



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN**

Case No: 17286/2017

In the matter between:

E[...] E[...] V[...] A[...]

Applicant

And

J[...] A[...] V[...] A[...]

Respondent

JUDGMENT

ANDREWS, AJ

Introduction

[1] The introductory remarks by the Constitutional Court in *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*¹ sets the tone for these proceedings:

¹ [2015] ZACC 10.

'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 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.'

[2] This is an opposed application in terms of which the Applicant seeks an order declaring the Respondent to be in contempt of court for the failure to adhere to the maintenance provisions of a Deed of Settlement which was made an Order of Court on 2 December 2019 under Case Number 17286/2017.

Factual Background

[3] On 2 December 2019, a decree of divorce was granted incorporating the terms of the Deed of Settlement dated 11 and 15 November 2019. The salient provisions in the Settlement Agreement stipulates as follows:

*'6.1 Defendant will pay an amount of **R16 500,00 (SIXTEEN THOUSAND FIVE HUNDRED RAND)** to Plaintiff as maintenance for a period of 3 (THREE) years from the date of divorce, with the first such payment to be made on the 27th (TWENTY SEVENTH) day of each succeeding month;*

*6.2 The maintenance amount referred to in **clause 6.1** above will escalate annually on the anniversary date of the divorce order in accordance with the headline consumer price index (CPI rate); and*

*6.3 At the expiration of the period of **3 (THREE) years** as mentioned in **clause 6.1** above the parties will agree to an amount which Defendant will*

pay as monthly maintenance or failing such agreement the parties will approach the Maintenance Court with the necessary jurisdiction to:

6.3.1 assess Plaintiff's maintenance needs, if any;

6.3.2 assess Defendant's ability to contribute to Plaintiff's maintenance needs; and

*6.3.3 to issue an order with regards to the monthly maintenance payable by Defendant to Plaintiff, if any, subject thereto that until such an agreement is reached or a Maintenance Court Order is granted the maintenance order as stipulated in **clauses 6.1 and 6.2** will remain in place...'*

[4] The Respondent instituted Maintenance Court proceedings to vary the aforesaid Maintenance Order. The Respondent is aware of the terms of the Maintenance Order. A warrant of execution for R60 038.83 was issued against the Respondent which was executed on 19 September 2023 and the Sheriff's returned an inventory. Simultaneously with the execution of the warrant, the Respondent was requested to pay the outstanding amount in respect of unpaid maintenance.

[5] The Maintenance Order is still extant. The Respondent has not fully complied with his obligations in terms of the Maintenance Order since December 2020

Point in limine

[6] The Respondent submitted that the current application was brought prematurely and cannot succeed for the following reasons:

- (a) In terms of clause 6.3 of the Settlement Agreement, the Applicant is precluded from approaching this Court when it is clearly indicated that the matter had to be considered by the Maintenance Court.

(b) Due to the pending Maintenance Court Application, the Applicant should not be permitted to seek relief in this Court regarding an Order that is in the process of being reviewed (sought to be rescinded retrospectively).

(c) If enforcement should be sought, it should have been done in the Maintenance Court, where an application was already pending.

[7] The Respondent instituted maintenance proceedings in order to obtain a discharge of the maintenance order early in February or March 2023, in the Strand Maintenance Court under case number 118/2023. The reasons identified on the application included:

- ‘1. Applicant can not (sic) afford to pay maintenance*
- 2. Respondent is in financial position to maintain herself’²*

[8] On 25 April 2023, being the date of the first appearance, the matter was adjourned to May 2023 for the exchange of the necessary documents between the parties. The matter was adjourned again, pursuant to an issue that was raised by the Applicant, for the filing of an alternative application. On 16 June 2023, an alternative application was submitted for the substitution of the existing order in the following terms:

- ‘1. That the monthly maintenance payable to Respondent by Applicant be refused (sic) to an amount of R5000-00 per month, alternatively such amount as the court may direct;*
- 2. That the payments and or contributions as set out in clause 3 and 4 of the existing maintenance order (divorce order) be discharged, alternatively substituted and reduced to the extent that it be included in the amount which the court may order Applicant to pay in terms of point 1 above.’³*

² Application Bundle, Substitution or Discharge of Existing Maintenance Order, para 3, page 56.

³ Application bundle, Applicants Request/Application for Amendment or substitution of existing maintenance order – in the alternative to discharged of the said order, pages 60 – 61.

[9] During June 2023, the Application was further postponed to 13 July 2023 for a formal Maintenance Enquiry. A Section 9(2) of the Maintenance Act⁴ order was issued in terms of which the Applicant was requested to produce the following documents:⁵

(a) 3 months bank statements;

(b) Proof of all latest monthly expenses and salary advice and

(c) Certified copy of identity document.

[10] The Maintenance Enquiry was thereafter seemingly adjourned *sine die* by agreement between the parties to attempt settlement. Settlement could not be achieved, despite the parties' efforts in this regard. On 28 July 2023, the Respondent's Attorneys, addressed an email to the Applicant's attorneys in which it was conveyed that the Respondent was unable to contribute anything toward the Applicant's maintenance. Notwithstanding, the Applicant tendered to make interim payments in the amount of R5000 per month, together with the medical aid contribution, pending the determination by the Maintenance Court. At the time when this proposal was made, the Applicants were already in receipt of the Respondent's supporting documents. The Respondent contended that he instructed his Attorneys to re-enrol the matter for hearing in the Maintenance Court after the parties were unable to reach an agreement in this regard. The Respondent argued that the Maintenance Court proceedings should be finalised before this application for contempt is heard.

[11] The Applicant contended that whilst it is so that the Respondent approached the Maintenance Court of a variation order the proceedings were terminated and the case was closed. In this regard, the Applicant referred the court to a SMS message received on 13 July 2023 to the following effect:

⁴ Act No. 99 of 1998.

⁵ Application bundle, Subpoena in terms of Section 9(2) of the Maintenance Act, pages 65 – 66.

‘Maintenance Case Closed on the 2023/07/12 Case Number: 000047/2023/191 at Strand from the DOJ’

[12] Despite the Respondent’s say-so that he instructed his Attorneys to re-enrol the matter, it is unrefuted that the maintenance case was closed as such, the point *in limine* falls to be dismissed.

Legal principles

[13] The matter of ***Fakie N.O v CCII Systems (Pty) Ltd***⁶, crystallised the trite requirements for contempt as follows:

- (a) the existence of a court order;
- (b) service or notice thereof on the alleged contemnor;
- (c) non-compliance with the terms of the court order by the alleged contemnor;
and
- (d) wilfulness and *mala fides* on the part of the contemnor.

[14] The law on “civil” contempt of court is well established. In the seminal judgment of ***Pheko and Others v Ekurhuleni Metropolitan Municipality*** (*supra*)⁷ the Constitutional Court in a unanimous judgment explains what is meant by civil contempt as follows:

‘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. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically

⁶ 2006 (4) SA 326 (SCA) at para 42.

⁷ *Pheko* *ibid* at para 30.

brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings mero motu.'

[15] ***Bannatyne v Bannatyne***⁸ deals with the competence of a court to enforce money judgments by way of contempt proceedings:

'[18] Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief is competent.'

[16] In ***Matjhabeng Local Municipality v Eskom Holdings Ltd and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited***⁹ the Constitutional Court stated as follows:

'Summing up, on a reading of Fakie, Pheko II, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.'

⁸ (CCT18/02) [2002] ZACC 31 at para 18.

⁹ 2017 (11) BCLR 1408 (CC) at para 67.

Issues in dispute

[17] The identified issue in dispute is whether the Respondent is in wilful and *mala fide* contempt of the Maintenance Order.

Issues for determination

[18] The issues for determination include:

(a) Whether the Applicant is precluded from approaching this court in circumstances where the terms of the order obliges the parties to approach the Maintenance Court, if they are unable to agree to an amount that the Defendant will pay as maintenance.

(b) Whether the Respondent's non-compliance was wilful and *mala fides*.

Principal Submissions by the parties

[19] The Applicant contended that the Respondent has refused and/or neglected since December 2020 to make full payments in respect of his monthly maintenance contribution and has failed to remedy same, despite demand. The Respondent was provided with opportunities to purge his contempt. The arrears as at the time when the application was launched amounted to R71 538.83. The Respondent has admitted to paying substantially less than he is required to pay in terms of the Court Order, namely R5 000 per month. The court was referred to the matter of **AG v DG**¹⁰ which dealt with a Respondent who had repeatedly breached a maintenance court order and frustrated the process of execution of such order including the hiding of assets.

[20] The Respondent denied that his non-compliance with the Order is wilful or *mala fide* and averred that he hasn't complied because he cannot afford the payment thereof. The Respondent explained that his expenses exceeds his monthly income.

¹⁰ 2017 (2) SA 409 (GJ) at para 14 and 20.

It was submitted that the Applicant's co-operation is required, which has to some measure contributed to the delays during the Maintenance proceedings when she failed to disclose her financial position. The Respondent argued that the Applicant was aware of his financial position, and notwithstanding, launched this application.

Is the Applicant precluded from approaching this court?

[21] It is trite that the enforcement of maintenance orders through contempt proceedings have been constitutionally sanctioned as is evident from the matter of ***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***.¹¹ The Applicant submitted that although the issuing of warrants may be an effective enforcement mechanism in respect of maintenance claims, it is not necessary to do so where attachment made pursuant to the writs, as in the case in *casu*, or where the Respondent can simply thwart the execution thereof by transferring monies out of an account. It was further contended that in those circumstances, amongst others, the Applicant can simply rely on the order and failure by the Respondent to satisfy that order to approach this Court for effective enforcement of the order on the basis of the Respondent's contempt.

[22] It is common cause that the first three elements for civil contempt had been met as set out in ***Fakie*** (*supra*) and approved by the court in ***Pheko*** (*supra*). In terms of the court order, the Respondent was obliged to pay maintenance for a period of 3 years and that at the expiration of the 3 years, the parties had to agree to an amount which the Respondent will pay as monthly maintenance, failing such agreement, the parties will approach the Maintenance Court to assess *inter alia*, the Applicant's maintenance needs and to assess the Respondent's ability to contribute to the maintenance needs of the Applicant.

[23] It is further common cause that that the Respondent had indeed approached the Maintenance Court as envisaged in the Court Order, however, the maintenance matter was closed, seemingly because it was not re-enrolled after having been

¹¹ [2021] ZACC 18.

adjourned *sine die*. The purpose for the adjournment, it would appear, was for the parties to attempt to reach settlement, which was not achieved. The maintenance matter was, as at the time when the matter was argued, not revived.

[24] The manner in which the wording of the order is framed makes it peremptory, in my view for the parties to approach the Maintenance Court after the expiration of the 3 years however, and of seminal importance, is that the Order specifically stipulates that until such time as an agreement is reached between the parties, or a Maintenance Court Order is granted, the existing Maintenance Order will remain in place. There is a plethora of case law that underscores the legal principle that court orders must be obeyed until it is set aside or varied by a Court of competent jurisdiction. This principle has been further qualified in ***Minister of Home Affairs and Others v Somali Association of South Africa EC and Another***¹², where the court emphasised that it cannot be left to the litigants to themselves judge whether or not an order of court should be obeyed. The court stated:

‘...after all there is an unqualified obligation on every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. It cannot be left to the litigants to themselves judge whether or not an order of court should be obeyed...’

[25] It therefore follows, that the maintenance obligation remains extant. Nothing therefore precluded the Applicant from approaching this Court for relief in circumstances where:

- (a) the Respondent’s application for a variation in the Maintenance Court has not been prosecuted to finality and
- (b) where the Respondent has been provided with the opportunity to purge the contempt.

¹² [2015] 2 All SA 294 (SCA) at paragraph 35; See also *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229 B – C ‘an Order of Court stands until it is set aside by a court of competent jurisdiction, and until then, it must be obeyed even if it may be wrong.’

Wilfulness and *Mala Fides*

[26] There is a presumption of *mala fides* and wilfulness when the first three elements of the test in **Fakie** have been established. In **Pheko** where the court held that:

‘...therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.’

[27] It is trite that where a Respondent acts under a *bona fide* belief that a maintenance order has ceased to operate, it is a defence that he did not act in wilful and *mala fide* disobedience of the order. In *casu*, if the Respondent labours under the belief that the Applicant’s circumstances have changed, that belief must be *bona fide*. This question must be answered with reference to the facts.

[28] It is only in circumstances where a Respondent is reasonable and *bona fide* in his belief that the maintenance order has ceased to operate, and that belief was ultimately incorrect, that a Respondent could be found to not have been in contempt of Court. This is clearly not the case in *casu*. It is clear that the Respondent appreciates that his obligation has not ceased. What the Respondent has done is to essentially pay what he claims he can afford. It amounts to a unilateral decision on his part, which goes against the terms of the Court Order as the terms of the existing Order remain in place until such time as it is varied or set aside. The Respondent is therefore not absolved from the responsibility to pay the arrears which has accumulated.

[29] The question that requires to be answered is therefore whether the Respondent’s non-compliance was because of affordability. Although an evidentiary burden rests on the Respondent to allege facts to create doubt, the Applicant bears the onus to prove beyond a reasonable doubt that the Respondent’s non-compliance

was not wilful and *mala fide*. Put differently, the ultimate burden rests on the Applicant that if on a conspectus of all the evidence it is reasonably probable that the Respondent's non-compliance was not wilful and *mala fide*, the Respondent cannot be subjected to criminal sanction.

[30] In **KPT v APT**¹³ the Court held that:

'Compliance with court orders is always important. There is a particular scourge in this country of spouses, particularly husbands, failing to pay judicially ordered maintenance. While a spouse facing a criminal sanction is entitled to the benefit of reasonable doubt, a court should not too readily find such doubt to exist where a spouse has failed to put up evidence which should have been available to support a claim of unaffordability.'

[31] The Respondent has in support of his contention that he is not able to afford the maintenance indicated that his financial position has not improved. In addition, he annexed a letter from his accountant which purports to confirm that his income has remained the same for the last few years. The Respondent, in elucidating his changed circumstances explained that he is a beekeeper and honey farmer. He stated that he owns hives on his property and rents others on neighbouring farms. In further augmentation, he averred that the business and income is not consistent either monthly or yearly. In addition, he explained that the harvesting is not possible throughout the year and this impacts on his income.

[32] The Respondent further elucidated that the business is managed and run as a separate company and he is paid a monthly salary, which is usually consistent at R65 000 but "it has in some months been less (all depending on the income or cashflow)".¹⁴ He went on to state that his ability to fully perform his occupation has recently been drastically impacted because of problems and pain that he has started experiencing in his hands. This has caused him to appoint an assistant, who travels with him. As a consequence, productivity has decreased due to operations he had to have. This has cumulatively seen an increase in his expenses and a decrease in his

¹³ (1215/2019) [2020] ZAWCHC 110 (2 October 2020) at para 95.

¹⁴ Opposing Affidavit, para 19, page 44.

income which has also been impacted because of his age. He is currently 61 years old. In addition, he is still paying off his daughter's study loan and in order to survive, he has had to apply for additional credit to survive. He only budgets an amount of R3500 toward groceries and none towards water and electricity.

[33] It is trite that the Respondent is required to make a full disclosure and has only seen fit to annex a letter from his Accountant. This court on the limited information is unable to assess the Respondents defence insofar as it pertains to affordability. He has clearly not taken the court into his confidence and as such, failed to discharge the evidentiary burden in this regard. The obligation to pay maintenance is serious as was held in **JD v DD**¹⁵ where Kollapen J remarked:

'The obligation to pay maintenance is a serious and indeed onerous one and in my view the very generalised nature of the respondent's assertions of being in constant financial crisis falls considerably short of what is expected of him in discharging the evidentiary burden that rests upon him.'

[34] Although the Respondent has not taken a supine approach altogether, it would have been expected that he at least produce documentary evidence to support his contentions. I am in agreement with the Applicant that it is not sufficient to baldly state that a business entity has performed poorly and therefore his ability to satisfy a maintenance order has been negatively affected. The order is not made against the business entity in which the Respondent has an interest, whether directly or indirectly.

[35] The Respondent is also required to make disclosure about the nature and extent of business dealings between different entities in which the Respondent has an interest either directly or indirectly which will enable the Court to determine whether, in fact, the Respondent is unable to satisfy the order as he alleges. Counsel for the Applicant pointed out that where the Respondent is in *de facto* control of various income generating entities, it is possible that he is able to determine the

¹⁵ JD v DD 2016 JDR 0933 (GP) at para 11.

salaries to be drawn, while other amounts to maintain his standard of living can be drawn as a loan or through other devices.

[36] The Court must therefore remain wary of any *'[w]ilfully and mala fide engineering [of] a decrease in salary or termination of employment to the extent that [the respondent] is for all intents and purposes unemployed simply for the purpose of deliberately frustrating the court's order'*.¹⁶ This is in particular where there are no documentary evidence to substantiate a claim that the Respondent's income has been reduced. Rogers J, remarked in **KPT v APT** ¹⁷ that the failure to provide bank statements is a critical gap in circumstances where reasonable doubt is to be shown. Also, in **CN v TN** ¹⁸, Dlodlo J, stated that there was no full disclosure regarding the nature and extent of business dealings as well as personal financial position, and remarked further:

'One would have for instance expected that the respondent should have provided details regarding the profit sharing arrangement ... There is no explanation about all this. The respondent's failure to provide documentary evidence supports the applicant's assertion that the respondent failed to make full disclosure of his personal financial position...'

[37] The court after contemplating the considerations in the aforestated authorities is satisfied that the Respondents failure to comply with the court order is wilful and *mala fide*. If the respondent was serious about applying for a reduction in the Order, he should have re-enrolled same. Instead, it appears that nothing was done since the closure of the maintenance case, which in my view is indicative of his clandestine approach to this matter. He has failed to have proper regard for the seriousness of the consequences of his actions. Section 165 (5) of the Constitution is said to "lie at the heart of the rule of law" and enjoins all persons to whom a court order applies obeys the terms thereof on pain of sanction.¹⁹

¹⁶ AG v DG at para 28.

¹⁷ **KPT v APT** (1215/2019) WCHC (2 October 2020), para 89.

¹⁸ 2017 JDR 0951 (WCC), at para 17.

¹⁹ See **MEC for the Department of Public Works and Another v Ikamva Architects CC** 2023 (2) SA 514 (SCA) para 30.

The Sanction

[38] The Constitutional Court in ***Pheko and Others v Ekurhuleni Metropolitan Municipality*** (*supra*), identifies wilful disobedience of an order made in civil proceedings as a criminal offence. The Court in ***Bannatyne***²⁰ (*supra*) stated that:

*'In terms of section 8 of the Constitution the judiciary is bound by the Bill of Rights. Courts are empowered to ensure that constitutional rights are enforced. They are thus obliged to grant "appropriate relief" to those whose rights have been infringed or threatened.'*²¹

[39] The Constitutional Court in the ***State Capture*** matter (*supra*) clearly emphasized that if litigants decide which orders they obey and which to ignore, our Constitution is not worth the paper upon which it is written:

*'The right, and privilege, of access to court, and to an effective judicial process, is foundational to the stability of an orderly society. Indeed, respect for the Judiciary and its processes alone ensures that peaceful, regulated and institutionalised mechanisms to resolve disputes prevail as the bulwark against vigilantism, chaos and anarchy. If, with impunity, litigants are allowed to decide which orders they wish to obey and those they wish to ignore, our Constitution is not worth the paper upon which it is written.'*²²

[40] The Applicant sought in its Notice of Motion that the Respondent be sentence to imprisonment for a period of 70 (seventy) days, alternatively, a period of imprisonment which the Court deems appropriate, alternatively that a sentence, penalty or fine which the Court deems to be appropriate be imposed against the Respondent.

²⁰ At para 19.

²¹ Section 8(1) of the Constitution provides: "*The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*"; Section 38 of the Constitution states: "*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights . . .*"

²² At para 137.

[41] The Applicant, in the Heads of Argument seeks to amend the relief to the effect that the Respondent be committed to imprisonment for a period of 60 days which is to be suspended for a period of two (2) years on condition that the Respondent pays the sum of R124 454 together with interest thereon within a period of 6 months. The Respondent argued that the Applicant is required to make out her case for the relief she seeks. The Founding Affidavit was deposed to in October 2023

[42] In considering an appropriate sanction, the court is mindful of the dual purpose of contempt proceedings. In this regard, the sentence to be imposed should contain both a punitive and coercive element. This court, in exercising its discretion, is enjoined to impose a sentence that is also just and equitable in the circumstance. Although the Respondent averred that he could not afford to make payment in terms of the order, he has been very economical with the information he deemed necessary to place before this court concerning his financial affairs. As previously stated, the onus rests on the Respondent to persuade the court that he could not afford the payment in order to demonstrate that the Respondent's reduction of the monthly amount was not *mala fide* or wilful. Although it was argued that this matter cannot proceed until the maintenance matter has been finalised, it is evident that the Maintenance matter was closed.

[43] The court has regard to the fact that the Respondent has substantially complied with the order until July 2023; the partial compliance having commenced around December of 2020. These proceedings were launched in October 2023. In my view, the arrear amount should be computed as at the time of the launch of the proceedings as it is impermissible for a party to plead a particular case and seek to establish a different case that was not pleaded. The Respondent has the right to know the case he must meet and the right to a fair opportunity to meet that case.

[44] It is noteworthy that the Applicant projected an arrear amount until December 2023, when the Respondent was not yet in arrears in the amount alleged. The Applicant then goes further to alleged that the Respondent failed to pay the total escalated amount of R37 038.83 inclusive of the December 2023 period. Later the Applicant states that the total amount in respect of the arrear maintenance owed is

R71 538.83. The computation of this amount is not clear. Furthermore, a warrant of execution for R60 038.83 was issued against the Respondent which was executed on 19 September 2023. What is further ominous is the fact that the Applicant, in the draft order has requested that the Respondent pays the sum of R124 454 together with interest. How this amount is derived at is also not clear.

[45] Therefore, in the absence of a proper elucidation of the arrears as at the date of the application, which in my view should have been as at the end of September 2023, this court cannot derive at an appropriate sanction.

Conclusion

[46] The Respondent cannot unilaterally change the terms of the order and pay an amount he deems appropriate. I am of the view, that had the Respondent taken the court into his confidence fully, this court might have been in a position similar to the matter of **F.S v Z.B**²³ to consider the matter differently, bearing in mind that the facts are distinguishable in that the court was seized with two applications, namely contempt proceedings and Rule 43(6) proceedings.

[47] This court, on the facts presented by the Respondent is unable to assess his level of affordability and is in any event not seized with a variation application. The correct forum to determine an appropriate order will ultimately be the Maintenance Court. Until such time the existing order remains in place. As guardians of the Constitution, courts jealously guard orders and ensure compliance “*by all and sundry*”.²⁴ It is said that “*[i]n doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.*”²⁵

[48] Consequently, I deem it appropriate to refer the matter to the Maintenance Court to conduct an enquiry.

²³ (5593 /2020) [2023] ZAWCHC 152 (20 June 2023).

²⁴ (Pheko II) at para 2.

²⁵ (Pheko II) at para 2.

Costs

[49] It is trite that costs ordinarily follow the result. The Applicant contended that costs on an attorney client scale is warranted if regard is had to the fact that the Respondent has been provided an opportunity to purge the contempt. Furthermore, it was argued that the Respondent is not reasonable and *bona fide* in his belief that there is any obligation on the Applicant to approach the maintenance court under circumstances where he has already approached the court with an application to vary the maintenance order. It was submitted that the Applicant under these circumstances, had no other option but to approach this Court for the relief sought.

[50] It is trite that Rule 67A of the Uniform Rules requires that party and party costs in the High Court be awarded on one of three scales. The scales set a maximum recoverable rate for work having regard to the importance, value and complexity of the matter. The amendment to the Rule applies prospectively.

[51] I am not persuaded that attorney and client costs are justified in the circumstances of this matter. Regard is also to be had to the yet to be determined arrears as at the time when the application was instituted. After carefully considering the complexity of the matter, its value and importance to the parties, in the exercise of my discretion, I am of the view that party and party costs on Scale A are justified.

Order:

[52] After having heard Counsel for the Applicant and Counsel for the Respondent, and having considered the document filed on record, the court directs that the following order is made:

1. The Respondent is found to be in contempt of the Order of this Court made on 2 December 2019 under case number 17286/2017;
2. The matter is referred to the Maintenance Court having jurisdiction to:
 - (a) Quantify the Respondent's arrears with an appropriate payment schedule;

(b) assess the Defendant's ability to contribute to the Plaintiff's maintenance needs; and

(c) to issue an order with regards to the monthly maintenance payable by the Respondent to the Applicant.

3. Should the Respondent fail to initiate maintenance proceedings within a period of 30 (thirty) days from date of this order, the Applicant is granted leave to approach this court to impose an appropriate sanction. The Applicant is granted leave to supplement the papers with due regard to the computation of the arrear amount as at the time of the launch of these proceedings.
4. The existing order made on 2 December 2019 under case number 17286/2017 remains in place until such time as it is amended, varied or set aside.
5. The Respondent is directed to pay the Applicant's costs on a party and party scale at Scale A.

P ANDREWS, AJ
Acting Judge of the High Court

CASE NO.: 17286/2017

APPEARANCES:

Counsel for the Applicant:

Advocate T Möller

Instructed by:

Badenhorst Attorneys

Counsel for the Respondent:

Advocate L Theron

Instructed by:

DVN Attorneys

Hearing date:

07 August 2024

Judgment Delivered:

18 September 2024

NB. This judgment was handed down electronically by circulation to the parties' representatives by email.