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

Case number: 2025-006745

Date of hearing: 28 January 2025

Date delivered: 3 February 2025

(1)		REPORTABLE: YES/NO
(2)		OF INTEREST TO OTHERS JUDGES: YES/NO
	(3)	REVISED
		DATE: 3/2/25
		SIGNATURE

In the application of:

J[...] G[...] K[...]

Applicant

and

E[...] C[...] K[...]

Respondent

JUDGMENT

SWANEPOEL J:

[1] The applicant seeks an urgent order suspending an order made in terms of rule 58 of the Magistrate's Court Rules, in the Tshwane Regional Court, pending an application to review the order.

[2] The respondent launched the rule 58 application on 11 November 2024. The applicant was called upon to deliver an answering affidavit within 10 days. He failed to do so, only delivering the affidavit on 30 December 2024. The applicant also failed

to seek condonation for the late filing thereof, and the Magistrate, correctly so, disregarded the answering affidavit.

[3] The merits of the review are not before me, although they do have some bearing on whether I should exercise my discretion to stay the order. In a nutshell, the applicant now says that the Magistrate's decision to hear the matter on an unopposed basis is reviewable. How that can possibly be so is beyond me. The applicant says that the Magistrate disregarded the *audi alteram partem* principle by hearing the matter on an unopposed basis. The applicant, however, ignores the fact that he was the author of his own misfortune by completely disregarding the Rules of the Magistrate's Court. The Magistrate was, in my view, entitled to act as she did.

[4] However, I do not have to make a finding on whether to stay the order. The matter can be disposed of on urgency. The applicant says that he cannot afford to pay the amount of maintenance that he has been ordered to pay. He says that if he fails to comply with the order, he would automatically be in contempt. He ends his affidavit dramatically by saying that if the order is not granted, "...*this court would be sentencing me to both prison and poverty.*" It is for this reason that the applicant argues that the matter is urgent.

[5] The applicant's contention is not only over-dramatic, it is also incorrect. A person will not be held in contempt of court unless it is shown beyond a reasonable doubt that he was able to comply with the order, and that he willfully failed to do so. An inability to afford maintenance is a complete defence to a contempt application.

[6] Furthermore, there is no reason why the applicant cannot exhaust his remedies in the Magistrate's Court. If the order was granted on an unopposed basis, as the applicant contends, the applicant can apply to vary the order, and may also apply for a suspension of the order in the interim, in terms of section 78 of the Magistrate's Court Act, 32 of 1944. It was ill-advised, in my view, to approach an urgent High Court.

[7] In the premises I make the following order:

[7.1] The application is struck from the roll for lack of urgency.

[7.2] The applicant shall pay the costs of the application on Scale B.

**SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA**

Counsel for the applicant: Adv. S van Dyk

Instructed by: Liebenberg Malan Molofo Inc

Counsel for the respondent: Adv. N du Toit

Instructed by: Hansen Inc

Date heard: 28 January 2025

Date of judgment: 3 February 2025