

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

Case Number: 2018-29229

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: YES/~~NO~~

26 August 2024

DATE

SIGNATURE

In the matter between:

W[...] J[...] J[...]

Applicant

And

K[...] V[...] W[...]

First respondent

KENNETH DANIEL BREUKEL

Second Respondent

ORDER

1. The first respondent is declared to be in contempt of paragraph 3 of the order granted on 24 November 2021 by the Honourable Acting Justice Clark, having enrolled the children born of the marriage at a school without the prior agreement of the applicant.

2. Each party shall pay his/her own costs.

JUDGMENT

LIEBENBERG AJ

[1] The applicant and first respondent are in the throes of an acrimonious divorce action which have endured for full some six years. They are the parents of two young children, a daughter, who is now 13 years old and a son who will be 12 in October 2024. The divorce action is under judicial case management by a different judge of in this Division, and the most recent management meeting was held on 5 August 2024.

[2] The second respondent was appointed to act on behalf of the first respondent by way of a power of attorney executed on 18 October 2022 for the limited period 21 October 2022 to 30 April 2023.

[3] The application before me was launched in February 2023 wherein the applicant, the husband, initially sought an order along the following lines:

[3.1] That the contents of the e-mail sent by the second respondent on behalf of the first respondent, on 9 February 2023, are false and defamatory and amount to malicious interference with the applicant's rights and responsibilities as a parent.

[3.2] That the first and second respondents are found to be in contempt of court and guilty of an offence as provided for in section 35(1) of the Children's Act¹ (*"the Act"*).

[3.3] An order that the first and second respondents pay to the applicant an amount of damages to be determined by the Court for the harm caused to his reputation and dignity.

[3.4] An order that the first and second respondents write a letter of apology to the applicant and the staff of the children's school.

¹ 38 of 2005.

[3.5] An order that the first and second respondents be held criminally liable for the crime of *crimen injuria* in accordance with the Criminal Procedure Act.²

[3.6] An order that the Office of the Family Advocate conduct an urgent investigation into the care and protection of the children and make recommendations in this regard, including the children's primary residence ought to vest with the applicant herein; and

[3.7] That the second respondent provide the residential address of the children.

[4] At the hearing, the applicant did not persist with all the relief he sought.

The applicant's case in the founding affidavit

[5] The applicant's case, distilled from the notice of motion and the founding affidavit, is this:

[5.1] Since the first respondent relocated from Johannesburg to Cape Town in May / June 2018 with the children, she has systematically interfered and sought to prevent the applicant from exercising his parental responsibilities and rights in respect of the children, including him being involved in and having contact with the children's schools and schoolteachers.

[5.2] The first respondent's faulted conduct include having enrolled the children in no less than four different schools during the period mid-2018 and January 2023, without the applicant's prior knowledge or consent.

[5.3] This behaviour, the applicant contends, contravenes the Constitution, the Act and an order granted by this Court on 24 November 2021 pursuant to an application in terms of Rule 43.³

[5.4] Towards the end of 2022, the first respondent enrolled the children at what is their current school, RH, in the southern suburbs of Cape Town, again without his prior knowledge or consent.

² 55 of 1977.

³ A copy of the order was not attached to the founding affidavit.

[5.5] On 9 February 2023, the second respondent, acting on behalf of the first respondent, sent an email to the staff of RH school, which the applicant contends, contains “false statements and misinformation” as described in the notice of motion, all of which defamed him, undermined his dignity, and constituted interference in the exercising of his parental responsibilities and rights.

[6] The false statements and misinformation complained of include:

[6.1] That the applicant only recently made contact with RH to confirm the children’s attendance, despite having been informed of their enrolment previously.

[6.2] A reference to the acrimonious divorce action, which remained unsettled, thereby implying that the delays were due to the applicant being uncooperative, which is false and amounts to a deliberate attempt to discredit and undermine the applicant’s integrity.

[6.3] The email implied that the applicant was or is unreliable and uncooperative in relation to arrangements for the exercise of his parental rights of contact with the children, which is false and a deliberate attempt to discredit him and undermine his relationship with his children.

[6.4] In the e-mail the first respondent claimed that she had taken on the full responsibility for the children's school fees as the applicant made no contribution to the children's school fees and extramural activities, implying that the applicant is financially irresponsible and neglectful of his parental duties. This, the applicant contends is false and amounts to a deliberate attempt to defame his character and undermine his rights as a parent. The applicant states that he pays maintenance “in line with the current Rule 43 order dated 24 November 2021”.

[6.5] The e-mail claimed that the applicant had elected to relinquish his parental rights and responsibilities, and as such no information regarding the accounts of the children at the school ought to be shared with the applicant.

[6.6] It is further stated in the email that the first respondent had elected not to have contact with the applicant, and thereby implying that her reason for doing so is that the applicant abuses the children by exposing them to

acts of domestic violence. The applicant states that this is not only false but amounts to a deliberate attempt to define him and negatively influence the opinions of the school's staff members against him.

[7] In conclusion, the applicant alleges that without High Court intervention, the first respondent "will continue to do everything possible to harm [his] dignity, defame [his] character and prevent the execution of [his] parental responsibilities and rights, with the ultimate aim to destroy any level of involvement and relationship with the children."

The respondents' defences

[8] Both the first and second respondents opposed the relief sought and filed an answering affidavit deposed to by the second respondent. The major thrust of the opposition was premised on four technical defences, being:

[8.1] The founding affidavit does not disclose a cause of action in respect of the alleged defamation.

[8.2] The lack of jurisdiction of this Court in so far as both the first and second respondents reside in Cape Town.

[8.3] The misjoinder of the second respondent, who is not a party to the divorce action under the captioned case number.

[8.4] The relief sought by the applicant being defective and irregular.

[9] Unsurprisingly, the second respondent disavowed personal knowledge of many of the allegations contained in the founding affidavit. The first respondent's confirmatory affidavit did not provide any further allegations but in a slovenly manner merely confirmed the allegations in the second respondent's answering affidavit in so far as it pertains to her.⁴

[10] What does appear from the answering affidavit is:

⁴ *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and others* [2017] 4 All SA 624 (SCA) at para 31.

[10.1] It is denied that the first or second respondent has in any way defamed the applicant's character or sought to limit and prevent him from having "access" to the children.

[10.2] Referring to an e-mail addressed to the applicant on 16 January 2023, ostensibly from the first respondent, it is contended that the first respondent did inform the applicant that the minor children had been enrolled at RH.

[10.3] The contents e-mail of 16 January 2023 do not purport to be an attempt to canvass the applicant's views and wishes regarding the children's enrolment at RH, but rather a case of the applicant being presented with a *fait accompli*. Additionally, the applicant was requested to commit to one of four options regarding an increased maintenance contribution towards the children's needs. The e-mail concluded thus:

"We will not enter into a protracted exchange of emails and lengthy debate with yourself. The information you require has been furnished to you. Please reply with either a simple yes and advise us of which option of point [the four options regarding maintenance] you will be selecting or a simple no, no later than 12:00 on 20th January 2023."

The replying affidavit

[11] Apparently, the application was held in abeyance for some months, until end-March 2024, when the respondents' attorney took steps to enrol the matter for hearing. This prompted the applicant to file a substantial replying affidavit which contained substantial new matter.

[12] The applicant details the overwhelming number of other litigious proceedings, including no less than three different applications by the first respondent in terms of the Domestic Violence Act⁵ against the applicant herein, all three of which being unsuccessful. The applicant also details a criminal complaint laid against him by his mother-in-law, which came to naught.

⁵ 116 of 1998.

[13] The applicant specifically refers to and attaches a copy of the Rule 43 order granted on 24 November 2021, which dealt with not only care and contact but also the applicant's maintenance obligations vis-à-vis the children.

[14] After the granting of the Rule 43 order, the first respondent obtained an interim protection order the terms of which threatened to interfere with the applicant's contact with the children over the 2021 summer school vacation. This gave rise to an urgent application heard by Fisher J on 22 December 2021 who granted an order varying the Rule 43 for a limited period until September 2022.

[15] According to the applicant, and during a judicial case management meeting held on 21 April 2023, the managing judge dismissed the application now before me, making no order regarding costs. The minutes of that meeting, a copy of which was annexed to the replying affidavit, do not bear out such an order having been made, and I could find no such order in the electronic case file.

[16] The applicant also referenced findings made during the course of psycho-legal investigations, and attached extracts of reports filed, pointing to the children being the alienated from their father.

[17] The primary purpose of a replying affidavit is to refute allegations made in the answering affidavit.⁵ This purpose flows from the trite rule that "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the applicant is the allegation of facts sated therein, because those are the facts with the respondent is called upon either to affirm or deny."⁶

⁵ *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at para 21.

⁶ Per Diemont JA in *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636H. Also see *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) at para 26, and *Mostert v Firstrand Bank t/a RMB Private Bank* [2018] ZASCA 54; 2018 (4) SA 443 (SCA) at para 13.

[18] It is only in 'exception circumstances' or 'subject to the discretion of the court' that new matter, raised in reply, will be allowed. Van der Merwe JA summarised the court's discretion thus:⁷

"In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs."

[19] Despite the substantial new matter raised in the replying affidavit, the respondents did not seek to have it struck out nor did they seek leave to file a supplementary affidavit. Some of the new matter relates to events prior to the launching of this application, which ought to have been included in the founding affidavit. The replying affidavit also refers to matters arising subsequently.

[20] I have purposefully refrained from attaching too much weight to much of the replying affidavit, but for the copy of the Rule 43 order and the minutes of the judicial case management meeting on 21 April 2023.

The existing court order

[21] The Rule 43 order granted on 24 November 2021 includes detailed provisions regulating contact between the children and the applicant herein, including with reference to the particular schools either of the children attend, and the distance the children and where the applicant resides. The order also provides that:

"3. [The first respondent herein] shall remain 100% liable for the costs of the children's schooling at private schools in which she has enrolled them, which costs shall include the cost of tuition and boarding fees. It is recorded that [the daughter] currently attends [X] College Grahamstown and [the son] attends

⁷ *Mostert v FirstRand Bank* above at para 13.

[Y] Preparatory School, Cape Town, and neither child shall change schools unless the parents agree to the change.

[underlining added]

4. [The applicant herein] shall contribute towards the children's maintenance as follows:

4.1 R 6 500.00 per children per month payable to the [first respondent herein] on or before the first day of each month.

4.2 50% of the children's medical aid premiums on the current plan, being Discovery Essential Saver Plan; and

4.3 25% towards the cost each school term of [the daughter's] transport between [the first respondent's residence] and [X] College per term."

[22] According to the replying affidavit, attempts to vary the Rule 43 order came to naught. So, the order of 24 November 2021 remains extant.

The hearing

[23] At the commencement of the hearing before me, I enquired from the applicant to clarify his position regarding this application. My enquiry stemmed from the allegations that the managing judge had already determined this application, in the face of the minutes of that meeting not referencing such an order having been granted.

[24] The applicant made it plain that he wished to put a stop to the litigation, but that he was concerned that the first respondent would continue thwarting his parental responsibilities and rights absent a conviction of contempt of court as also provided for in section 35 of the Act. He did not wish to proceed with the defamation claim, payment of damages and/or the publication of an apology.

[25] This Court was at pains to explain to the applicant the requirements for a criminal finding of contempt of court which must be established beyond a reasonable doubt, and the difference between a criminal and civil finding of contempt of court,

the applicant indicated that he did not wish to see the first respondent incarcerated, but that a declarator order would be in order.

[26] Ms Rouke, who appeared for the respondents, confirmed the contents of the minutes of the meeting on 21 April 2023 as well as the fact that that a judicial case management meeting was held on 5 August 2024.

[27] I was also told that the minutes of this most recent meeting are yet to be finalised, but that the managing judge did grant an order to the effect that the office of the Family Advocate in Cape Town, is requested to investigate the children's best interests. As such, the parties are agreed that I need not concern myself with granting such an order.

The law on contempt of court

[28] "Contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary. As the applicant correctly avers, "the authority of courts and obedience of their orders – the very foundation of a constitutional order founded on the rule of law – depends on public trust and respect for the courts". Any disregard for this Court's order and the judicial process requires this Court to intervene."⁸

[29] The rule of law is cornerstone of South Africa's constitutional democracy, and to maintain the rule of law, judicial decisions must be implemented and adhered to. Judicial authority should not be impugned, and court should protect their institutional authority and judgments. In *Pheko*⁹ the Constitutional Court held:

"The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom

⁸ *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* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) at para 27.

⁹ *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko*) at para 1.

and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

[30] Based on *Fakie*¹⁰, the dictum of the Supreme Court of Appeal, which was confirmed in *Pheko*, it is trite that an applicant who alleges contempt of court must establish:

[30.1] An order was granted against the respondent;

[30.2] The respondent was served with the order or had knowledge of it; and

[30.3] The respondent failed to comply with the order.

[31] Once these three elements have been established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish reasonable doubt. If the respondent fails to do so, contempt will be established.

[32] For a criminal finding of contempt of court, an applicant must prove the requisites of contempt beyond a reasonable doubt. A declarator or other appropriate civil remedies remain available to a civil applicant on a balance of probabilities.¹¹

[33] A deliberate failure to comply with a court order is not enough, for good faith avoids the infarction. Even a refusal to comply that is objectively unreasonable may be *bona fide*, although unreasonableness could evidence lack of good faith.¹²

[34] At common law and in terms of the Constitution, the High Court has the inherent jurisdiction to regulate its own processes, including dealing with instances of contempt of court.

¹⁰ *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (“*Fakie*”).

¹¹ *Fakie* above at para 42.

¹² *Fakie* above at para 9.

[35] The provisions of section 35(1) of the Act also colours non-compliance with court order regulating the exercising of parental responsibilities and rights as an offence which, upon conviction, is punishable by a fine or imprisonment up to one year. This offence is but contempt of court by another name.

Discussion

[36] Ms Rouke was constrained to concede the existence and contents of the Rule 43 order, and her client having knowledge thereof.

[37] As contempt proceedings are a continuation of a previously instituted proceeding, the judgment or order must be enforced in the court that granted the original order. The Rule 43 order was granted by this Court, and this Court has the requisite jurisdiction to enforce the Rule 43.¹³ The fact that the first respondent resides in the Western Cape does not divest this Court from its authority to enforce an order it made against her.

[38] It was submitted that the applicant was not entitled to a declaratory order on contempt as he simply did not make out a case in the founding affidavit. It was argued that the contents of the notice of motion not being under oath, cannot be taken into consideration in determining whether the applicant was entitled to a finding in his favour on the first respondent's non-compliance with the Rule 43 order.

[39] The respondents' argument loses sight of the applicant having specifically incorporated the contents of the notice of motion in paragraph 28 of his founding affidavit. The notice of motion include in paragraph 1, the allegation that the first respondent had enrolled the children at RH without his knowledge or consent; and paragraph 4 thereof, that the email sent to RH school, constituted an attempt to interfere with and limit his parental responsibilities and rights confirmed by the Rule 43 order.

¹³ *Els v Weideman* [2010] ZASCA 155; 2011 (2) SA 126 (SCA); [2011] 2 All SA 246 (SCA) at para 34.

[40] By virtue of paragraph 3 of the Rule 43 order, the applicant's responsibilities and rights include having to agree to a change to the schools at which the children are enrolled. Plainly the first respondent did not seek the applicant's agreement to enrol the children at RH school. She did not canvass his views and wishes on this score prior to making the decision, and simply decreed that it would be so.

[41] In the result, I am satisfied that the applicant has proven the first three requisites of a finding of contempt. Accordingly, an evidentiary burden rests on the first respondent to dispel the inference of wilfulness and *mala fides*.

[42] The answering affidavit deposed to by the second respondent does not contain even an attempt to justify the first respondent's failure to comply with the Rule 43 order. The email of 16 January 2023 evidences the high-handed manner in which the applicant was simply informed of the decision, and resultant demands for additional contributions towards the children's maintenance needs. The contents of the letter certainly points to a lack of *bona fides* and a wilful disregard of not only the applicant's role, responsibilities and rights as parent, but of the sanctity of court orders.

[43] I find that the first respondent failed to acquit herself of the evidentiary burden on her. Resultantly, the applicant has proven each of the elements of contempt of court, and he is entitled to the declaratory order he seeks on this score.

Costs

[44] Section 30(2) of the Act requires a parent to obtain prior agreement of the other parent before surrendering or transferring parental responsibilities and rights to a third party. There is no suggestion that the applicant's agreement was sought prior to the first respondent having executed a power of attorney on 18 October 2022, whereby the second respondent was appointed amongst other "to assist [her] in meeting all of her parental responsibilities and rights" in respect of the children.

[45] It is clear that the second respondent had a hand in the drafting of the email of 16 January 2023 – it specifically refers two powers of attorney executed. He also

deposed to the answering affidavit, there being no reason why the first respondent, who has the necessary personal knowledge, could not have instructed her attorneys. I accept that she may have been indisposed because of spinal surgery, but she was after all able to depose to a confirmatory affidavit.

[46] I am mindful of the limited success the applicant achieved against the first respondent only. Yet, from the affidavits before me it is apparent that the second respondent had involved himself in matters which is none of his concern. His involvement led to consternation all of which could have been avoided.

[47] In the result, and in the exercise of my discretion on costs, I am satisfied that no order as to costs is appropriate in the circumstances.

[48] I make the following order:

1. The first respondent is declared to be in contempt of paragraph 3 of the order granted on 24 November 2021 by the Honourable Acting Justice Clark, having enrolled the children born of the marriage at a school without the prior agreement of the applicant.
2. Each party shall pay his/her own costs.

S LIEBENBERG
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the applicant:

In person

For the respondent:

Adv M Rouke

Instructed by:

Duff & Associates Attorneys and Notaries

Heard on 20 August 2024

Judgment on 26 August 2024