

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO. CA42/2024

In the matter between:

ODG

Appellant

and

ZG

Respondent

(The names of the parties have been redacted to protect their identities.)

APPEAL JUDGMENT

HARTLE J,

[1] The appellant appeals with leave against a judgment and order of this court dated 24 October 2023.

[2] The court below was concerned with an application launched by the appellant against the respondent styled “*Urgent Contempt of Court Proceedings for Committal*,” which application was dismissed with costs. (*“the committal proceedings”*)

[3] The chief challenge on appeal is that the court *a quo* erred in approaching the application as one for contempt rather than only for the committal of the respondent

arising from a clear finding of contempt made earlier by Matebese AJ in a preceding application.

[4] There were in fact 3 preceding applications launched in the course of the parties' divorce litigation prior to the committal proceedings, the one cascading into the other.

[5] In the first application, launched in terms of the provisions of Uniform Rule 43, the appellant obtained an order on 23 July 2021 directing the respondent to release and hand over a BMW X5 motor vehicle to her; to pay her an amount of R34,000.00 per month sourced from rental income derived from one of their properties for use as maintenance for their minor children; to maintain payments in respect of the bond, insurance, lights, water and rates relating to one of the properties owned by their joint estate which was occupied by the appellant and the children as their primary residence (*"the property"*); and to pay school fees and related expenses in respect of the children (*"the original Rule 43 order"*).

[6] Five days later the appellant launched an urgent application due to the respondent's failure to comply with the original rule 43 order (*"the first contempt proceedings"*). The application was initially opposed and a counter application resorted to by the appellant in response to an application brought by the respondent to vary the terms of the original rule 43 order, but it became settled pursuant to a consent order made an order of court by Malusi J on 24 August 2021. The order recorded that both subject applications had been withdrawn and repeated the respondent's obligation to pay for the bond and utility charges in respect of the property *"until the bond has been settled or paid in full"*; to pay maintenance *pendente lite* for the minor children in the reduced sum of R20 000.00 per month; to continue paying the school fees and related expenses of the three children; and *"to continue paying for the BMW X5 including insurances and related expenses until another alternative vehicle acceptable to the (appellant) has been provided."*

[7] In February 2022 the appellant yet again launched contempt proceedings on the pretext that the respondent had continuously and deliberately failed to bring the bond account, water services and rates charges in respect of the property up to date (*“the second contempt proceedings”*). The appellant also complained in those proceedings that the respondent had failed to pay the credit instalments and related charges concerning the BMW X5.

[8] Matebese AJ heard the application in the second contempt proceedings and on 15 February 2022 delivered a comprehensive judgement in which he found the respondent to be in contempt of the two prior orders but gave him *“a lifeline”* by affording him a period of 60 days to purge his contempt. The respondent was also ordered by the court to file a compliance affidavit, which direction he duly complied with.

[9] It is apposite to set out the terms of the order of Matebese AJ’s order which he noted in his judgment to have been uniquely appropriate to vindicate the court’s honour and to keep tabs on the respondent’s compliance with the two prior orders. I should point out further that although he found the respondent to have been in wilful and *mala fide* disobedience of the two court orders under contemplation he had evidently taken his cue from the appellant’s affidavit filed in reply in which she had intimated that she did not desire an order for criminal sanction against him but had instead proposed an order directing him to purge his contempt within a specified period of time. He emphasized that the type of order suggested by the appellant in the end, which implicates supervisory relief, was not inconsistent with our law and jurisprudence in contempt proceedings¹ but reasoned that the respondent deserved a longer period than the one suggested by her to provide him with a reasonable opportunity to purge his contempt.

[10] Matebese AJ’s order, referenced vaguely by the appellant in passing in the committal proceedings, provides as follows:

¹ *Matjhabeng Local Municipality v Eskom Holdings Ltd & Others* 2018 (1) SA 1 (CC) at paras 46 – 67.

“1. The respondent is declared to be in contempt of the orders dated 23 July 2021 and 24 August 2021;²

2. The respondent is ordered and directed to comply with the said orders within sixty (60) days from the date of this order, in particular in the following manner:

2.1 The respondent shall pay to the applicant the monthly amount of R34000-00 ordered by this court on 23 July 2021, including settling the arrears to date and shall continue to do so until the divorce proceedings are finalized;

2.2 The respondent shall settle the arrears on the bond, the levies, rates and services and continue to pay for same on a monthly basis or as and when they fall due for the property situated at (address withheld) as ordered and directed by the court on 23 July 2021 and 24 August 2021.

2.3 The respondent is directed to refund the applicant, by way of direct payment to her account, the amount of R22 266.00 paid by the applicant for the BMW X5 tyres and to pay for the insurance on a monthly basis in respect thereof.

2.4 The respondent is directed to settle the outstanding arrears in respect of the BMW X5 and/or ensure that the vehicle remains available for use by the applicant and the children and is not repossessed by the bank by reason of his failure to pay the instalment due in respect thereof.

3. The respondent is ordered and directed to file an affidavit in this court, and serve same on the applicant's attorneys, within ten (10) days from the date of expiry of the sixty (60) day period, detailing the extent of his compliance with this order and with the orders dated 23 July 2021 and 24 August 2021.

4. The respondent shall pay the costs of this application.”

² Read with the judgment the effect of the declarator is that he was declared to be in wilful contempt of the two prior orders.

[11] From the context of the record before us the parties continued in earnest to settle the divorce action. A decree of divorce was ultimately issued on 7 February 2023 incorporating the provisions of their settlement agreement.

[12] Nothing further transpired until, on 5 June 2023, the appellant approached the duty judge with an urgent certificate complaining that as a result of the respondent's failure to have paid for the utility charges in respect of the property or to have maintained the credit agreement in respect of the BMW X5, she had received notices from the relevant municipality and body corporate which heralded that legal proceedings were imminent to recover arrear utility charges and levies respectively. Repossession of the motor vehicle was also under threat. Either event occurring would have negative implications for the interests of the minor children which was the primary premise for the claimed urgency.

[13] Thus the committal proceedings were launched in which the appellant prayed for an order that the respondent be committed to prison for a period of 30 days, provided that the criminal sanction be suspended on condition that he comply with the first two orders as well as the divorce order (*sic*) within 14 days of the urgent order anticipated, or subject to such further or alternative conditions as the court might direct.

[14] As an aside the divorce order obviously brought an end to the main action which gave life to the Rule 43 proceedings and its aftermath in its own unique way.³ Despite the usual clause in the parties' settlement agreement that was incorporated in their divorce order suggesting that its terms were in full and final settlement of all the proprietary and related issues arising between them, they were however *ad idem* amongst themselves that the arrears accumulated by the interim and related orders were not eradicated thereby or intended to be written off. The problem of their existence remains very much at the forefront of the appellant's concerns. Both the prospects of the foreclosure of the bond (and the resultant threat of the appellant's

³ It was conceded for example that the obligation on the respondent to pay interim maintenance (as a monthly requirement in terms of the prior orders) came to an end by the issue of the divorce order.

home being sold in execution) as well as the recovery of the motor vehicle by the financier loom large to the disadvantage of the appellant and the parties' children. Only the payment of the arrears will avoid these unfortunate eventualities, an outcome that the respondent appears in all the earlier proceedings to have reconciled himself with.

[15] Inasmuch as the court *a quo* found that the arrears were cancelled out by the divorce order and or were written off, such a perception is a mistaken one in conflict with the parties own understanding of what the respondent's obligations are.⁴ Indeed, in the divorce settlement the respondent has assumed the responsibility for payment of the bond and credit agreement respectively (including related utilities), arrears and all, even on the proviso that these assets are to be vested in the appellant's name as her exclusive property. But as mistaken as the court *a quo* was in finding that the orders that were the subject of the contempt and committal proceedings before her (or at least certain aspects of them) were not extant, she yet proceeded to deal with the matter further on the assumption that their existence had been established as one of the requisites of contempt reiterated by the Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd*⁵ in such proceedings namely : the order; service and notice; non-compliance; and wilfulness and *mala fides*.

[16] As a further aside the court *a quo* was criticized on appeal for finding that the committal proceedings were not urgent after apparently having informed the parties that it was unnecessary to address it on the subject. Although the court was of the view in the judgment that urgency had not been established, it yet proceeded to deal with the merits of the application. Having decided the application in any event (and that the issue of urgency was not dispositive of the application) we find no need to press this ground of appeal any further either.

⁴ The court *a quo* observed that this was not one of those instances where the existence of the Rule 43 order, which by obvious implication is of a *pendent lite* nature, "*survived*" the decree of divorce. Indeed she expressed the view that the orders of 23 July and 24 August 2021 had "*lapsed*" with the finalization of the divorce proceedings.

⁵ [2006] ZASCA 54 at para [42].

[17] The main enduring challenge of the appeal is that the court *a quo* should not have entered into any debate about the respondent's contumacy in respect of his obligations spelt out in two court orders. Instead, it should have accepted that this had already been pronounced upon by the court in the second contempt application (per Matebese AJ) and that all it was called upon to do was to proceed to commit him to prison and not to give him a further lifeline as it were because, by the time of the launch of the committal proceedings, he had failed to purge his contempt.

[18] This argument is best understood by having regard to the relevant grounds stated in the appellant's notice of appeal as follows:

"2. The Learned Judge erred and misdirected herself by dealing with the matter as if it is an application for contempt even though it was an application for committal. The effect of the judgement appealed against had an impact of impugning and overturning the judgement by Acting Judge Matebese. In a nutshell the Learned Judge made a ruling on what was not before her, something that was dealt with by Matebese AJ.

3. The Learned Judge's reasons for dismissing the application was that the Appellant had not discharged the onus of proving that the respondent's non-compliance is wilful and *mala fide*. It is respectfully submitted that this was not the pronouncement that the court *a quo* was called to make as this finding was already made in Matebese AJ's judgement.

4. All what was required for the Learned Judge to do was to issue a coercive order that would compel the Respondent to comply with the orders. The finding made by the Learned Judge had far-reaching implications and would create a mockery of the justice system in that one Judge makes a finding on a particular issue and another judge (not sitting as a court of appeal) makes a different finding on the same issue in the same matter.

5. The Learned Judge erred and misdirected herself in finding that the Respondent was justified in not complying with the orders because of his financial constraints and Covid 19 related reasons. The Judge further found, in

paragraph 46 of her judgment, that she considered Respondent's partial compliance as a basis for finding that his conduct was not wilful and *mala fide*. It was unfortunate that this finding was at war with what was found by Matebese AJ in paragraphs 25 to 27 of his judgment."

[19] It is necessary at the outset to consider the nature of the application that was before the court *a quo*.

[20] Quite evidently, whether the emphasis falls on the word "*committal*" or the phrase "*contempt of court*" that appear in the header of the applicant's notice of motion, it is the remedy prayed for that puts the application under scrutiny foursquarely within the dimension of contempt proceedings requiring the higher standard of proof and particular deference to constitutional dictates. The standards of proof are those set out in *Fakie* : a balance of probabilities in respect of civil remedies, and a reasonable doubt when a committal order is requested.⁶

[21] Merely calling the application one for committal does not mean that the court below could therefore disengage from a full enquiry into the requisites for contempt or compartmentalize them. This is especially so since the sanction of imprisonment, or the threat thereof, was at that point on the cards.⁷

[22] Further since the committal proceedings were a sequel to the structural order granted by Matebese AJ (and the divorce had since intervened) it is self-evident that any introspection by the court into the requisites for contempt would have to be considered afresh and properly established on the evidence having regard to the unique developments since. This would necessarily involve a consideration of the exact extent of the non-compliance or breach of the original orders (or aspects thereof), as well as

⁶ *Pheko & Others v Ekurhuleni Metropolitan Municipality* (No. 2) 2015 (5) SA 600 (CC) at para [50] and *Fakie supra* at paras [39] and [42].

⁷ *Pheko* (No. 2) *Supra* at para [35] and *Fakie Supra* at para [24].

the terms of the subsequent contempt order (per Matebese AJ), where applicable, and the respondent's endeavours at compliance therewith.⁸

[23] In summary the court below did not erroneously misdirect itself by dealing with the application as one for contempt in the strict sense of the concept. It is the sacrosanct nature of these proceedings and the implication of the criminal dimension to them that calls special attention to their hearing with due regard to constitutional dictates.⁹ Whether the respondent's failure to comply with the relevant aspects of the prior orders that remained extant was contumacious is exactly the pronouncement that the court below was expected to make. Indeed it would make the difference whether the appellant could ask for the order she desired in the event that the requisites were proven beyond reasonable doubt, or whether she had to content herself with a mere declarator and other appropriate remedies remaining available to a civil applicant on proof of a balance of probabilities.¹⁰

[24] It is also a misconception that the court *a quo's* consideration of the necessary requisites that it was obliged to have regard to means that it was in the process undermining the findings of Matebese AJ made in the antecedent proceedings.

[25] I believe it follows logically instead that the respondent's historical contempt found at the time stands as a firm judgement. The respondent did not take issue with this finding after the fact neither was it contended on his behalf in the committal proceedings that he should not have been found to have been in contempt of the two prior orders as the court had found. He also evidently did not suggest that the remedy peculiar imposed by Matebese AJ for his culpable breach of the main thrust of the two prior orders fell to be questioned in any manner.

⁸ There is always a prospect and a hope that a contemnor might entirely avoid the imposition of a sentence by complying with the terms of a structural order as employed by Matebese AJ.

⁹ *Pheko (No. 2) Supra* at para [35].

¹⁰ *Fakie Supra* at para [42.5]

[26] The respondent ultimately complied with the order insofar as he was directed to furnish a compliance affidavit, albeit he contended in it that he was battling to make ends meet and to bring up the arrears. It was in this context that he highlighted that he had thrown all his weight into settling the divorce action because the cost of litigating the action had proved to be prohibitive.

[27] Further, and quite self-evidently, he took no steps to vary the terms of Matebese AJ's order, simply bemoaning the fact, at least at the time of filing his compliance affidavit in the manner that the supervisory order required of him, that it had been difficult for him to fully comply with the orders' terms, but he also outlined what steps he had taken and what payments he had in fact made by that date.

[28] I am therefore not in agreement with the sentiment expressed on behalf of the appellant that the court *a quo*'s own pronouncement of the requisite of culpable contumacy, whereas Matebese AJ had considered the same requisite under separate circumstances, creates a mockery of the justice system.

[29] Further and in any event Matebese AJ's finding of contempt was vindicated by the peculiar order made that the court considered appropriate for that moment in time and relative to the facts that served before him. The proceedings were brought to their logical conclusion by the imposition of a sanction in the form of a structural order to vindicate the court's authority.¹¹

[30] That brings me to the final question whether the court *a quo* can be criticized for concluding that although the respondent had not fully complied with the court orders, it did not follow upon malice or wilful conduct towards the court which constituted its primary reason for dismissing the appellant's application. I think not on the evidence.

¹¹ The historical findings may well be the basis to justify a more stringent sanction down the line.

[31] The respondent's non-compliance with the orders *per se* by no stretch of the imagination automatically equates to a finding of contumacy on his part. Instead, the court *a quo* accepted that he was not in wilful default as he insisted in his answering affidavit because he was trying by all might to bring up the arrears.

[32] Co-incidentally, the appellant hardly engaged with this requisite for the contempt proceedings, simply reverting to her stance that the respondent's wilful contempt was old-hat and already decided.

[33] While there may have been a good reason for her to have launched an application for committal when she did because the bond and credit agreements were being called up, it certainly required more than a generic averment that the respondent had not purged his contempt or tried to address the arrears. Whilst the appellant relied on a replying affidavit filed in response to the respondent's compliance affidavit this was deposed to some 11 months before the launch of the application, during which a number of payments could have been made in the interim. It certainly does not follow axiomatically that because the banks were threatening foreclosure this equaled contumacious disobedience of court orders. (Current payments made on the affected accounts that were substantially in arrears could also for example have been allocated by the banks to the older arrears and interest). Given the detailed structural plan enunciated in Matebese AJ's order one would have expected the appellant to engage with each part of that order to define the exact extent of the non-compliance that would, if the other requisites for contempt had been established, have justified the remedy of committal sought by her.

[34] In the end, whether the application had been dismissed for want of the appellant's establishing clear non-compliance of each aspect of the prior orders that still required obedience at the time and in the manner applicable, or for the reason that the court below decided that the respondent was not in wilful default of the prior orders, the outcome in my view was the correct one.

[35] In the premises the appeal should not be upheld, and the costs should follow that result.

[36] I make the following order:

1. The appeal is dismissed with costs.

B HARTLE
JUDGE OF THE HIGH COURT

I agree,

F DAWOOD
JUDGE OF THE HIGH COURT

I agree,

M MAKAULA
JUDGE OF THE HIGH COURT

DATE OF APPEAL : 21 August 2024

DATE OF JUDGMENT : 28 August 2024

Appearances:

For the Appellant: Mr. H Zilwa of Zilwa Attorneys, Mthatha (ref. Mr Zilwa)

For the Respondent: Mr. M Mneno instructed by Mgxaji Zazaza Attorneys, Mthatha (ref. Mr. Mgxaji)