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

CASE NUMBER: 358/22

(1) REPORTABLE: YES / NO

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

(3) REVISED

DATE 30 October 2024

SIGNATURE

In the matter between:

T[...] M[...] B[...]

APPLICANT

and

M[...] C[...] R[...]

FIRST RESPONDENT

ABSA BANK LIMITED

SECOND RESPONDENT

ABSA HOME LOANS GUARANTEE COMPANY (RF)

THIRD RESPONDENT

SUMMARY: *Notice of Motion- Contempt of Court proceedings- Requirements thereof.*

ORDER

HELD: *The Applicant is granted permission in terms of Rule 6 (5) (e) of the Uniform Rules to file a further affidavit.*

HELD: *The First Respondent is declared to be in disobedience of the Court Order dated 23 June 2023.*

HELD: The First Respondent is ordered to comply with the Court Order dated 23 June 2023 within 10 (ten) days of service of this order. In the event that the First Respondent fails to comply with this Order within the ten days as prescribed, he is sentenced to pay a fine in the sum of R40 000 (forty thousand rand) or in default of payment to undergo 90 (ninety) days imprisonment. This amount of R40 000 (forty thousand rand) is to be paid into the following account:

Bank: Tyme Bank Limited.

Account name: M[...] B[...].

Account number: 5[...].

HELD: The First Respondent is ordered to pay costs on attorney and client scale including Counsel Fees.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] The Applicant, Ms T.M. B[...] brought contempt proceedings in which she sought the following relief as per the amended Notice of Motion-

'1. That the applicant's further affidavit be permitted in terms of, inter alia, Rule 6 (5)(e) of the Uniform Rules and/ or the above honourable court's inherent jurisdiction.

2. That the First Respondent is declared to be in disobedience of the Court Order dated on or about the 23rd of June 2023.

3. That the First Respondent is sentenced to imprisonment for a period of 90 days.

4. The First Respondent is fined a sum of R40 000 to be effected within 7 days hereof to the Applicant's nominated bank account:

Account name: M[...] B[...]

Bank name: Tyme Bank Limited

Bank account number: 5[...]

5. That the First Respondent be ordered to pay the Applicant's costs of this application on a scale as between attorney and client, and the fees of Counsel on Scale B.

6. That the Applicant be granted further and/ or alternative relief.'

[2] The First Respondent is Mr M[...] C[...] R[...] who is an adult male and a former spouse of the Applicant. The Second Respondent is ABSA Bank Limited, a public company with limited liability. The Third Respondent is ABSA Home Loans Guarantee Company (RF) (Pty) Ltd, a private company with limited liability. The Second and Third Respondents are not opposing the relief sought. The Applicant was represented by Adv. Botomane who submitted that there was merit to the application. The First Respondent elected not to oppose the application.

BACKGROUND FACTS:

[3] The Applicant and the First Respondent are former spouses who signed a written settlement agreement in the divorce action which was instituted by the Applicant. The marriage was dissolved by the Court on 22 February 2022 and the settlement agreement was made an order of Court. Some of the expressed terms of the settlement agreement relevant to the current application were that –

(a) the First Respondent shall acquire sole ownership of the immovable property at No [...] M[...] B[...] in Schoemansville;

(b) each party shall be solely liable for the repayment of outstanding bond instalments, municipal taxes and rates for each immovable property awarded from the date of divorce;

(c) upon bond cancellation of each immovable property registered in their respective names, each party shall be solely liable for such costs to the exclusion of the other.

[4] After the divorce, the First Respondent was granted sole ownership of the said immovable property and was obligated to make payments in respect of among others the mortgage bond, Municipal rates and taxes. The Applicant then requested from the Second and Third Respondents to be released from the liability and was advised that they require consent from the First Respondent who allegedly refuses or fails to discuss the matter. The Applicant then lodged the first contempt proceedings against the First Respondent which were presided over by Van Niekerk AJ.

[5] On 23 June 2023 Van Niekerk AJ granted the following orders in favour of the Applicant-

'1. The First Respondent is in contempt of the Court Order dated the 22nd of February 2022.

2. The First Respondent is to contact the Second and Third Respondents' Attorney of record in respect of releasing the applicant's estate from liability under the bond number ----- within 20 days of this order.

3. The First Respondent is to provide the Applicant's Attorney of record with proof, whether in the form of writing or recording, that prayer 2 supra has been complied with, within 10 days thereof.

4. In the event that the First Respondent fails to comply with paragraph 2 and paragraph 3 supra, the applicant may approach this court on the same papers.

5. That the First Respondent be ordered to pay the Applicant's costs of this application on a scale as between attorney and client.'

[6] There is an allegation that the First Respondent has failed to adhere to the Court Order dated 23 June 2023 giving rise to the current second contempt proceedings.

ISSUE FOR DETERMINATION:

[7] The issue for determination was whether or not the First Respondent should be held in contempt of the Court Order dated 23 June 2023.

APPLICABLE LEGAL PRINCIPLES:

[8] There is a duty on all persons to abide by Court Orders as the failure to do so is a direct attack on the rule of law¹. Section 165 (5) of the Constitution provides that an order or decision issued by a Court binds all persons to whom and organs of state to which it applies. It is for this reason that it is a crime to unlawfully and intentionally to disobey a Court Order.² This ensures that the dignity and authority of the Courts be maintained.

[9] In **Matjhabeng Local Municipality v Eskom Holdings Limited and Others, Mkhonto and Others v Compensation Solutions (Pty) Ltd 2018 (1) SA (CC)** para [48] it was held *'To ensure that courts' authority is effective, section 165 (5) makes orders of court binding on "all persons to whom and organs of state to which it applies". The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority.'*

[10] It was also recognised by the Constitutional Court that courts unlike the other arms of State rely on the trust and confidence of the people to carry out their

¹ The rule of law requires that the dignity and authority of the courts be upheld.

² See *Attorney – General v Crockett* 1911 TPD 893 at 925.

constitutionally mandated function.³ Therefore civil contempt procedure is a valuable mechanism for securing compliance with Court Orders.⁴ Where the primary objective for contempt proceedings is to force the compliance of the Court's Order, usually the period of imprisonment is suspended pending the compliance by the contemnor of the Court Order. Punishment is thus used for coercive purposes.

[11] The requirements for civil contempt of Court are⁵ –

- (i) The existence of a Court Order.
- (ii) The contemnor must have knowledge of the Court Order.
- (iii) There must be non-compliance with the Court Order.
- (iv) The non-compliance must be wilful and mala fide.

[12] In contempt proceedings where there is no criminal sanction, the standard of proof that an applicant must discharge is on the balance of probabilities. Where a committal is ordered, the standard of proof is similar to a criminal standard. The elements must be proved beyond reasonable doubt. Once an applicant has proved the first three elements, wilfulness and mala fide are presumed. There is an evidential burden on a respondent to establish reasonable doubt. If the respondent fails to discharge this evidential burden, then the crime of contempt is established. It is recognised that contempt does not only equate to the act of non-compliance with a Court Order, but encompasses the nature of such contempt, the extent and the surrounding circumstances.⁶

[13] In **Pheko and Others v Ekurhuleni Metropolitan Municipality (No2) 2015(5) SA 600 (CC)** para [30] it was held '*Civil contempt is a crime and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in*

³ See Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others 2021 (5) SA 327 (CC) para [1].

⁴ See Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) para [42].

⁵ See Secretary of the Judicial Commission of Inquiry supra para [37].

⁶ See Secretary of the Judicial Commission of Inquiry supra para [92].

criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons.'

[14] All Court orders must be obeyed whether granted correctly or not. In **Sparks v Sparks 1998 (4) SA 714 (W)** at 726 E it was stated '*In general all orders of court, whether correctly or incorrectly granted have to be obeyed until they are properly set aside. If it were otherwise respondents would be able to defy court orders with impunity, contending that they believed such orders to be wrong.'*

[15] Lastly, in **Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others 2021 (5) SA 327 (CC)** para [61] it was held '*Finally, I hasten to point out that "contempt of court is not an issue inter partes [between the parties]; it is an issue between the court and the party who has not complied with a mandatory order of court". . .the overall damage caused to society by conduct that poses the risk of rendering the Judiciary ineffective and eventually powerless is at the very heart of why our law forbids such conduct.'*

EVALUATION:

[16] After the assessment of the papers, I accept that the Applicant and the First Respondent concluded a written settlement agreement which was subsequently made an order of Court on 22 February 2022. The question is whether or not the Applicant has proved all the requirements for contempt. On the basis that the Applicant seeks imprisonment or committal as a means to coerce compliance, the test is proof beyond a reasonable doubt. I am mindful that due to other considerations (such as the rights of liberty of the First Respondent and the drastic nature of an order for committal), this must be ordered as a last resort⁷.

(a) The existence of a Court Order.

⁷ See *Dezius v Dezius* 2006 (6) SA 395 (T).

[17] The first Court Order was as a result of a written settlement agreement between the Applicant and the First Respondent. It is trite that agreements concluded by parties freely and voluntarily must be respected and enforced, hence the settlement agreement was made an order of Court on 22 February 2022. Following contempt proceedings, Van Niekerk AJ duly ordered on 23 June 2023 that the First Respondent must comply with the Court Order dated 22 February 2020. The order by Van Niekerk AJ constitutes a valid Court Order. I am satisfied that there is a valid Court order dated 23 June 2023 marked as annexure 'BOD1'. The said order has not been rescinded therefore it remains enforceable. The First Respondent elected not to oppose this application and failed to adduce evidence that there exists no Court Order. It follows that this requirement has been proven.

(b) The contemnor must have knowledge of the Court Order.

[18] The Applicant duly amended the Notice of Motion which was personally served upon the First Respondent on 3 November 2023 together with these documents - Applicant's further affidavit and annexures. One of the attached annexures is the Court Order dated 23 June 2023 marked BOD1. I am satisfied that beyond a reasonable doubt the said Court Order dated 23 June 2023 has come to the knowledge of the First Respondent on or about 3 November 2023 at the very least. The First Respondent elected not to oppose this application and failed to adduce evidence that he had no such knowledge of the Court Order. It follows that this requirement has been proven.

(c) There must be non-compliance with the Court Order.

[19] The Applicant's version that the First Respondent has not complied with the said Court Order remains unchallenged. In the founding affidavit, the Applicant avers '*The First Respondent has failed and/or refused to act in accordance with clause 4.1.2(i) of the agreement.*' In addition, the Applicant avers in the founding affidavit '*I have been advised further that the First Respondent failed and/or refused to discuss the matter with the Second and /or the Third Respondent/s. Leaving the Court Order and section 45bis (1)(a), read together with, section 45bis (2) (a) and section 45 (2) of the DRA, nugatory.*' Lastly, the Applicant avers '*Given that the First Respondent*

initialled and signed the agreement, which agreement was later made an Order of Court, it is humbly submitted that the First Respondent, with the knowledge of the Court Order, acted in a manner which is in conflict with the terms of the Court Order.'

[20] The First Respondent failed to adduce evidence that establishes a reasonable doubt that he did not breach the Court Order wilfully. Instead, what is clear from the papers is that the First Respondent not only had failed to comply with the Court Order dated 22 February 2022 but also failed to comply with the Court Order dated 23 June 2023. Put differently, in the absence of a version by the First Respondent disputing the averments made by the Applicant, I am satisfied that the Applicant has proved this requirement.

(d) The non-compliance must be wilful and mala fide.

[21] Having considered the fact that the First Respondent was aware of the Court Order dated 23 June 2023 after it was served upon him. The evidence establishes the fact that he was well aware that the first Court Order has not been complied with. I reasonably presume that the non-compliance by the First Respondent is both wilful and mala fide. It follows that the Applicant has proved this requirement. In view of the fact that the crime of contempt has been proven beyond a reasonable doubt, it calls for a determination whether an order for committal is just under the circumstances. I have taken into account the fact that the Court Order which is dated 23 June 2023 provided the First Respondent with an opportunity to rectify the non-compliance. He failed to do so even after he was served with a notice of set down for the current proceedings. This is blatant wilfulness on the part of the First Respondent.

[22] There is one issue I deem it appropriate to remark on. Despite a defect in the Notice of Motion, I am satisfied that the First Respondent has not suffered any prejudice. I hold this view on the basis that the First Respondent was personally served on 25 April 2024 with a notice of set down for the current proceedings which provided a date on which this application will be heard. The defect has been cured by a notice set down which was personally served on the First Respondent who elected not to participate or oppose the application. It must be reiterated that the duty

of Courts is to do justice between litigants. The interests of justice have not been compromised.

[23] The last aspect I need to remark on is in respect of the Applicant seeking an indulgence to file a further affidavit as envisaged in Rule 6 (5) (e) of the Uniform Rules. The Court has a wide discretion to allow the filing of a further affidavit where there is a good reason for doing so provided the other party will not be prejudiced thereby.⁸ Some flexibility is permitted by the presiding judge who must exercise his or her discretion in relation to the facts of the case before court to do justice. On the facts, the First Respondent elected not to file any opposing papers, and it is evident that there were relevant and further facts that the Applicant needed to disclose for a just decision. Accordingly, I am satisfied that the interest of justice permits that this court allows the Applicant to file the further affidavit. To do so will not cause prejudice to any of the Respondents. Applying the discretion as envisaged in Rule 6 (5) (e), I will allow for the further affidavit to be filed. See **James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons, NO 1963 (4) SA 656 (AD)** 660 D- F.

CONCLUSION:

[24] In conclusion, I am persuaded that the Applicant has proved all the elements for contempt and is entitled to the relief. I am further satisfied that the facts of this matter warrant an order for committal.

COSTS:

[25] The last aspect to consider is the costs. It is trite that the basic principle on costs is that the Court has a discretion which has to be exercised judicially. It is further trite that costs follow the course. Punitive costs of the scale as of attorney and client is extraordinary and usually reserved for cases where the court finds that the circumstances warrant it showing its displeasure with the conduct of a litigant. See **Tjiroze v Appeal Board of the Financial Services (CCT 271/19) [2020] ZACC 18** (21 July 2020) para [27]. On the facts in this matter, the refusal by the First Respondent Court Order despite being afforded an opportunity by Van Niekerk AJ

⁸ See *Hano Trading v JR 209 Investments* 2013 (1) SA 161 para [11].

demonstrates such a high level of contempt that it warrants censor from this court in a form of punitive costs. For that reason, punitive costs are warranted. It is therefore just and equitable that the First Respondent be ordered to pay costs on attorney and client scale.

Order:

[26] In the circumstances the following order is made:

- (1) The Applicant is granted permission in terms of Rule 6 (5) (e) of the Uniform Rules to file a further affidavit.
- (2) The First Respondent is declared to be in disobedience of the Court Order dated 23 June 2023.
- (3) The First Respondent is ordered to comply with the Court Order dated 23 June 2023 within 10 (ten) days of service of this order. In the event that the First Respondent fails to comply with this Order within the ten days as prescribed, he is sentenced to pay a fine in the sum of R40 000 (forty thousand rand) or in default of payment to undergo 90 (ninety) days imprisonment. This amount of R40 000 (forty thousand rand) is to be paid into the following account:

Bank: Tyme Bank Limited.

Account name: M[...] B[...].

Account number: 5[...].
- (4) The First Respondent is ordered to pay costs of this application on attorney and client scale including Counsel Fees.

MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicant : Adv. M. V. Botomane
Instructed by : Malherbe and Roos Attorneys
: Corner Leslie and William Nicol
: 128 Leslie Avenue, Building 2 Design Quarter
: Fourways

On behalf of the 1st, 2nd and 3rd Respondents : No Appearance

Date of Judgment : 30 October 2024