an agreement to adapt the maintenance payment accordingly. The applicant's reply to this is: "It does not mean that the respondent was entitled to unilaterally deduct what he spent on "U" from the maintenance he was obliged to pay." Any hint of consensus between the parties on the maintenance of the minor is rejected by the applicant by stating that there was seldom any meaningful discussion between herself and the respondent but constant conflict prevailed, especially against the background of his failure to comply with the provisions of the court order and pay in terms thereof.

[22] The payment and calculation of maintenance monies are pure cold accounting. It is devoid of emotions. Neither the courts, nor counsel or the parties may allow for it to turn it into psychological warfare. As soon as the court order had been made it must

¹⁶ It was stated by the respondent that the minor could testify that he is satisfied with the way his father cares for him. The mother paints a picture of unpaid maintenance monies and consequent hardship suffered by her and the minor. He realised that his parents are embroiled in litigation about him and it upset him greatly. He apparently ended up in the emergency ward of a local hospital with a panic attack after the situation became known to him.

cause stability. It caused emotional mayhem in this case due to the conduct of both parties. The parties should have; with or without the assistance of their legal representatives, ensured that the changed circumstances culminated into and be captured in formal detailed Maintenance Court Orders. The justice system was available to them and did not fail any of the parties; it is the parties and their legal advisors that failed the minor child and themselves by not applying the law effectively.

[23] The applicant, on her own version, remained “silent” on the issue until 2018; for about six years, when she approached her current lawyer and they started correspondence in which the non-payment of maintenance toward “U” was addressed.

[24] The applicant’s case is unreliable. There is a severe want of proof therein. Her application is based on:

For the years 2011 to 2012 the respondent paid maintenance in accordance with the agreement although he did not adjust the maintenance upwards as provided for in clause 2.2. For the years 2013 to 2017 I have no record of the respondent paying maintenance as provided for in the agreement.¹⁷

And: “For the year 2018 he paid an amount of R35 000-00 and for 2019 up to date hereof he paid R10 000-00. These are amounts paid to me as provided for by the settlement agreement. Apart from this he did make payments towards certain needs of “U” but did not provide me with any detail of payments he allegedly made.

[25] She then proceeded to state that: “I have caused a calculation to be made of the maintenance the respondent should have paid and what he in fact paid and I attach the same hereto marked annexure ZJ5 which calculations speak for themselves.”

[26] In the next instance she admitted that the calculations might be wrong and need to be adjusted and that she is not in a position to furnish the exact amounts the respondent paid. The total amount outstanding was reflected on page 37 of the record to be R875 624,1506; on page 38 an amount of R171 283,6385 is depicted. The total amount was severely adjusted to R344 618.70 in her replying affidavit after she

¹⁷ Paragraph 5.1 of the founding affidavit.

directed the court to errors in the calculations and statements supplied by the respondent.

- [27] Absurdly in the face of an application for contempt of court, she held that: “The respondent is in the excellent position to give a proper account of all payments he has made towards “U’s” maintenance over the years and I invite the respondent to fully disclose to this court, supported by vouchers, what payments he made in respect of “U’s” maintenance.”
- [28] The real situation evades the court. The parties cannot adduce effective evidence on which the court can make a finding as to whether the respondent is in arrears.
- [29] The parties should have realised on the available evidence and animosity that a formal maintenance inquiry would have been the most suitable to establish the real situation.
- [30] Since it cannot be established that the respondent is in arrears with the payments the next step will be to adjudicate the alleged contemptuous intent and unlawfulness by the respondent to not pay the maintenance directly to the applicant and in the amount and at the time prescribed.

VI CONTEMPT OF COURT

- [31] The law on contempt of court is established in the South African common law and legislation. It is an imperative in the administration of justice and the stability of democracy. Cameron J noted in the Fakie-case¹⁸ that disobedience to the courts sullies the authority of the courts and the rule of law.
- [32] The notion is ever so real in maintenance cases.¹⁹ The preamble of the Maintenance Act guarantees social and constitutional stability, security and equality to the victims

¹⁸ 2006 (4) SA 326 (SCA).

¹⁹ CR Snyman, *Criminal law*, 6th edition. LexisNexis. Last Updated: 2014 at 315 to 327.

14 Failure to comply with an order of court

A party to a civil case against whom a court has given an order, and who intentionally refuses to comply with it, commits contempt. Such contempt is, however, hardly ever charged as a criminal offence by the state, and it is left to the party in whose favour the order has been given to apply to court, if he so wishes, to convict the

of perpetrators of maintenance orders. Court orders must instil order and protect the vulnerable.

- [33] The Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017)²⁰ addressed the complexities that evolved over the decades.²¹ Procedural and substantive issues concerning the requirements of contempt of court were raised.

defaulting party. Such an application is merely a way of enforcing the court order because if the application is successful the sentence, such as imprisonment, is almost always suspended on condition that the defaulting party comply with the order in the manner prescribed by the court. Although this form of contempt is usually referred to as "civil contempt" because it is usually dealt with by civil law only, there is nothing to prevent the Director of Public Prosecutions from indicting for criminal contempt of court in such a case if he thinks the circumstances merit public prosecution.

²⁰ <http://www.saflii.org/za/cases/ZACC/2017/35.html>.

²¹ CR Snyman, *Criminal law*, 6th edition. LexisNexis. Last Updated: 2014 at 315 to 327.

1 Definition Contempt of court consists in unlawfully and intentionally

(a) Violating the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity; or

(b) Publishing information or comment concerning a pending judicial proceeding which constitutes a real risk of improperly influencing the outcome of the proceeding or to prejudice the administration of justice in that proceeding.

2 Elements of the crime

The elements of the crime are the following: (a) (i) *the violation of the dignity, etcetera of the judicial body or judicial officer; or (ii) the publication of information or commentary concerning a pending judicial proceeding, etcetera; (b) the administration of justice by the courts; (c) unlawfulness; and (d) intention.*

3 Unusual features of crime

The crime is characterised by the following unusual features:

Firstly, contempt of court manifests itself in a variety of forms, some of which have requirements all of their own (e.g. the requirement in cases of publication of information which has the tendency to prejudice the outcome of a case that the case must still be pending (*sub iudice*)). Because of this the crime can in a sense be subdivided into a number of "sub-offences", which [Page 316] often have requirements of their own. These particular forms of the crime will be discussed separately below. In fact, the expression "contempt of court" can be regarded as a collective noun for a number of different crimes that have certain features in common.

Secondly, certain cases of contempt of court are dealt with, not by the ordinary criminal processes, but by civil law. These are cases where there has been non-compliance with a court order in a civil case, and where the litigant in whose favour the court has made the order seeks to implement it by requesting the court to punish the defaulting party for contempt of court if the order is not complied with. It has now been settled, however, that these so-called cases of "civil contempt" also constitute the crime of contempt of court: the Director of Public Prosecutions is free to charge a person with contempt of court in these cases too.

A *third* peculiarity of this crime is that its perpetration may sometimes call for a drastic procedure in terms of which a judge or magistrate may convict and punish somebody for contempt of court committed inside the court in the presence of the judge or magistrate.

During the period after (and even shortly before) the introduction of the new Constitution with its Bill of Rights, the field of application of this crime had shrunk, especially because of the right to freedom of expression and of assembly and demonstration enshrined in sections 16 and 17 of the Constitution. Conduct such as demonstrations in favour of a certain verdict in front of courts, or criticism of courts and judges seem, nowadays, not to lead to prosecutions for contempt, unless there are exceptional circumstances. As a result the older case law dealing with this crime, which tended to overprotect the judiciary, should be read with caution and reservation, and a readiness to adapt the law to the new human-rights dispensation in terms of the new Constitution.

1. The legal nature of the common law phenomenon is uncertain. There is a widely held view that contempt of court is neither criminal nor civil.
2. What must the procedural vehicle that brings the issue before court be? Cases concerning contempt of court are now brought to our courts with more frequency and by way of motion. Courts often employ summary contempt procedures followed by imprisonment in motion proceedings. The dichotomy of civil proceedings that cause imprisonment begs the question whether motion procedures are suitable for all issues? Should it then not be enrolled in courts by the only authority empowered to prosecute crime; the National Prosecuting Authority?
3. The fair trial principle comes to the fore. Frequently, the resultant committal to prison violates the right to freedom and security of the person – which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial – in terms of section 12(1) and the fair trial rights in terms of section 35(3) of the Constitution.

[34] The conclusion of the Constitutional Court²² indicates that the declaration of an entity to be in contempt of court has a hybrid status to be applied according to the facts of each case. Contempt of court as remedy for the disobedience to a court order and consequential imprisonment passed constitutional muster in the protection of the judicial authority of courts. Both civil and criminal procedure law may be applied, the standard of proof must be applied in accordance with the purpose sought to be achieved and that is the consequences of the various remedies that is sought.

[35] To reiterate, non-compliance with a maintenance order is a crime and the penalty imprisonment. The onus is on the applicant to prove beyond a reasonable doubt that the order was not complied with and that the respondent acted with male fides and wilful. If after the case for the applicant was concluded and prima facie evidence points to his guilt, the respondent has a case to answer. If reasonable doubt exists at the end of the case the court may not declare contempt.

[36] Reading of the papers directs to an arrogance of the respondent that boils down to contempt; contempt towards the right of the applicant to have equal input and

²² *Matjhabeng Local Municipality* at paragraphs 46 to 62.

treatment during the financial care of the minor, contempt towards the truth and towards the court. On his own version he unilaterally decided how and when to pay the maintenance. He had the luxury of legal representation and years of rows over the issue confirms this.²³ His claim of ignorance of the law was thus rejected.

VII CONCLUSION

[37] The crucial question the court must decide is whether the minor child had been and is being cared for in terms of the decree in the Constitution of the Republic of South Africa, 1996 read with the law of maintenance and care of minors in South Africa. Included herein is the stability that must exist in law to protect the care of minor children that is proclaimed in the Constitution. The case resorts within the Family Law realm and is definitely not for the protection of commercial assets. Secondly lies the protection of the judicial authority of the court as balanced with the democratically proclaimed freedom of parties to contract. Slotting in herewith is the duty of the High Court as Upper Guardian of all minor children in its jurisdiction to protect these children even against the actions and contracts of their biological parents that were entrusted with their care in terms of the law. Lastly is it for the court to comply with the law of evidence and procedure to ensure an outcome that serves the focus above ultimately.

[38] The *sui generis* nature of maintenance matters demands that the court invokes its inherent jurisdiction and refer the matter for trial on the issue of the arrears. Hearing in this instance not to preclude any process provided for this purpose in the Maintenance Act 99 of 1998. It is imperative and in the interest of justice that the matter of the arrears be resolved.

²³ *Bannatyne v Bannatyne and Another* (CCT18/02) [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) (20 December 2002):

[29] Compounding these logistical difficulties is the gendered nature of the maintenance system. The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.

[30] These disparities undermine the achievement of gender equality which is a founding value of the Constitution.²³ The enforcement of maintenance payments therefore not only secures the rights of children; it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism. Fatalistic acceptance of the insufficiencies of the maintenance system compounds the denial of rights involved.

[39] The applicant is declared to be in contempt of court in relation to the provisions of the order of this court handed down on 21 October 2010 to the extent that the instalment amount of R9000 and the yearly increase was not paid to the applicant directly and on or before the first of each month.

[40] The respondent is sentenced to imprisonment but to be wholly suspended. Since the arrears cannot be determined on the evidence and the dispute is severe, it is only the method of payment that can be managed as a condition of the suspension.

[41] Each party must pay its own costs because as I already pointed out; the parties are both to be blamed for the issues that gave rise to the litigation.

VIII ORDER

1. The respondent is declared to be in contempt of the court order dated 21 October 2010 under case 4839/2010 and committed to imprisonment for a period of ninety days that is wholly suspended for three years on condition that the respondent shall comply with the method of payment as decreed in the court order. The instalment to include the increase and calculated as prescribed in the court order and to be paid on or before the 1st December 2019 and thereafter on or before the first of each subsequent month.
2. The dispute in regard to the specific amount in arrears is referred for trial.
 - 2.1 Trial in this instance not to preclude any process provided for this purpose in the Maintenance Act 99 of 1998.
 - 2.2 The notice of motion in the application shall stand as the applicant's simple summons.
 - 2.3 The respondents' answering affidavit shall stand as the respondents' notice of intent to defend.
 - 2.4 The applicant shall, as plaintiff, within 20 days of the date of this order deliver her declaration.
 - 2.5 The further exchange of pleadings and pre-trial procedures, including discovery and the request for and provision of trial particulars, shall be regulated by the Uniform Rules of the Court.

3. Each party to pay their own costs.

M OPPERMAN, J

Appearances

For applicant: ADV. F VAN RENSBURG

Chambers

Bloemfontein

Instructed by: HAASBROEK & BOEZAART INCORPORATED

c/o WILLERS ATTORNEYS

Bloemfontein

For respondents: ADV. S TSANGARAKIS

Chambers

Bloemfontein

Instructed by: HONEY ATTORNEYS

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