IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable

Case no: 830/2022

In the matter between

D[…] J[…] V[…] R[…] **APPLICANT**

and

J[…] F[…] J[…] V[…] R[…] **RESPONDENT**

Coram: Ramdeyal AJ

Heard: 12 September 2024

Delivered: 20 September 2024

ORDER

1. The application is dismissed.

2. Costs in the cause.

JUDGMENT

Ramdeyal AJ

Introduction

[1] The applicant approaches this court requesting that the respondent be found guilty of contempt of court for failure to pay maintenance for herself timeously, in terms of a court order dated 21 July 2022 and for failing to comply with a court order dated 20

June 2023, following a Rule 43 and Rule 43(6) application, respectively. The applicant contends that the respondent has, on various occasions, made late payments in terms of the first court order. The applicant avers that the late payments by the respondent to her is economic abuse and a 'strong-arm tactic' (see para 23 of the applicant's opposing affidavit in this regard). She has monthly obligations to honour. She denies his averments in his opposing affidavit and submits that the respondent is willfully in default in paying her interim maintenance late. She further avers that the respondent is trying to economically badger her and torment her into submission.[1]

[2] Contempt of court is understood to be the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in official capacity, which includes willful disobedience and resistance to lawful court orders. Willful disobedience of a court order made in civil proceedings is both contemptuous and a criminal offence. The term civil contempt is a form of contempt outside of the court and is used to refer to contempt by disobeying a court order.[2]

[3] Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamus, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest.[3]

[4] In this case it is common cause that the there are two existing interim court orders. It is not the applicant's contention that the respondent failed to comply at all in respect of the first order but that it was not paid on time. He made late payments for the months of December 2023 to June 2024. The payments ranged between 3 to 18 days

[1] As expounded in para 27 of the applicant's replying affidavit.
[2] *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2015] ZACC 10; 2015 (5) SA 600 (CC).
[3] *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC) para 54.

late.[4]

[5] In respect of the second leg of the contempt proceedings, it is contended that the respondent failed to comply with the court order[5] to make payment to the applicant in the amount of R4000 per month in respect of remuneration for the domestic worker and other related expenses and is in default of payment of approximately R41 000. All payments in respect of both court orders were to be paid on or before the last day of each month.

[6] The respondent avers in his opposing affidavit that he is not withholding payment from the applicant purposefully or intentionally, but he is not earning enough money to comply with the order and has to wait for funds from the business to become available so that he can pay the applicant.[6]

[7] The respondent avers that at the time of the Rule 43 application, the domestic worker was in his employ at the communal home. He paid her an amount of R4000 per month with some additional expenses. The applicant, after vacating the communal home, terminated her services and employed another domestic worker. He is not aware of the contract conditions of the new domestic worker. However, in respect of his domestic employee of eight years, who's services were terminated by the applicant, he had to reinstate her by employing her at his business and paying her the monthly salary as she threatened to approach the CCMA for being unfairly dismissed. The applicant's conduct was uncalled for and it cost him further expenses.[7] He did in any event offer to pay the arrears to the applicant at an amount of R1000 per month but the applicant refused to accept same. The domestic worker is now employed in his business to counteract the applicant's dismissal of her employ.

[8] For these reasons and having to reinstate the domestic worker as referred to in the court order, he refused to continue to pay the additional R4000 per month to the

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[4] See court order FA 1 of the court bundle.
[5] FA2 of the court bundle.
[6] Paragraph 6 of opposing affidavit.
[7] See para 8.1 to 8.2 of the opposing affidavit.

applicant because he was now paying the domestic worker in question at his business.[8] He concedes that he did not apply for a variation of the court order, but that was due to limited financial resources and believed that this could have been resolved out of court.[9] He makes contributions to their major and minor children's expenses solely; he has a blind child and exclusively maintains him. The expenses for their blind child attending school in Worcester is substantial and, together with the applicant's expenses, may result in him not being able to cope with all the expenses imposed on him.[10] He may not have paid timeously and stopped paying the applicant for the services of the terminated domestic worker, for the reasons mentioned above, but he does more than what is expected of him as per the court order. He pays towards a storage unit for the applicant which amounts to R3 230.00 per month, which does not form part of any order of court.

[9] Whilst it is incumbent of the respondent to comply with the court orders and to apply for a variation of same if need be, it is important to consider the fact that the applicant did make the payments required and with regard to the domestic worker, remedied the situation himself, even though it would have been preferable to approach the court for a variation of same in terms of rule 43(6) of the Uniform Rules of court.

[10] It is incumbent on a court to ensure that the respondent's conduct was *male fide* and wilful, beyond a reasonable doubt. Whether the failure to meet his financial obligations to the respondent was intentional, or as a result of the deterioration of his financial circumstances, it remains an important aspect to consider.[11]

[11] In *Fakie NO v CCII Systems (Pty) Ltd*[12] (*Fakie*) it was held:

'Finally, as pointed out earlier (para 23), this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and

[8] Paragraph 8.4 of the opposing affidavit.
[9] Paragraph 9.2 of the opposing affidavit.
[10] Paragraph 10 of the opposing affidavit.
[11]See *S v SH* [2023] ZASCA 49.
[12] *Fakie NO v CCII Systems (Pty) Ltd* [2006[ZASCA 52; 2006 (4) SA 326 (SCA).

mala fide, the requisites of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt.'[13]

The Court continued

'To sum up:

i) 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 adapted to constitutional requirements.

ii) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

iii) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; wilfulness and mala fides) beyond reasonable doubt.

iv) 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.

v) . . .'[14]

[12] The respondent filed a detailed affidavit explaining his reasons for the late payments, the offer he made to the applicant for the arrear maintenance for the domestic worker as well as how he had to remedy the situation when the applicant terminated the domestic worker's services. More especially the respondent pays for storage for the applicant in the amount of R3200 which is not disputed by the applicant. The respondent makes these payments despite not being an order of court.

[13] The applicant chose to institute application proceedings. The approach to be adopted by the court in such an eventuality is trite. The matter must be decided on the respondent's version.[15]

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[13] Ibid para 41.
[14] Ibid para 42.
[15] See *Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) 623 (A).

[14] In *National Director of Public of Prosecutions v Zuma*[16] the Supreme Court of Appeal clarified the *Plascon-Evans* principle as follows:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'[17]

[15] A respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.[18] On the accepted test for fact finding in motion court proceedings, it is impossible to reject the respondent's version in this case as fictitious or unworthy of credence.

[16] The respondent has discharged the evidentiary burden on him. He has established a reasonable doubt that his non-compliance was not willful and mala fide.

[17] In the result I make the following order:

1. The application is dismissed.
2. Costs in the cause.

Appearances:

T RAMDEYAL, AJ

[16] *National Director of Public of Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA).
[17] Ibid para 26.
[18] Footnote 12 para 56.

On behalf of the Applicant	Adv. GSJ Van Rensburg
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On behalf of the Respondent	Adv. C Coetzer
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