



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

CASE NO: 51591/2009

In the matter between:

M.A.V.T.

Applicant

And

J. V.T.

Respondent

JUDGMENT

LEPWABA, J

[1] The applicant brought an urgent application for the respondent to be committed for contempt of court in that he failed to pay in accordance with the Rule 43 court order dated 20th May 2009.

[2] The relevant orders in the court order reads as follows:

“3. DAT die Respondent betaal onderhoud aan Applikant teen R19 000.00 per maand vanaf 1 Junie 2009 en daarna vanaf die eerste van elke maand.

*4. DAT die Respondent betaal verder:
4.1. die kinders se skoolgelde en fooie;*

*4.2. die kinder se redelike buitenuurse aktiwiteite wat insluit;
einsteinklasse, skaakleese en klavierlesse;*

*4.3. die Applikant en die kinders se redelike mediese,
tandheelkundige en hospital uitgawes wat nie deur die Applikant of
Respondent mediese fonds gedek word nie;*

*4.4. die Applikant se motor uitgawes ten opsigte van die paalement,
onderhoud, en instandhouding, verbetering en Matrix/Netstar. ”*

[3] The court order was made after the court heard the applicant and respondent's version in the Rule 43 proceedings.

[4] It is common cause that there is a valid court order that the respondent did not comply with. The onus is on the respondent to prove that he was not *mala fide*. For the majority, Cameron JA, as he then was, in **Fakie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326**, in his erudite exposition said in paragraph 42 the following:

“ To sum up:

(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 adapting to constitutional requirements.

(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.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities. ”

[5] The defence raised by the respondent is simply that with his monthly salary of R62 052.00, it is impossible to comply with the court order because he should pay the bond of the house and his other personal expenses. Unless the applicant signs the documents for the application of a second bond on the house which forms part of the joint estate as per the counterapplication. The applicant opposes the counter-application.

[6] The respondent quantified his obligations in the court order as follows:

“3.1. R19 000.00 in respect of maintenance.

3.2. -R1 611.00 in respect of school fees.

-R766.67 in respect of music tuition.

-R200.00 in respect of school related expenses. -R200.00 in respect of extramural activities.

-R250.00 in respect of extramural activities.

3.3. R3 000.00 in respect of car instalment.

3.4. R178.95 in respect of vehicle tracking.

3.5. R500.00 in respect of vehicle insurance.

3.6. R1 197.14 in respect of counter medicine.

3.7. R10 333.33 in respect of relocation and contribution to costs. ”

[7] Advocate Arnoldi (SC) submitted on the respondent's behalf that having regard to the respondent's expenses, in particular the bond repayment of R28 292.74 it is impossible

for the respondent to comply with the court order.

[8] The applicant alleged in the papers that the respondent was in arrears with the amount of R47 000. She further alleged that since the court order was made he paid:

R10 333.33 for relocation fees on 30/06/2009,

R10 000.00 for maintenance on 20/06/2009 and R10 333.33 for relocation fees on 20/08/2009.

[9] On the respondent's version he cannot comply with the court order because he has other liabilities. However, the respondent does not state why his other liabilities are more important than the court order and why some of the said liabilities cannot be reduced.

[10] I will have to keep in mind that an application for committal for contempt of court arising from failure to comply with a Rule 43 order involves the likelihood of depriving the party who does not comply with his/her liberty and concomitantly the applicant may not benefit financially if such an order is granted.

[11] In **Burchell v Burchell** ECJ NO 010/2006 (JOL 16722 E) Froneman J correctly said committal for contempt of court orders is not contrary to fundamental rights, but that, on the contrary, compliance with court orders is of fundamental concern to a society that bases itself on the rule of law. I agree.

[12] The court should carefully consider the circumstances of each case before granting such an order. The court should be satisfied that non compliance was wilful and *mala fide*.

[13] In carefully scrutinising the defence raised by the respondent, he states that because of the bond payment and his personal expenses he cannot comply with the court order.

[14] Advocate Arnoldi SC submitted that the respondent cannot challenge the court order because he cannot prove the material change which took place in the circumstances of either party as required in Rule 43(6). The respondent has not even approached the maintenance court to seek a reduction.

[15] The respondent filed a counter-application in terms whereof he should be permitted, without the applicant's written consent to obtain a loan about R250 000.00 and to register a second bond on the house so that he could comply with the court order.

[16] The respondent, in my view, raises, as a shield his personal expenses and the payment of the bond for the house for his failure to comply with the court order.

[17] The respondent has not stated what steps did he take to reduce his expenses and if he tried to rent out the house so that the bond payment should not be a burden to him.

[18] The respondent wants to increase the liabilities of the joint estate without a loan with showing what material steps he took to reduce his other expenses.

[19] In my view, it is not impossible for the respondent not to comply with the court order, he regards his other expenses to be more important than the court order, in my view, he is acting wilfully and *mala fide*.

[20] The respondent is presently in the arrears with an amount of about R47 000 since the order was made in May 2009. The relocation costs are almost settled but the respondent is not making any offer regarding compliance with the court order. As far as possible compliance with the court order is concerned, the respondent stated that he wants a loan to pay the amounts in the court order.

[21] Should a loan of R250 000 be obtained, and if the respondent is going to pay about

R40 000 per month to comply with the court order and to settle the arrears, in six month's time the loan amount would be exhausted. The respondent would therefore fall into arrears again.

[22] The respondent did not, in my view, put a credible and acceptable version before the court showing that he cannot comply with the court order and that he is not acting wilfully *mala fide*.

[23] I am therefore, satisfied that the applicant succeeded beyond reasonable doubt that the respondent is in contempt of the court order.

[24] I therefore, make the following order:

1. The respondent is sentenced to three months imprisonment which is wholly suspended for three years on the following conditions:

1.1. That the respondent settles the arrear amounts including the arrear amounts in respect of the items 4.1-4.4 in the court order dated 20 May 2009 within three months from the date of the order and

1.2. That the respondent complies with the court order dated 20 May 2009 every month from the 1 October 2009.

2. The respondent's counter-application is dismissed.

3. The respondent is ordered to pay the costs.

A. P. LEDWABA

JUDGE OF THE HIGH COURT

