



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No.: 11852/2015

In the matter between:

HAYWANTHIE DEENANATH

APPLICANT

and

RONNIE DEENANATH

1ST RESPONDENT

GYANWATHIE GUNGADEEN

2ND RESPONDENT

SHORLEY CHEDDY

3RD RESPONDENT

REGISTRAR OF DEEDS, KZN

4TH RESPONDENT

REGISTRAR OF CLOSE CPRPORATIONS

5TH RESPONDENT

RAM'S CHAIRS CC

6TH RESPONDENT

SIYACOPHELELA CC

7TH RESPONDENT

J U D G M E N T

CHETTY J:

[1] This is an application in which the estranged spouse of the first respondent¹ has brought an application seeking his committal to prison, periodically, on the grounds of his contempt of an order requiring him to pay maintenance *pendent lite* to

¹ Only the first respondent has opposed the application. He is referred to in the remainder of the judgment as the respondent.

the applicant and her minor child in the amount of R10 000 per month. This order was granted by Balton J on 13 February 2013. In terms of a second order granted on 9 May 2013 by Madondo J (as he then was), the respondent is alleged to be in contempt as he has failed to pay a contribution towards the applicant's costs in the amount of R165 000. Of that amount, only R4000 has been paid leaving the balance of R161 000 outstanding. In respect of the maintenance order granted on 13 February 2013, the amount outstanding as at November 2015 was R322 643.00. At the time of hearing this matter, counsel for the applicant informed me that the arrears in respect of maintenance stood at R393 500,00. It is the alleged wilful non-compliance with these orders that has given rise to this application.

[2] The gravamen of the respondent's opposition is that he is financially not in a position to comply with either of the orders and that his inability to pay is neither wilful and or *mala fide*.

[3] The issue to be determined is whether the respondent has placed sufficient evidence before this court to discharge the evidential burden in relation to the wilfulness and *mala fides* of his conduct in failing to satisfy the two orders granted by this court. The onus is on the applicant to prove that the respondent had knowledge of the orders and that there has been non-compliance therewith. These aspects are not in dispute inasmuch as the respondent was represented by counsel at the time when both orders were made. Subsequent thereto, the respondent has been legally represented throughout and has not raised the service of the orders on him as a ground of opposition. As such, the respondent bears the evidential burden in relation to the issues of wilfulness and *mala fides*.

[4] It is common cause that the applicant instituted divorce proceedings against the respondent in 2005 on the basis of his alleged infidelity. The matter was set down for trial in May 2013, at which time it ran for a period of 10 days. Since then the parties have attempted to settle the matter but to no avail, with both parties claiming that the other has been guilty of making unreasonable demands, rendering the prospect of settlement illusory.

[5] It has regrettably become all too common in divorce litigation that allegations are traded back and forth between the parties, with scant regard for the obligation to comply with orders issued by the court. Legal representatives of the parties appear to do little to cause the parties to act with restraint towards each other, with the result that after significant passage of time, the courts are called upon to decide whether a party has acted in wilful defiance of its orders. In the interim, the party who has been reliant on relief secured, such as interim maintenance, is greatly prejudiced. More importantly, where awards are made in respect of maintenance towards the upkeep and well-being of a minor child born of the union, parties often lose sight of the purpose for which such orders are made. The rights of the child become relegated to matters of secondary, or sometimes no importance, while the battle between the spouses takes centre stage. In this particular matter, while the respondent has not complied with the order in respect of maintenance towards the applicant and their minor child, the affidavits allege that he has spent various sums towards his child, purchasing items of furniture for him, as well as taking him on holidays. The applicant argues that such expenditure does not absolve the respondent of his responsibility to comply with the orders of court, and furthermore it begs the question as to how he has managed to pay for such holidays or furniture, when he has in essence pleaded financial inability to comply with orders for maintenance and costs.

[6] The defence raised by the respondent will be dealt with in detail below, save that Mr *Fleming*, who appeared on behalf of the respondent, submitted that the purpose of contempt proceedings in such cases is not to secure the committal of the errant party, but rather is a means to secure his or her compliance with the order of court. In this regard he submitted that if the respondent is found to be in contempt and sentenced to a period of imprisonment, such committal would offer no prospect of the respondent being able to pay off the amounts owed to the applicant. On the other hand, if he were not sent to prison, there remains the possibility that the orders could be complied with. Counsel relied on the decision in *Dezius v Dezius* 2006 (6) SA 395 (T) where Patel J carried out an extensive overview of foreign and local jurisprudence on the origins of contempt. In particular the court at para 5 noted the following:

‘Lord Ormrod in *Ansah v Ansah* [1977] 2 All ER 638 (CA) aptly alluded that:

“Such a breach or breaches of an injunction in the circumstances of such a case as this do not justify the making of a committal order, suspended or otherwise. Breach of such an order is, perhaps unfortunately, called contempt of court, the conventional remedy for which is a summons for committal. But the real purpose of bringing the matter back to the court, in most cases, is not so much to punish the disobedience, as to secure compliance with the order in the future. It will often be wiser to bring the matter before the court again for further direction before applying for a committal order. Committal orders are remedies of last resort; in family cases they should be the very last resort. They are likely to damage complainant spouses almost as much as offending spouses. . . .”

[7] The court in *Dezius* para 6 noted that an offender should not be deprived of his liberty without procedural fairness and safeguards, and only after conclusive proof has been established of the disobedience of the court order in question. It follows therefore that where the deprivation of liberty is the relief sought by the party seeking a contempt order, the facts in the matter must be closely scrutinised. It bears noting that the converse of this argument, and one relied on by Mr *Haasbroek*, who appeared for the applicant, was that echoed by Mokgoro J in *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) who stated at para 27 that:

‘Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The Judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.’

[8] By way of background, it is important to note that prior to the two orders in respect of which the respondent is alleged to be in contempt of, the applicant brought two applications in terms of Rule 43, on 26 August 2005 and 15 November 2010 respectively. In respect of the first mentioned order, Hugo J ordered the respondent to pay the applicant maintenance in respect of herself in the amount of R 3 500 per month, as well as maintenance for the minor child in the amount of R1 000

per month, and a contribution towards her legal costs in the amount of R7 500. In respect of the second order, Jappie J (as he then was) granted an order directing the respondent to pay maintenance to the applicant for herself and the minor child *pendent lite* in the amount of R7 500 per month as from 7 December 2010. In addition, the court ordered the respondent to pay a contribution towards the applicant's costs in the amount of R7 500.

[9] In terms of the schedule of maintenance payments made and those owing, which was attached to the applicant's founding papers, it appears that the respondent made payment between June 2013 and November 2013 in respect of his maintenance obligations, in the total amount of R16 500. For the same period, he paid a total of only R4 000 in respect of his contribution towards the applicant's legal costs.

[10] In light of the applicant's legal costs beginning to escalate as a result of the protracted divorce proceedings, she brought two further applications in terms of Rule 43 and was granted the orders which form the subject matter of this contempt application. Both parties in their respective affidavits have alleged that the other's legal costs have escalated to enormous proportions. According to the applicant, even at the time when the orders in February 2013 and May 2013 were granted by Balton J and Madondo J, the respondent on each occasion had pleaded that he was financially unable to comply at that stage. Despite this plea of 'poverty', the court nonetheless granted the orders.

[11] According to the applicant, apart from the paltry payments made by the respondent, he has resolutely failed to obey the orders while at the same time engaging in a lifestyle of holidays and a high-living, both of which he denies. On the other hand, the applicant states that she is compelled to eke out an existence for herself and their minor son. This, the respondent strenuously disputes.

[12] In substantiation of her contention that the respondent has embarked on a stratagem to prolong the divorce proceedings for as long as possible in an attempt to wear her down, the applicant points out that she has not had the necessary injection of legal funds to allow for her attorney to set the matter down for continuation of the

trial. It would appear that both parties certainly cannot restore the bonds of their marriage and that their dispute relates primarily to the assets in the joint estate. The applicant however points out that the respondent is clearly in a better financial position to set the matter down for trial, but he has not seen it fit to do so.

[13] As regards the allegations of his lavish lifestyle, the applicant alleges that the respondent has purchased a new vehicle for his partner, Ms Cheddy (the third respondent). In addition, the founding papers allege that the respondent hosted a birthday party for his minor son at his house, indicative that he has sufficient funds to pay for a party but no funds to comply with his obligation to pay maintenance. The same sentiments are expressed in relation to a lounge suite purchased by the respondent for his son, as well as having taken his son on holiday to Johannesburg in 2014. The applicant further alleges that the respondent and Ms Cheddy embarked on a luxury holiday to the Maldives in June 2014, a holiday to Cape Town in January 2015 and an overseas trip with his son to Disney World in October 2015.

[14] In respect of the various holiday trips referred to above, the respondent denies that such holidays were paid by him personally except those in relation to the expenses pertaining to his son. The respondent concedes that *some* of these expenses were paid using his credit card.

[15] The applicant further contends that the respondent has carried out extensive structural improvements to their matrimonial home, which she estimates to be in the region of R113 500. In response he denies the estimates put up by the applicant, but concedes having undertaken the alterations. Despite a dispute as to how often the respondent continues to live in the matrimonial home, it was common cause that until recently he slept over at the matrimonial house on possibly two nights per week. Recently and prior to the present hearing, the respondent moved out from the matrimonial home due to the illness of his mother, and now lives with her. It is also not disputed by the respondent that he operates his business from part of the matrimonial home.

[16] In reply of these allegations, the respondent contends that while he may not have complied with the orders for maintenance and costs, he has however paid the

water, lights and revenue bills in respect of the matrimonial home, from which the applicant and their minor child have derived benefit. To that extent, he argues that his failure to pay is not wilful or *mala fide*, and accordingly he cannot be found to be contempt of court.

[17] The applicant disputes that any payment of utility bills by the respondent can constitute a defence to the contempt application. It was contended that he should be directed to serve a period of imprisonment in the form of periodical imprisonment, as he can well afford to pay the amounts of maintenance and costs ordered by this court, but that he steadfastly refuses to do so.

[18] When the matter came before me on 23 September 2016 Mr *Flemming* moved an application for the admission of a supplementary answering affidavit. The application was issued on 15 September 2016, and served on the applicant's attorney on the same date. This was two weeks before the hearing on the opposed roll. Mr *Haasbroek* opposed the introduction of the answering affidavit, despite his client having already prepared a reply thereto. To that end, he conceded that even if I allowed the introduction of the affidavit, the matter could still proceed without the need for it to be adjourned. The fact that the applicant's counsel was prepared to proceed with the matter is only but one aspect of the enquiry as to whether I should, in the exercise of my discretion, permit the introduction of an affidavit at this late stage. Of equal importance is the opportunity afforded to the court to have regard to the contents of any replying affidavits from the applicant and the time to be accorded to the court for that purpose. While the applicant's counsel would not be at a disadvantage, it is unfair to the presiding judicial officer to be expected to adjudicate an opposed motion where arguments would be advanced on affidavits, which he or she has not had the opportunity to properly consider in the fullness of time.

[19] On the face of it, this matter was certified by the applicant's attorney as being ready for the allocation of a date on the opposed roll as far back as 22 March 2016. It is an accepted practice that a court will exercise its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. See *Bader & another v Weston & another* 1967 (1) SA 134 (C) at 138D;

Dickinson v South African General Electric Co (Pty) Ltd 1973 (2) SA 620 (A) at 628F; *Cohen, NO v Nel* 1975 (3) SA 963 (W) at 970B; *Dawood v Mahomed* 1979 (2) SA 361 (D) at 365H. In *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons, NO* 1963 (4) SA 656 (A) the court noted that while the general rules regarding the number of and proper sequence of affidavits should ordinarily be observed, some flexibility must necessarily also be permitted. The court went on to add at 660D-H that:

'It is in the interests of the administration of justice that the wellknown and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided Provincial Courts in exercising a discretion to admit or reject a late tendered affidavit (see e.g. authorities collated in *Zarug v Parvathie* 1962 (3) SA 872 (N)). It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry.'

See too *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) where the court at 617B-E set out some of the factors to be considered in deciding such an application. These include:

- (a) the reason why the evidence was not produced timeously;
- (b) the degree of materiality of the evidence;
- (c) the possibility that it may have been shaped to 'relieve the pinch of the shoe';

- (d) the balance of prejudice to the applicant if the application is refused and the prejudice to the respondent if it is granted; and
- (e) the stage which the particular litigation has reached.

[20] In his affidavit setting out the basis for the court to allow the admission of his supplementary answering affidavit, the respondent submits that the information contained in the supplementary affidavit would be of assistance to the court as it would show the applicant to have been dishonest in her founding affidavit, and in particular, that she is involved in the running of a busy catering enterprise, which facts have thus far been hidden from the court. The respondent filed his answering affidavit on 13 January 2016. The information which he seeks to place before this court refers to events on 5 February, 6 February and 8 February 2016. He also alludes to certain email messages exchange between the applicant and one Keshia Persathan in August 2016, making reference to the applicant having been engaged in certain business activities. In addition, the respondent attaches photographs of the motor vehicle which the applicant uses, operating under the name of Vernon's Catering and Function Hire.

[21] The respondent contends that the applicant will not suffer any prejudice by the introduction of the evidence contained in his supplementary answering affidavit as all of this evidence is irrefutable. This was certainly not the impression that I gained from the response of the applicant's counsel. In any event, the applicant's stance is that the information which the respondent seeks to place before this court at this late stage is wholly irrelevant to the issue of whether the respondent is in contempt. See *South African National Roads Agency v City of Cape Town* [2016] JOL 36668 (SCA) para 110.

[22] Having regard to the factors which the court alluded to in *James Brown & Hamer* supra, the respondent's affidavit is silent as to why he was unable to file this affidavit as soon as he became aware of the facts alluded to by him. There is no explanation as to what factors account for the delay from February 2016 (when part of the information which he seeks to place before the court came to light) and thereafter from 8 August to 15 September 2016, assuming that he brought these matters to the attention of his attorney, in the full knowledge that this matter was set

down for 23 September 2016. The respondent's counsel was unable to provide any response to this enquiry during the course of the hearing. One would have expected that the respondent or his attorney would have acted with the necessary promptitude, particularly in light of the applicant seeking the respondent's committal to prison for contempt. That apart, where the matter also concerns maintenance of a minor child, a greater sense of urgency should prevail.

[23] The matters alluded to in the supplementary affidavit do not take the enquiry into the respondent's alleged contempt any further. The respondent in his answering affidavit filed in January 2016 clearly sets out that he should not be held in contempt because of his dire financial circumstances. In particular, he states at paragraph 27 of his answering affidavit that he is not in a position to make any contribution towards the orders made by this court :

".... The applicant on the other hand does not even need any assistance given her being flush with money. She pays cash to the sixth respondent (Ram's Chairs cc) for all orders that she placed the sixth respondent. She also uses Vernon's Catering as a front to conduct our business. She was also operating a lucrative catering business under the name of Las Vegas Lighting and Decor, and on it being brought to her legal representative's attention that we are fully aware of this lucrative business, she ceased using the said name when training.'

The supplementary affidavit sought to be introduced therefore introduces nothing new to the opposition by the respondent. Moreover, no special circumstances have been shown to exist justify the introduction of such affidavit.

[24] In light of the above, I was satisfied that the respondent had not discharged the onus of establishing that it would be in the interests of justice for the admission of a supplementary answering affidavit. Counsel for the applicant asked that the application for the introduction of the supplementary answering affidavit be dismissed with costs, as the applicant had been obliged to prepare a replying affidavit in response thereto, and at short notice. Mr *Flemming* on the other hand submitted that if I was inclined to disallow the application, no costs should be

awarded. I am of the view that costs should follow the result, and the application to introduce the supplementary affidavit is accordingly dismissed with costs.

[25] I now proceed to deal with the primary issue in this application, namely whether there is sufficient evidence before me to conclude that the respondent has acted in wilful disregard for the orders of this court, and acted *mala fide*, justifying the conclusion that he has been in contempt. The test in contempt proceedings has been definitively dealt with by the Supreme Court of Appeal in the decision of *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) where the court importantly noted that:

‘[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

[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).’ (Footnotes omitted.)

[26] This test received the attention of the Constitutional Court in *Pheko & others v Ekurhuleni City* 2015 (5) SA 600 (CC) where Nkabinde J said the following:

‘[28] 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: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that 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.’ (Footnotes omitted.)

[27] The applicant must prove beyond reasonable doubt that the respondent has not merely disregarded the court order, but has deliberately and intentionally violated the “*court’s dignity, repute or authority*”. In her founding affidavit the applicant has detailed the various expenses which the respondent has incurred, which she refers to as his “lavish spending”, which she contends has taken precedence over his compliance with the orders of this court. She further submits that she has been unable to bring finality to the issue of her pending divorce because she has not had the financial means to place her attorneys in funds. Her application to the Legal Aid Board for financial assistance was declined by virtue of her share of the assets forming part of the joint estate. As a result of the respondent’s non-compliance she has also fallen into arrears with her credit card payments to Nedbank, who instituted proceedings against her. These have been stayed, pending the finalisation of this application. She adduced further evidence of being in arrears with her payments of an account with a clothing store, where she purchased clothing for her son, daughter and herself. In short, she is unemployed and has no funds or savings to sustain either herself or her child.

[28] While the applicant contends that the respondent has a 30% member’s interest in the sixth respondent, Ram’s Chairs, the respondent consistently in his answering affidavit adopts the position that he is merely employed by Ram’s Chairs as a Manager and has nothing to do with the matters of Ram’s Chairs for almost two years. He contends that he earns a salary, but has not taken the court into his confidence by producing a salary advice slip from which it can be ascertained the extent of his earnings as opposed to his expenses. For purposes of this application, the court will accept his contention that he is simply an employee.

[29] The respondent also contends that Ram’s Chairs is under business rescue proceedings. He repeatedly makes reference to this fact and contends that in light thereof he is “*presently still not in a financial position to pay the absurd amounts demanded by the applicant.*” He does not say when he will be in a position to satisfy his maintenance obligations and pay the applicant’s costs. He takes the view that the financial imposition placed on him is a demand imposed by the *applicant*. He, or those representing him, appear not to be fully cognisant that the contempt proceedings arise not from the respondent’s non-compliance with a demand

imposed by the applicant, but rather from his non-compliance with two orders of this court. In so far as the reliance on the business rescue proceedings, the respondent has not put up any documentation to indicate at whose instance the business rescue proceedings was initiated, what circumstances led to the business rescue application, the identity of the business rescue practitioner, and what plan has been put in place to steer Ram's Chairs out of its financial predicament. After all, on his version, he is simply an employee.

[30] In dealing with this attack the respondent contends that all of this information could have been obtained by the applicant from attorneys Schoerie & Sewgoolam, who he says are the business rescue practitioners. I doubt that the attorneys have taken on the mantle of being business rescue practitioners, although they may have been responsible for the application placing Ram's Chairs into business rescue. Notwithstanding, it is no answer from the respondent, faced with a prospect of imprisonment owing to his contempt, to say that the financial information pertaining to the business rescue proceedings could be subpoenaed by the applicant from the attorneys dealing with the matter. He adopts a high-handed approach on the basis of him being supposedly financially impecunious. He simply has not put up any information from which his *bona fides* can be gauged. One would have expected him to have stated that since the business rescue of the business, there has been a turn-around in the number of its clients and in respect of orders or bookings. As a manager, he would be able to comment on these matters. His affidavit is silent in this regard. Moreover, I fail to see (on the basis of what is set out in his affidavit) how the business rescue proceedings have adversely affected his earnings as an employee. He has not made mention of a cut in his salary or of him having to work short time. To this end, it is reasonable to infer that the business rescue proceedings have had no negative impact on his earning ability. In addition, as an employee, he would have had to receive notification or a copy of the application papers before the business rescue order was granted. He would therefore have seen a copy of the court application or as a manager, would presumably know when this matter would next be in court. His suggestion that information in this regard should be obtained by the applicant via the attorneys is unhelpful and does his case no good.

[31] The contention of the respondent is that he does not have the means to comply with the maintenance and costs orders. He goes further in his answering affidavit to state that he is not in a position to make 'any contribution' towards liquidating his indebtedness in terms of the orders. This suggests that he is in no position now, or at any time in the future, to comply with any order of this court in so far as it relates to money orders against him. This raises the question as to why the respondent has not sought, to date, to bring an application for the variation of the orders in terms of rule 43(6). The respondent contends that he has not been able to do so because he cannot afford to do so. Again, he bears the onus of placing information before the court from which his financial predicament can be interrogated and assessed. He has chosen not to place such information before the court, and as such, has not discharged this onus.

[32] Mr *Flemming* conceded that in the absence of a variation of the orders granted by Balton J and Madondo J, the respondent is obliged to comply therewith, even if he may hold the view that the applicant is not entitled to it. See *Culverwell v Beira* 1992 (4) SA 490 (W) at 494A where it was held that all orders of court, 'whether correctly or incorrectly granted, have to be obeyed until they are properly set aside'. This principle was endorsed in *Clipsal Australia (Pty) Ltd & others v GAP Distributors & others* 2010 (2) SA 289 (SCA) para 22.

[33] The respondent denies the contention that he leads a lavish lifestyle, yet is unable to honour his commitments in terms of the orders of court. In response to the allegation that he has treated his current partner, the third respondent, to the indulgences of an outing at a spa yet pleads poverty in relation to the compliance with the orders, the respondent states that the trip to the spa, at a cost of R800, was paid for by the third respondent. He further denies that he purchased her a new motor vehicle. This vehicle, a picture of which appears in the applicant's founding papers, with the third respondent standing at its side, according to him, belongs to her. In relation to the allegation that he was responsible for throwing an elaborate birthday party for their son in May 2014, he denies that the function was extravagant in anyway.

[34] Similarly, in response to the allegation that the he paid an amount of R47 712 towards the cost of his daughter's wedding expenses, the respondent admits to having done so, but states that he borrowed the money and points out that it was a fraction of the amount that was paid by the applicant towards the wedding. Counsel for the applicant was quick to point out that the applicant's contribution towards her daughter's wedding is immaterial in the context of this application, in as much as it is the respondent who is alleged to be in contempt and it is he who has pleaded financial inability to comply.

[35] It was further submitted that the respondent's plea of poverty cannot be *bona fide* as he has the means of borrowing money in order to satisfy certain obligations, but is unable to adopt the same approach in order to comply with the obligation to pay his maintenance. Similarly, in response to the allegation of him having purchased a lounge suite for his son for his birthday, the respondent denies this and attributes the lounge suite as a gift from his mother.

[36] The applicant further alleges that in June 2014 the respondent and third respondents embarked on a lavish holiday in the Maldives, which the applicant believes was paid for by the respondent. The latter denies the allegation, contending that the trip was paid for by the third respondent. Similarly, in relation to a holiday to Cape Town in January 2015, the respondent admits having gone on the holiday but contends that this was paid for by friends. Yet again, in October 2015 the respondent took his son on a trip to Disney World in Florida and contends that this was funded from his son's savings and the use of a credit card. Despite his contention that the trip did not cost more than R60 000, the respondent fails to explain to the court what part of the expenses in respect of the overseas trip were paid for by him, and what part were paid from his son's savings. The fact that he may have stayed in fairly modest accommodation is immaterial. The point stressed by Mr *Haasbroek* is that the respondent has the means to access financial assistance for the purpose of holidays or to contribute towards his daughter's wedding (as laudable as this may appear), yet he is unable to access these resources to comply with his obligations of paying maintenance and costs.

[37] In respect of the allegation that he spent over R113 000 on alterations and improvements to the matrimonial home, the respondent challenges the correctness of the amounts, but does not deny that the alterations were carried out. He contends that much of the improvements were carried out by himself and his son, and that the material was paid for using his credit card, for which he is billed on a monthly basis. The applicant contends that these alterations were undertaken because the respondent carries out his business operations from the matrimonial home, and because he harbours plans to eventually buy-out her half share of the property.

[38] Even in the face of a denial of these allegations by the respondent, the point remains that he has seen it fit to carry out alterations to the property yet is unable to find the financial means to comply with the orders of court. Importantly, he does not take the court into his confidence to state exactly how much he spent on the alterations, and how precisely these expenses were funded. The same applies to his installation of new carpets in part of the house. The difference in price between what the applicant contends the carpets cost as opposed to the version of the respondent, is immaterial. The fact of the matter is that he is able to afford incidental expenses such as paying approximately R5 000 for carpeting, yet is unable to find the financial means to comply with the court orders.

[39] During the course of the hearing, Mr *Flemming* placed much emphasis on the fact that the respondent purchased groceries and paid for the utilities on a monthly basis at the matrimonial home. Such payments were not part of the respondent's maintenance obligations, but nonetheless were of beneficial value to the applicant and the minor child. Counsel relied heavily on para 9 of the dictum in *Fakie*, which I have referred to earlier, and submitted that the amounts paid for by the respondent occurred in circumstances where he was under no legal obligation to do so, and which ensured that his wife and child would not be destitute and without water and electricity. Counsel for the applicant dismissed this explanation contending that the only reason for him paying for the utilities is because his business operates from part of the marital home. In the event that the electricity to the house is cut off, this would directly impinge on his ability to run his business. It was therefore submitted that his payment of the utilities should not be seen as an act of benevolence towards the

applicant and his minor child but rather for the self-centred purpose of ensuring the continued operation of his business.

[41] The respondent takes refuge behind para 9 of *Fakie* for the contention that even though he may not have complied with the court orders, his conduct, as evidenced by the payment of the utilities, does not constitute evidence beyond reasonable doubt of a deliberate and intentional violation of the “*court’s dignity, repute or authority*”. I am not convinced by the soundness of the respondent’s argument. On the contrary, he has chosen to be somewhat economical with regard to placing necessary and sufficient facts before the court with regard to his financial circumstances. While he contends that the business of Ram’s Chairs has deteriorated, he fails to provide specifics of the extent of the slump in its business or whether the business rescue proceedings have yielded any positive outcome. The fact that he may have unsuccessfully approached the banks for finance or a loan does not remedy his non-compliance. The respondent adopts a confrontational attitude towards the compliance of the court orders, which appears from his answering affidavit where he says the following at paragraph 30.2:

‘... This is aggravated by these intermittent applications launched by the applicant at her own whims and fancies. *The more the court orders me to pay, the less opportunity I will have to comply therewith.*’

[42] While he complains of his inability to make payment as taking an emotional and psychological strain on him, he continues to enjoy spa treatments, holidays both locally and overseas, while his maintenance and costs obligations remained unfulfilled.

[43] Having regard to the facts placed before me, I am satisfied that the applicant has succeeded in proving beyond reasonable doubt that the respondent’s conduct in failing to comply with the orders of this court are both wilful and *mala fide*. I accordingly conclude that the applicant has satisfied the test for this court to find the respondent to be in contempt.

[44] In so far as the relief which the applicant seeks, being that of the imprisonment of the respondent, periodically for a period of 30 days, to be served

from 17h00 on a Friday until 07h00 on a Monday, Mr *Flemming* submitted that such imprisonment would serve no purpose unless it can bring about a change in the respondent's financial circumstances or payment of the amounts which he owes in respect of the two court orders. The constitutional court in *Pheko* para 30 stated

‘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.’

[45] Counsel for the applicant however submitted that committal of the respondent to imprisonment is justified in the circumstances of this matter where the respondent has simply been contemptuous in his approach to the orders of this court. As set out earlier, his payments towards compliance with the court orders is anything but reflective of someone who shows respect for honouring his obligations towards his child and spouse, despite the fact that they are in the process of a protracted divorce. It has been held that although money judgments cannot ordinarily be enforced by contempt proceedings, ‘it is well established that maintenance orders are in a special category in which such relief is competent’: See *Bannatyne* supra para 18.

[46] Counsel for the respondent further urged me to take into account that the respondent's business is probably at its busiest during the periods for which the applicant seeks that he be periodically imprisoned. On the other hand, on the respondent's own version, he talks of a slump in the business of Ram's Chairs and on the facts before me, there is nothing to indicate what precisely are the first respondent's duties with Ram's Chairs, whether he works alone or in conjunction with others, and whether he attends to clients at night or over weekends. Again, this court is faced with a paucity of information from the respondent, whose version is that he is simply an employee of Ram's Chairs. Moreover, to the extent that the spectre of committal to prison would bring about a payment of the outstanding amounts in respect of maintenance and the contribution towards costs, Mr *Fleming* submitted that it would be impossible for the respondent to raise such amounts within a relatively short period of time. In this regard it was submitted that the court

should afford the respondent a reasonable opportunity to do so, even if I were inclined to commit him to jail.

[47] In the result, the order I make below is intended not only to secure the rights of the minor child but also the dignity of the applicant who has been without any form of maintenance payment since December 2013. In the five months prior thereto, the contributions made by the respondent had been less than half of the amount ordered by the court. At the same time, the order below affords the respondent an opportunity to avoid imprisonment. It is therefore reflective of the balancing of the competing interests of all parties, and which is just and equitable in the circumstances. In relation to costs, this should follow the result. I agree that the first respondent's conduct justifies the sanction of costs on an attorney client scale as a mark of this court's displeasure in his contempt at it orders.

[48] I make the following order:

- a. The first respondent is guilty of contempt of the court orders dated 13 February 2013 and 9 May 2013 under case number 4723/2005.
- b. The Sheriff in whose area of jurisdiction the first respondent may be found be and is hereby directed to take the first respondent into custody and commit him to periodical imprisonment, for a period of 30 days, such imprisonment to be served from 17h00 on every Friday until 07h00 on Monday thereafter.
- c. That the order contemplated in paragraph (b) above be and is hereby suspended on condition that the first respondent pays the amount of R393 500,00 in respect of the order dated 13 February 2013 and R161 000,00 in respect of the outstanding contribution towards cost granted on 9 May 2013, together with interest at 15.5% as from the date when such amounts became due, such payments to be made within 30 (thirty) days of the granting of this order into the trust account of the applicant's attorneys Pravda & Knowles, standard bank – ABC branch, Durban Account number 050411071, branch code - 0401 2600.
- d. In the event of the first respondent effecting payment as set out in paragraph (c) then the first respondent is cautioned and discharged.

- e. The first respondent is directed to pay the costs of this application on an attorney and client scale, with the cost of the applicant's opposition to the first respondent's application for the admission of a supplementary answering affidavit to be paid on a party and party basis.



CHETTY J

Appearances:

For the Applicant	: Adv P Haasbroek
Instructed by	: Pravda & Knowles Attorneys 320 Anton Lembede Ref: MP/Kp/01-D389-001-2014 Ph : 031 307 3982
For the Respondent	: Adv AG Flemming
Instructed by	: Siva Chetty & Company c/o Naidoo Maharaj Incorporated Morningside Ref: Mr S N Chetty/Chendre/G1868 Ph: 033 342 9636
Date of Hearing	: 23 September 2016
Date of Judgment	: 14 November 2016