

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

Case number: 124145/2023

Date of hearing: 25 June 2024

Date delivered: 9 July 2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

DATE: 9/7/24

SIGNATURE:

In the matter of:

L[...] M[...] G[...] Applicant

and

J[...] M[...] G[...] Respondent

JUDGMENT

SWANEPOEL J:

[1] It is essential to the proper administration of justice, and ultimately, to the preservation of the rule of law, that there is a common understanding that court orders are to be obeyed. Should the view prevail, that persons may decide

whether they are bound to a court order or that they may choose to ignore an order if they so wish, the very foundations of our legal system would be in jeopardy.

[2] Courts do not enjoy the enforcement powers of the executive branch of government. However, the judiciary does enjoy the power to enforce its orders through contempt proceedings, and in appropriate cases, by imposing an appropriate sentence on a recalcitrant party in instances where the conduct violates the dignity and authority of the court. There is, in my view, a distinct obligation on the judiciary to jealously guard against the willful failure of a party to comply with a court order.

[3] In this case an interim order was granted against the respondent by Retief J on 21 May 2024, pursuant to an application in terms of Rule 43. The respondent was ordered (inter alia) to do the following:

[3.1] To effect payment of maintenance to the applicant in the sum of R 6 000 per month per child, thus a total of R 12 000 per month;

[3.2] To pay R 300 per month as maintenance for the applicant;

[3.3] To pay for the repairs and maintenance of the applicant's motor vehicle, and if the vehicle were not available, to provide the applicant with an alternative vehicle;

[3.4] To arrange and accept a quotation for new tyres for the applicant's vehicle within three days of the order being handed down;

[3.5] To pay R 3000 per month in respect of the solar system;

[3.6] To make a contribution to the applicant's costs in the sum of R 40 000, in four instalments of R 10 000 each.

[4] The respondent chose not to comply with any of the aforesaid orders. He continued to make payment of those items that he had decided to pay before the Rule 43 order was granted. It is not in dispute that the respondent was aware of the order. It is also not in dispute that the respondent has not complied with the parts of the order set out in paragraph 3 above. Within days of the order being granted the respondent's attorneys wrote to the applicant's attorneys to advise them that the respondent did not intend to comply with the abovementioned sections of the order. They advised that the respondent did not have the means to comply with the order, and that he intended to seek a reconsideration of the order in terms of rule 43 (6). The letter alleged that the respondent was obliged to pay maintenance in the sum of R 73 683.03 monthly, on a monthly income of R 73 950.98, and that, in addition to the aforesaid maintenance obligation, he had personal expenses of R 31 203.87 per month, thus leaving a monthly deficit of R 30 935.92.

[5] The respondent's salary was alleged to be R 66 200.98, and he received a further R 6 400 as rent on an immovable property. His total income was alleged to be R 73 950.98 (the mathematical discrepancy is not explained). The respondent had been receiving a further R 10 000 per month as payment for shares that he had sold. The letter alleged that it was "common cause" that he was no longer receiving those monies. The letter also alleged that the respondent had additional expenses as he was now living with his mother, although the respondent's bank statements do not support that contention.

[6] In a letter dated 7 June 2024 the respondent's attorneys contradicted themselves by providing a list of monthly debit orders that amounted to R 75 106.93. That list, however, included R 8 559.77 for the vehicle that the respondent had purchased in November 2023, the respondent's monthly cell phone charges, his credit card and personal loan repayments, and R 4 038.88 towards his insurance.

[7] The respondent has therefore refused to pay the monthly cash portion of the maintenance, nor has he paid the solar system instalments, he has not

arranged to service the applicant's vehicle, nor has he sought a quotation, nor purchased tyres for the applicant's vehicle. He has also made no contribution towards her costs. By the time that this application came before me the respondent had also not brought a variation application. The respondent seeks an order now that he must deliver such an application within 10 days of this order. I am not entirely sure why the respondent requires such an order, as he has been at liberty to launch a variation application since the Retief J order was granted.

[8] The above is a brief background to the circumstances in which this application was brought. The applicant seeks an order that the respondent be held to be in contempt of the order of Retief J, that he be sentenced to 3 months' imprisonment which is to be suspended for two years on condition that the respondent purges his contempt within three days. The respondent raised an *in limine* defence to the effect that the proceedings were not urgent. As will be noted hereunder, it is my view that the respondent is in ongoing contempt of the order, which must inherently be addressed urgently.¹ Nothing more is required to be said on this issue.

[9] When contempt of court is sought to be punished by the imposition of a sentence, it has a criminal element to it that requires a Court to find beyond a reasonable doubt that the elements of the crime of contempt have been established. In *Uncedo Taxi Service Association v Maninjwa and Others*² Pickering J pointed out that previously the civil standard of proof had been applied in contempt applications. The learned Judge referred to *Kamma Park Properties (Pty) Ltd v Ngesi and Others*³, a case of the same division, in which the learned Judge held that in cases where a party chooses to follow the route of bringing civil contempt proceedings by way of application, the civil standard of proof applied. In such cases, *Kamma* said, if the order and its breach are proven, the respondent bore the onus of rebutting the inference of willfulness and mala fides.

¹ Protea Holdings v Wriwt and Another 1978 (3) SA 865 (W) at 867 G

² 1998 (3) SA 417 (E)

³ Eastern Cape unreported case no 1220/97

[10] Pickering J held that such an approach was unconstitutional. This approach was later applied in *Burchell v Burchell*⁴ and in *Fakie NO v CCII Systems (Pty) Ltd*⁵.

[11] Once it has been established that the respondent is aware of, and that he has not complied with the order, which is common cause in this matter, then one must consider whether the respondent acted willfully and with *mala fides*. The Court must then bear in mind what Cameron J said in *Fakie (supra)*:

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

[12] The respondent's reason for not complying with the order is that he was financially not able to do so. The question is whether that is objectively so. Firstly, as I have said in para 6 above, the respondent's attorneys' own letters show that there was not such a shortfall as they allege.

[13] Furthermore, the respondent's explanation regarding his involvement with

⁴ (2005) ZAECHC 35 (3 November 2005)

⁵ 2006 (4) SA 326 (SCA)

a number of companies other than his formal employment, and in relation to the R 10 000 monthly payments (that he says have stopped) is highly suspicious. In a CIPC search that was conducted by the applicant's attorneys on 12 June 2024 the respondent was reflected as being an active director of various companies: Clara's Hair Design (Pty) Ltd, Flexmed (Pty) Ltd, Flexmed Africa (Pty) Ltd, Grundlingh Investment Holdings (Pty) Ltd, Hawkeye Protection Services (Pty) Ltd, Hawkeye Protection Services Africa (Pty] Ltd, and K2017349980 (Pty) Ltd. The application was served on respondent on 14 June 2024. In a CIPC search conducted by the respondent's attorneys shortly thereafter, on 18 June 2024, the respondent's status as director in Grundlingh Investment Holdings (Pty) Ltd, Flexmed (Pty) Ltd, Flexmed Africa (Pty) Ltd, K2017349980 (Pty) Ltd and Clara's Hair Design (Ply) Ltd had suddenly been changed to 'inactive'. The respondent provides no explanation for the sudden change in status. The inference that the respondent orchestrated the change in status in order to distance himself from those companies is inescapable.

[14] Interestingly, the respondent remains a director of Hawkeye Protection Services (Pty) Ltd ("Hawkeye") and Hawkeye Protection Services Africa {Pty) Ltd, although he denies that that is the case. The respondent alleges that he sold his 50% shareholding in Hawkeye to one Fanus Theunis Prinsloo in terms of a written agreement dated 3 February 2023 at a purchase price of R 120 000, which was payable in 12 instalments of R 10 000 monthly. The final payment was to be made on 30 April 2024. If that were so, that the respondent does not have any further interest in Hawkeye, then it begs the question why the respondent was still a director of Hawkeye on 18 June 2024. The respondent does not provide an explanation.

[15] Even more troubling is that the agreement that the respondent relied upon to support his version has nothing to do with Hawkeye. It is an agreement between the respondent and Prinsloo for the sale of shares in Indodana Security Services (Pty) Ltd, a completely unrelated company. The question must be asked why the respondent would attempt to bolster his version by putting up a clearly irrelevant agreement? This is, in my view, an indication that the respondent is not

being open and transparent with the Court.

[16] There is no doubt that the respondent has access to monies that have not been accounted for in the rule 43 application, nor in this application. On 3 May 2024 the respondent received R 106 000 into his Standard Bank account with the reference "magtape credit". The source of the monies has not been disclosed. However, the respondent's bank statements show that he paid R 106 563.61 to his attorneys for their services on 6 May 2024. It is evident that the respondent is able to access substantial amounts of money when he so wishes.

[17] Finally, the respondent's bank statements show that when the rule 43 order was granted, he had access to funds, albeit on his overdraft and credit cards. He was able to comply with the order, and if he was truly of the view that the order was unreasonable, he could have then brought the application after having complied with the order. The fact is that the respondent chose not to comply with the court order.

[18] Furthermore, the question remains that if the respondent were so adamant that the order was unsustainable, and reflected a "misunderstanding" of the respondent's finances, as his attorneys phrased their objection, then why has he not brought his variation application? By the time that the matter came before me more than a month had elapsed since the order was granted. One would have expected the respondent to realize that his non-compliance with the order was worrisome, and to have launched the application. Instead, the respondent sat back and did nothing.

[19] An aspect that makes it clear to me that the respondent is willfully disobeying the rule 43 order is this. On the respondent's own version, he knew in November 2023 that the applicant's vehicle would require new tyres "at some point in future". He was ordered to obtain a quotation for new tyres. He was not obliged to simply accept the applicant's quotation, and he could have tried to obtain a cheaper rate. The fact that he has taken no action whatsoever to even obtain a quotation convinces me that the respondent is willfully and *mala fide* in

breach of the order.

[20] Furthermore, even if the respondent was not fully able to comply with the order, which I do not believe to be the case, then one must ask why he did not comply to the extent that he was able? The fact that the respondent has not paid one cent in terms of the disputed parts of the order puts the issue of *mala fides* beyond question, in my view.

[21] The respondent has made much about the fact that the applicant earns a salary, and he has 'challenged' her to disclose what she does with her money. The suggestion is that the applicant is not in need of the cash portion of the maintenance, and that the rule 43 order was incorrectly granted in this regard. The respondent's submission is irrelevant to this application. Retief J has already considered the respective parties' income and has spoken on the issue. It is not for the respondent to decide not to abide by the order because of his belief that Retief J incorrectly granted the order that she did. However, the belief that respondent holds strengthens my view that his failure to comply with the order is not so much the result of an inability to comply, but out a sense of grievance that his views did not triumph in the rule 43 application.

[22] I find, therefore, that the applicant has established that the respondent is willfully and *mala fide* in contempt of the order of 21 May 2024. In my view, respondent's *mala fides* justify a punitive costs order. However, the applicant did not seek such an order, nor was it dealt with in argument, and therefore the normal costs order will follow.

[23] In the premises, I make the following order:

[23.1] The respondent is found to be in contempt of the order granted by Retief J on 21 May 2024 ("the order").

[23.2] The respondent is sentenced to imprisonment for a period of three months, which imprisonment is suspended for a period of two years on the

following conditions:

[23.2.1] That the respondent complies fully with the order during the period of suspension;

[23.2.2] That the respondent purges his contempt within 3 days of this order by:

[23.2.2.1] Paying all amounts due to date in terms of paragraphs 5, 6, 12 and 14 of the order;

[23.2.2.2] Complying with paragraphs 10 and 11 of the order.

[23.3] The respondent shall pay the costs of the application.

**SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA**

Counsel for the applicant:

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Instructed by:

Chari Lochner Attorneys

Counsel for the respondent:

Adv. B. Bergenthuin

Instructed by:

VFV Attorneys

DATE HEARD:

25 June 2024

DATE OF JUDGMENT:

9 July 2024