

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: B 957/2023

Date of hearing: 23 October 2024

Date of judgment: 29 October 2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
29/10/24	[REDACTED]
DATE	SIGNATURE

In the matter of:

K G

Applicant

and

D G

Respondent

JUDGMENT

SWANEPOEL J:

[1] The parties to this application are in the throes of a divorce action. They are the parents of two minor girls ("G" and "C" respectively). During May 2023 the respondent launched a rule 43 application in which he sought interim parental rights and responsibilities in respect of contact with the minor children, with their primary residence vesting in the applicant. The respondent tendered payment of maintenance *pendente lite* in the sum of R 47 606 per month in respect of various expenses relating to the minor children. The applicant launched a counter-application in which she sought an order that primary residence would vest in her, and that the respondent be ordered to effect payment of various expenses.

[2] Having heard the application, the Court (per Retief J) granted the following order on 10 November 2023 (I summarize):

[2.1] Primary residence of the minor children was awarded to the applicant subject to the respondent's rights of contact as outlined in the order.

[2.2] The respondent was ordered to pay the following maintenance in respect of the minor children:

[2.2.1] G's school fees, including her school uniform and related school expenses;

[2.2.2] C's school fees not paid by the applicant;

[2.2.3] Household expenses in the sum of R 4 350. The respondent was ordered to settle the monthly municipal expenses, and to pay the difference between the amount paid and the sum of R 4 350 to the applicant;

[2.2.4] Medical aid premiums for the minor children;

[2.2.5] Netflix and Apple TV subscription;

[2.2.6] The monthly bond instalment on the parties' home;

[2.2.7] The monthly expenses in respect of the applicant's Haval motor vehicle, including the insurance premiums;

[2.2.8] A cash payment to the applicant of R 5 000 per month;

[2.2.9] A contribution towards costs in the sum of R 50 000, payable in five monthly instalments of R 10 000 each.

[3] The order provided for the applicant to effect certain payments in respect of the minor children. The details thereof are not relevant to these proceedings.

[4] The applicant alleges in this application that the respondent has failed to comply with the rule 43 order in a number of respects, and that he is in contempt of court. She alleges that:

[4.1] The respondent made one payment of R 10 000 towards costs, but has failed to effect any further payments. He is, consequently, indebted in the sum of R 40 000;

[4.2] The respondent has failed to effect payment of the difference between the amount paid by the applicant in respect of C's school fees, being R 4 763, and the actual monthly school fees in the sum of R 5000. As at May 2024, when this application was launched, the respondent was in arrears in the sum of R 948;

[4.3] The respondent has failed to pay school holiday care fees in the sum of R 2 128;

[4.4] The respondent has failed to effect payment monthly to the applicant of the difference between the municipal account paid by him and the sum of R 4 350, totaling the sum of R 8 599. The

respondent has paid a total of R 6 900.01 towards the municipal accounts;

[4.5] The respondent has failed to make any payment of the cash amount due to the applicant, and was, at the time of launching of this application, in arrears in the sum of R 25 000;

[4.6] The respondent has failed to pay the minor children's extramural activities in the sum of R 3 520;

[4.7] The respondent has stopped all payments in respect of the Haval vehicle. It has now become apparent that even before the rule 43 order was granted the respondent had already surrendered the vehicle to the finance house, and he has not made any payments in respect of the vehicle as he was ordered to do. In fact, the respondent allowed the rule 43 court to decide the matter on the understanding that the finance agreement was still in place, whereas he had in fact been cooperating with the finance house to repossess the vehicle.

[5] A further bone of contention is that the respondent was ordered to disclose to the applicant where he would reside when he is in South Africa. He has refused to do so, and has insisted on contact with the children without complying with the order.

[6] For the aforesaid reasons, the applicant contends that the respondent is in contempt of the court order. She seeks an order in the following terms:

[6.1] That the respondent be found to be in contempt of the order of 10 November 2023;

[6.2] That the respondent be committed to imprisonment for a period of thirty days, or such period as the Court deems fit;

[6.3] In the alternative to paragraph 6.2 above, that the imprisonment be suspended for one year on condition that the respondent complies with the order of 10 November within 5 days of the granting of the order;

[6.4] That, in the event that the respondent does not comply with the order, the applicant may approach the court on supplemented papers for an order committing the respondent to imprisonment;

[6.5] Costs on the attorney/client scale;

[6.6] Further and/or alternative relief.

[7] The first aspect to be considered is the application for condonation for the late filing of the answering affidavit. The application was served on the respondent personally on 7 May 2024. The answering affidavit was due by no later than 4 June 2024. Notice of opposition was delivered on 29 August 2024, and the answering affidavit was served on 13 September 2024, three days ahead of the hearing date of 16 September 2024 on the unopposed roll.

[8] The respondent says that the litigation has been ongoing for years, and that due to his financial situation he has been struggling to pay his attorney. He also says that the time difference between South Africa and the United States makes it difficult to consult, and that it is difficult to find a commissioner of oaths overseas. It was only when the date for hearing on the unopposed roll was brought to his attention that the respondent took steps to oppose the matter. The respondent provided the aforesaid excuses without further elucidation. I find no merit in the respondent's explanation. However, given that this is a matter that bears upon the respondent's freedom, and given the view that I take on the matter, I allowed the answering affidavit into evidence. I will, however, show my displeasure with the respondent's cavalier and disrespectful approach to the matter when I make a costs order.

[9] In *Fakie N.O v CCII Systems (Pty) Ltd*¹ the Court explained² that the applicant in a contempt application has to establish the following elements: firstly, that the order relied upon exists, secondly, that the respondent is aware of the order, thirdly, that the respondent has failed to comply with the order, and finally, that the respondent's non-compliance is willful and *mala fide*.

[10] In this case, the first three elements are common cause. The respondent says, however, that he does not have the financial means to comply with the order, and that his failure to do so is not *mala fide*. The respondent alleges that he is still providing for the applicant and the minor children within his "financial means". The respondent has sought to sell the home in which the applicant and the children reside, as well as a home that he owns in which the applicant's parents reside. He says that it is only by so-doing that he can extricate from the financial distress in which he finds himself.

[11] The applicant now resides in Nashville, Tennessee. He initially resided in a two-bedroomed home, but has since moved to a four-bedroomed home. At a meeting in November 2023 the Family Advocate asked the respondent whether he was involved in a romantic relationship. He stated firmly that he was single. This turned out to be untrue, and in April 2024 the respondent admitted that he was involved in a relationship and that his partner was five months pregnant. Apparently, the arrival of his newborn child was partially the reason for the respondent's decision to relocate to a larger rental home. The respondent alleges that the rentals on the two rental properties are the same, but he has not provided any further information, nor evidence, supporting his allegation. The respondent also owns a motor vehicle in the United States, in addition to owning a Porsche in South Africa, in respect of which the respondent still owes an undisclosed sum of money. The respondent also recently indicated his interest in purchasing a Tesla vehicle and took steps to acquire such a vehicle..

[12] The respondent stated in his answering affidavit that he earns US\$ 9 734.70 per month. This version is clearly incorrect, as the record shows that the respondent received an increase in salary in approximately April 2024. He receives a gross salary of approximately US\$ 14 547.84.

[13] It is especially when one considers the respondent's reported expenses that it become quite apparent where the respondent's loyalties, and priorities, lie. The respondent pays R 43 471.82 for the house in which he resides in the United States. His motor vehicle instalments amount to R 20 621.56. His new-born baby attends a creche at a cost of R 6 393.95 per month, whilst the respondent's partner is unemployed and at home. The respondent pays R 15 857.42 towards a study policy and R 2 992.87 towards another undisclosed policy. He saves R 7 985.81 per month so that he can visit the children in South Africa. He repays his partner R 4 355.89 on a loan, and his gymnasium subscription is R 3 310.48 per month. The respondent's "other medical expenditure" amount to R 9 679.76 per month, in addition to the monies deducted from his salary for a medical and dental plan. He spends R 3 291.66 per month on DSTV, Netflix, Disney and Apple TV subscriptions, in addition to a further R 2 613.54 on entertainment.

[14] The respondent has also now stopped the debit order in respect of the medical aid of the children. He alleges that due to his relocation he was unable to remain as the main member of the medical aid. However, there is no explanation why the debit order was cancelled.

[15] Whereas the respondent had made the categorical statement in his answering affidavit that he paid the applicant US\$ 3000 per month, in a later supplementary he said that he wished to provide some clarity about his answering affidavit. One aspect that he 'clarified' was that he did not pay the applicant the US\$ 3000, but that it was paid partially to service providers, and the rest was paid to the applicant. Conspicuously absent from the respondent's affidavits is any evidence supporting this claim. I

specifically sought clarification from the respondent's counsel on this issue, and counsel was forced to concede that there was no evidence for the respondent's contention. I reject this version without hesitation.

[16] The respondent has clearly shown that he is not to be trusted to adhere to the rule 43 order. Even though he had surrendered the Haval vehicle in July 2023, knowing that the applicant required the use of the vehicle, he allowed the rule 43 Court to labour under the misapprehension that the vehicle was still available for the applicant's use, and he did not disclose that he had surrendered the vehicle. That is simply dishonest. Then, in November 2023, he tried to mislead the Family Advocate by denying his relationship with his current partner, whereas within a month or so thereafter she was already pregnant. He also did not disclose that she was residing with him in the United States.

[17] The fact that the respondent has made a paltry contribution towards the municipal accounts (for which he is in any event liable), but has not paid anything further towards the maintenance of the children and the applicant, leaves me with no other conclusion but that the respondent has abandoned his family in South Africa in order to start a new life in the United States. Surely, given his financial position, the respondent could have cut down on his expenses and he could have made some contribution, even a paltry one, if he wanted to? In my view he clearly does not want to comply with his obligations.

[18] When this application was served on the respondent he approached the Magistrate's Court seeking a reduction of the rule 43 order. He did so despite the fact that there has been no change in circumstances, save that the respondent received an increase in salary in the interim. In my view the sole reason for the application in the Magistrate's Court was that the respondent wanted to use that application as an excuse in this court. In fact, the respondent's counsel urged me to postpone these proceedings pending the Magistrate's Court case. The

application in the lower court is, in my view, a dishonest attempt to avoid the consequences of the rule 43 order, and I declined to do so.

[19] The respondent has not only disregarded his financial obligations, he has also refused to advise the applicant of his whereabouts when the children visit with him in South Africa. In my view the respondent clearly does not understand that court orders do not allow him to exercise a discretion as to whether to obey or not. Orders are to be obeyed to the letter, as my order will show.

[20] The respondent's cavalier approach to this matter, in causing a postponement of the application by filing an answering affidavit at the proverbial last minute also does not impress me. His various attempts to mislead on various issues leave me with the impression that he is purposely mendacious.

[21] In any event, the respondent's current circumstances, and their consequences, are solely the result of his own decisions. As the Court said in *TWS v DFH*³:

"Where the respondent's subsequent commitments and the change in his circumstances reduced his capacity, he was required to adjust his circumstances to bring it according to his means. It was not evident that he did so, especially as there was no full explanation regarding his income and expenses and the adequate reasons why he could not comply with the maintenance order. In view of the above, it cannot be said that the court erred in finding the respondent had not met the burden of proof that he was not in willful and mala fide contempt of the court order."

[22] In *Uncedo Taxi Service Association v Maninjwa and Others*⁴ the Court held that the respondent in contempt proceedings did not bear an onus to rebut an inference of willfulness and mala fides. Such an approach was unconstitutional, in proceedings where punishment was sought for non-compliance with an order. Pickering J held that such an

approach was unconstitutional. He pointed out that although a civil procedure was used to bring the matter to court, the relief sought, punishment for contempt, has a criminal law element to it. He relied upon *Re Bramblevale Ltd*⁵, and *Churchman and Others v Joint Shop Stewards' Committee of the Workers of the Port of London and Other*⁶, both English authorities, and Miller,¹ to hold that the application of two different standards of proof, depending on the remedy chosen, is unreasonable and unjustified. The elements of contempt must be proven beyond a reasonable doubt.

[23] In *Burchell v Burchell*⁷ Froneman J (as he then was) was faced with circumstances very similar to this case. The learned Judge held that committal for civil contempt remains a form of the crime of contempt of court, and that a person brought before court in civil contempt proceedings remains an 'accused person' under section 35 of the Constitution. The guilt of the perpetrator, therefore, has to be established beyond a reasonable doubt. However, Froneman J said that contempt proceedings have a dual nature, incorporating both a civil and a criminal aspect. The learned Judge held that if the offence is not established beyond a reasonable doubt, but it is possible to find on a balance of probabilities that the contempt has been proven, then a declaratory order may be made that the person is in contempt, together with other civil sanctions. The Court made the point that "...upholding the rule of law and ensuring the effective administration of justice is not wholly dependent on the effectiveness of civil contempt proceedings in its guise as the prosecution of a criminal offence that allows committal to goal of the offender. Other possibilities, purely civil in nature, need to be explored and developed as well."

[24] The approach in *Uncedo* was approved in *Fakie N.O.* (supra).

¹ Contempt of Court 2nd Ed at 425

[25] It is, therefore, necessary to determine whether the applicant has established, beyond a reasonable doubt, that the respondent willfully and with *mala fides* failed to comply with the order. The summary of the facts above makes it clear that I have no doubt that the respondent willfully disregarded the order. He is clearly in contempt of court and liable to be punished.

[26] I do, however, believe that it is prudent to give the respondent an opportunity to purge his contempt.

[27] Consequently, I make the following order:

[27.1] The respondent is found to be in contempt of the order of Retief J dated 10 November 2023 (“the order”).

[27.2] The respondent shall be committed to imprisonment for a period of sixty days.

[27.3] The order in paragraph 27.2 above shall be suspended on the following conditions:

[27.3.1] That the respondent shall fully comply with the order within 30 days of the handing down of this order by effecting all arrear payments;

[27.3.2] The respondent shall continue to comply fully with the order;

[27.4] In the event of the respondent not complying with the order of 10 November 2023, or with this order, the applicant may approach the Court, on supplemented papers, for the authorization of a writ of commitment for contempt of court.

[27.5] The respondent shall pay the costs of the application, including the costs of the application for condonation on the attorney/client scale.


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

Counsel for the applicant:	Adv A Coertze
Instructed by:	WF Bouwer Attorneys
Counsel for respondent:	Adv. M F Jooste
Instructed by:	Van Zyl Inc
Date heard:	23 October 2024
Date of judgment:	29 October 2024

¹ Fakie N.O v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

² At para 42

³ Unreported Full Court appeal, Gauteng Division Case no: A 5001/2022 dated 24 May 2022 at para 20

⁴ Uncedo Taxi Service Association v Maninjwa and Others 1998 (3) SA 417 (E)

⁵ [1963] 3 ER 1062 (CA)

⁶ [1972] 3 ALL ER 603 (CA)

⁷ [2005] ZAECHC 35 (3 November 2005)