

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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.


F. MARCANDONATOS

28 February 2025

CASE NO: 2025-019141

In the matter between:

R.M.S

Applicant

and

L.N.M.

First Respondent

**THE MAGISTRATE CHILDREN'S COURT
JOHANNESBURG NORTH, RANDBURG**

Second Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 28 FEBRUARY 2025

JUDGMENT

MARCANDONATOS AJ:

INTRODUCTION

- [1] The Applicant, in this Counter Application, seeks civil contempt proceedings arising from the failure by the Respondent to comply with Orders issued out of the Randburg Children's Court under case number 14/1/4/2 – 67/2024 on *12 December 2024, 24 January 2025 and 07 February 2025*.¹ The circumstances which have given rise to this situation are set out hereunder. For convenience, I shall refer to the Applicant in this Counter Application as Mom and the Respondent, as Dad.

THE ISSUES

- [2] On *12 February 2025*, Dad launched Motion proceedings, as a matter of urgency against Mom, as well as the Magistrate of the Children's Court, Johannesburg North, Randburg, in which he sought, *inter alia*, the following relief:-²

- 2.1. condoning and dispensing with Dad's non-compliance with the forms, time limits and service provided for in the Uniform Rules of Court and that the matter is enrolled and heard as an urgent Application in terms of Uniform Rule 6(12);

¹ Notice of Counter Application: CL 02-174

² Notice of Motion: CL: 02-2 to 02-6

- 2.2. reviewing and setting aside paragraphs 1 to 6 of an Order made on **07 February 2025**, in the Children's Court, Johannesburg North held at Randburg under file reference number: 14/1/4/2-67/2025 by additional Magistrate Mr W Vittee and referring the matter back to the Children's Court for determination relating to residency, care and contact of a minor child;
- 2.3. maintaining the *status quo* regarding the temporary residency and care of the minor child with the paternal grandparents in KwaZulu-Natal until a final Order of Court determining permanent residency, care and contact of the said child;
- 2.4. allowing supervised contact by Mom and Dad with the minor child in the presence of either one or both of the paternal grandparents of the minor child, once a week, on separate days for 2 hours each;
- 2.5. Dad to make the minor child available in Johannesburg escorted by one or both of the paternal grandparents at a cost to be shared between the Mom and Dad on a 50/50 basis for interviews, assessments, evaluations, treatment or any other purpose required by Court appointed social worker(s), the South African Police Service investigating a possible criminal offence committed against the minor child, the Teddy Bear Clinic and/or the Curator *ad Litem*, Advocate Vida Scheepers;
- 2.6. appointing Advocate Vida Scheepers as the Curator *ad litem* on behalf of the minor child;
- 2.7. that Advocate Vida Scheepers is conferred various powers as detailed in the Notice of Motion, in her capacity as the Curator *ad litem*;
- 2.8. that the powers of Advocate Vida Scheepers are illustrative and not exhaustive and that the said Curator *ad litem* shall possess any and all additional powers reasonably necessary or incidental to the fulfilment of

her appointed role and responsibilities in service of the minor child's best interests;

2.9. Advocate Vida Scheepers is to file a Report containing her findings and recommendations in her capacity as Curator *ad litem* to the Children's Court within a reasonable time frame;

2.10. the costs of the Curator *ad litem* to be shared equally between Mom and Dad.

[3] It is common cause I informed the parties that, sitting as a single Judge in the Family Court, I could not hear the Review and Setting Aside Application, as same stood to be determined, as a consequence of the applicable practice in this Division, by a Bench comprising of two Judges. By agreement between the parties, the relief relating to the Review and Setting Aside Application of the Order dated *07 February 2025*, in the Children's Court, Randburg, was postponed *sine die*, costs reserved, with Dad abandoning the relief sought in paragraphs 3, 4 and 5 of the Notice of Motion.

[4] On the back of my aforesaid advices, Dad sought to Amend and include relief by seeking to suspend the Order made on *07 February 2025*, in the Children's Court, Johannesburg North, held at Randburg, file reference number: 14/1/4/2-67/2024 whilst persisting with the urgent relief sought in respect of the appointment of a Curator *ad litem*. I delivered *ex tempore* Judgments in respect of the Amendment as well as the appointment of a Curator *ad litem*, not allowing the Amendment and striking the Application for the appointment of a Curator *ad litem*, for lack of urgency.

[5] As a consequence of the Application by Dad, simultaneously, Mom proceeded with the civil contempt proceedings as referred to herein above, as a matter of urgency, against Dad, in which she sought, *inter alia*, the following relief:-³

³ Notice of Counter Application: CL 02-173 to 02-174

- 5.1. the forms and service provided for in the Rules of this Honourable Court be dispensed with and the matter be disposed of by way of urgency in terms of Rule 6(12);
- 5.2. the Review Application in respect of the Orders issued out of the Randburg Children's Court on *12 December 2024, 24 January 2025* and *07 February 2025* be dismissed with a punitive cost Order;
- 5.3. that the Children's Court Orders be upheld and Dad be compelled to, as a matter of urgency, comply with the said Orders by returning the minor child to Johannesburg, at Dad's expense, to give effect to the Children's Court Orders;
- 5.4. Dad is held in contempt of the provisions of the Children's Court Orders;
- 5.5. Dad be committed to imprisonment for contempt of Court for a period of 30 days, or such period as this Honourable Court deems just and equitable;
- 5.6. in the alternate, to committing Dad to imprisonment for a period of 30 days, that Dad be committed to prison for a period of 30 days, which committal is to be suspended on condition that Dad complies with all the existing Children's Court Orders as well as subsequent and future Court Orders in relation to the pending Randburg Children's Court proceedings as aforesaid.

[6] Dad opposed the Counter Application.

[7] Given the various issues raised, both in respect of Dad's Application and this Counter Application, the matter was argued over 2 days, the Counter Application having rolled over into the second day.

- [8] On the morning of the second day of hearing, Dad's representative filed Heads of Argument in the Counter Application, not previously having done so, wherein at paragraph 37 therein⁴ it is stated that:-

"It is only when the applicant has to postpone the review and settling aside application on 19 February 2025 on the first day of hearing of the main application before court that the possibility of him not having the 07/02 order set aside on urgent basis is realised. The applicant immediately actions compliance with the 07/02 Order by arranging for the minor child to be flown up to Johannesburg and be handed to the social worker and Omphile House. Proof of this will be placed before court as soon as it becomes available." [my emphasis]

- [9] As a result and prior to further argument, I raised whether in light of that stated at paragraph 37 of the Heads of Argument and if indeed the child would be returned to Johannesburg and in compliance with the **07 February 2025** Randburg Children's Court Order, whether the Counter Application, was not in the circumstances, academic and/or counter-productive.
- [10] The parties asked to briefly stand the matter down, whereafter I was informed that Dad was indeed returning the child to Johannesburg and would comply with the **07 February 2025** Randburg Children's Court Order and whilst both parties agreed that the Counter Application would then become academic/counter-productive, the sticking point, was that Dad wanted Mom to waive the costs order granted in the striking of the urgent relief sought by Dad for the appointment of a Curator *ad litem*.
- [11] Mom was not willing to waive the said costs Order.
- [12] Each party then presented open Tenders.

⁴ Heads of Argument in Counter Application: CL 19-32

[13] Mom's Tender being that:-

13.1. Dad undertakes to return the child to Johannesburg on *20 February 2025* and hand over the child in accordance with the *07 February 2025* Randburg Children's Court Order; and

13.2. no order as to costs.

[14] Dad's Tender being that:-

14.1. the matter stands down until 14h00 whereafter the Application will fall away as by then it was contended that Dad would have complied with the *07 February 2025* Randburg Children's Court Order; and

14.2. no order as to costs.

[15] Given that the parties were unable to reach Agreement, the Counter Application was argued.

CONTEMPT OF COURT

Points in limine

[16] Dad raised two points *in limine*, the first being lack of urgency and the second being lack of Jurisdiction of this Court to hear the Counter Application.⁵

[17] Having heard argument I delivered an *ex tempore* Judgment, not having upheld either *points in limine*.

⁵ Replying/Answering Affidavit in the Counter Application: CL 02-283

The relevant context

[18] It is common cause that proceedings are pending between the parties in the Magistrate's Children's Court, Johannesburg North, Randburg, under file reference number: 14/1/4/2/-67/2025 in which Orders were granted on *12 December 2024, 24 January 2025 and 07 February 2025*.⁶

[19] In respect of the *12 December 2024* Order it provides that:⁷

"THE FOLLOWING ORDER IS MADE: INTERIM ORDER

recommendations of the Social worker made an order of court. By agreement. Telephone contact by the party without the minor child allowed between 6pm & 7pm. Video contact provided the mother gets a phone with capabilities. The neutral venue is Spar Robindale pp to 16 April 2025.

parties warned.

Father to be provided 1 weekend a month."

[20] In respect of the *24 January 2025* Order, neither party had a copy thereof given that neither was able to gain access to the content of the Children's Court file to obtain a copy. The parties are in dispute as to the content thereof.⁸

[21] In respect of the *07 February 2025* Order, it provides as follows:⁹

"THE FOLLOWING ORDER IS MADE: INTERIM ORDER/FINAL ORDER

⁶ Notice of Motion in the Counter Application: CL 02-108 and Respondent's Heads of Argument in the Counter Application: CL 19-19 to 19-22

⁷ Annexure "LMA3", CL 02-249

⁸ Respondent's Heads of Argument in the Counter Application: CL 19-20

⁹ CL, 27-2

1. *By no later than Tuesday the 11/02/2025, the applicant, Respondent & Social worker are to facilitate and arrange a flight from King Shasha international airport to OR Tambo international airport for the minor child and one of the father's family members who the child is currently residing with. Both the applicant and Respondent are to pay for the costs on a 50/50 basis.*
2. *the Social worker will collect the minor child from OR Tambo international airport and place the minor child into a place of safety being Omphile House.*
3. *Immediately upon the child being placed in the place of safety, Ms tanya Kriel is to compile a report with recommendations in regards to the Parents rights of access to the minor child, considering the allegations levelled against both the mother and the fathers current girlfriend.*
4. *the said report is to be provided by no later than 28/02/2025.*
5. *the child will be placed in the place of safety pending finalisation of the said report & recommendations & further determination by this Court.*
6. *Pending finalisation of the Report, the mother & father are allowed supervised access with the minor child, once a week (on separate days) for a period of two hours. the said access is to be supervised by the Relevant Parties at the place of safety & conducted at the Place of Safety.*
7. *p/p 28/02 for the said Report.*
8. *both parties warned."*

[22] In respect of the Orders granted on **12 December 2024** and **24 January 2025** no certainty was provided as to whether the Orders are still in operation, Dad contending that due to the provisions of the **07 February 2025** Order, the terms

of the *12 December 2024* and *24 January 2025* Orders, no longer being in force and effect,¹⁰ thus having been accepted in argument by both parties that the only relevant Order for the purposes of this Counter Application, is the Order of *07 February 2025*, albeit that Dad raised whether the said Order was interim and/or final, as the Order does not indicate which it is, however, given the nature of the proceedings pending in the Children's Court, Johannesburg North, Randburg, the reasonable interpretation thereof is that it is an Interim Order. I shall therefore not deal further herein with either the *12 December 2024* or *24 January 2025* Orders.

The legal principles applicable to Contempt of Court Applications

- [23] Our law on civil Contempt of Court is well established. Contempt of Court is defined as the wilful disobedience of a Court Order and the purpose of Contempt proceedings, serve to protect the rights of everyone to fair trials, maintaining public confidence in the judicial arm of Government and upholding the integrity of Court Orders.¹¹
- [24] In summary, an Applicant in a Contempt Application must therefore establish (1) the Court Order, (2) service or Notice of the Court Order, (3) non-compliance with the terms of the Order and (4) wilfulness and *mala fides* but once the Applicant has proved, (1) the Court Order, (2) service or Notice of the Court Order, and (3) non-compliance with the terms of the Order, the Respondent bears an evidentiary burden in relation to (4), i.e. wilfulness and *mala fides*.
- [25] The nature of the relief sought in this civil Contempt procedure is not coercive but rather punitive. This is evident as the Mom seeks an order that Dad be committed to imprisonment for a period of 30 days (*suspended for 2 years on condition that Dad fully complies with the Court Order*).

¹⁰ Respondent's Heads of Argument in the Counter Application: par 23, CL 19-29,

¹¹ Fakie N.O. v CCI Systems (Pty) Limited 2006 (4) SA 326(SCA)

- [26] Because the relief sought in this Contempt Application is punitive and includes a committal to imprisonment, the criminal standard of proof of beyond a reasonable doubt applies.¹² The onus is therefore not the ordinary civil onus (*i.e. on a balance of probabilities*), but instead one of beyond reasonable doubt.
- [27] As such, if on all the evidence, there is a reasonable possibility that the non-compliance with the Court Order in issue was not wilful and *mala fide*, Contempt is not established.¹³
- [28] The wilfulness consideration is further supported by the requirement that there must be an intention to defeat the course of justice for an act to constitute civil contempt.¹⁴

The relevant and material background facts

- [29] In these proceedings, it is common cause that (1) a Court Order exists i.e. the *07 February 2025* Order, (2) Dad has knowledge of the said Court Order and (3) there has not been compliance with the express terms of the *07 February 2025* Order. However, Dad's alleged wilfulness and/or *mala fides* are in dispute.
- [30] Accordingly, Mom is required to demonstrate Dad's non-compliance is wilful and/or *mala fide*, beyond a reasonable doubt, in order to succeed with this Application.
- [31] Mom avers that Dad has not complied with the *07 February 2025* Order in that he failed to arrange for the return of the minor child by *11 February 2025* to Johannesburg from KwaZulu-Natal and/or hand her over the relevant Social Worker so that she may be placed into Omphile House for the purposes of Tanya Kriel to compile a Report with recommendations.¹⁵

¹² Matjhabing Local Municipality v Eskom Holdings Limited & Others, Mkhonto & Others v Compensation Solutions (Pty) Limited 2018 (1) SA 1CC

¹³ Fakie N.O. v CCI Systems (Pty) Limited 2006 (3) SA paras 67 and 85 to 88

¹⁴ Gauteng Gambling Board & Another v NEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) par 51

¹⁵ par 48, CL 02-191

- [32] Dad's position is that he acted immediately and applied to this Court for a Review and Setting Aside of the *07 February 2025* Order on an urgent basis,¹⁶ believing that the Review Application is founded, due to the irregularities Dad sets out in relation thereto and continuously alleging that the Review Application is premised on the prejudice and trauma that the minor child will suffer if removed from his family in KwaZulu-Natal to Omphile House and that he has the minor child's best interests at heart. Given that this Court informed the parties that this Court sitting as a single Judge in the Family Court could not hear the Review and Setting Aside Application, Dad (*wisely so*) immediately actioned compliance with the *07 February 2025* Order, by arranging for the minor child to be flown to Johannesburg and be handed to the Social Worker and Omphile House. It was confirmed by the parties just prior to the conclusion of argument that there had been compliance with the *07 February 2025* Order in that the minor child had been returned to Johannesburg, handed over to the Social Worker and Omphile House. Accordingly, Dad acted *bona fide* in the honest belief that he was justified and proper, without the intention to be wilful and *mala fide*.

THE FACTS AND THE LAW

- [33] In my view I find that Dad genuinely, even if mistakenly, believed that he was entitled to proceed as he did. Even assuming in favour of Mom, that Dad's conduct constituted a breach of an express term of the *07 February 2025* Order, I am unable to find that Dad's conduct was *mala fide*. By all accounts, Dad's, *bona fide* believed, is that he was entitled to proceed in the way he did.
- [34] Accordingly, I find that in respect of the *07 February 2025* Order, Dad genuinely believed, even if mistakenly, that he was entitled to act in a way claimed and I am therefore unable to find that Dad has purposefully breached the terms of the *07 February 2025* Order.

¹⁶ par 18 CL 02-287, par 20 CL 02-288, par 24 CL 02-289

- [35] As I have already stated, it has been emphasised by our Courts that Contempt of Court is not a mere disobedience of a Court Order but consists of disrespectful judicial authority. Upon an analysis of the facts it cannot be said that Dad wilfully and *mala fide* failed to comply with the provisions of the *07 February 2025* Order.
- [36] In my view, Dad has furnished a satisfactory explanation regarding his non-compliance with the *07 February 2025* Order.
- [37] I find that Dad's version before this Court discharges the evidentiary burden resting on him and that he establishes a reasonable doubt that his non-compliance with the provision of the *07 February 2025* Order, was not wilful and *mala fide*.
- [38] Accordingly, Mom has not discharged the onus resting on her on the standard of beyond a reasonable doubt.
- [39] It is concerning that Mom has sought drastic relief, particularly in light of the fact that the Children's Court proceedings is pending and not completed and the historic nature of the matter, however, I will give Mom the benefit of the doubt that she did not intend to use the Contempt proceedings for an ulterior purpose.
- [40] Notwithstanding my aforesaid findings, I need to express my displeasure in respect of the failure by the parties to comply with the Practice Manual and/or Practice Directives of this Division relating to the setting down and hearing of urgent Applications. This coupled with the failure on the part of Dad not to file Heads of Argument timeously, as a result, placed this Court under extreme time constraints to read lengthy papers and consider arguments submitted, including in respect of technical legal issues. It is my perception that there was a distinct failure to recognise that each party was required to act expeditiously, yet failed to do so in the preparation of the matter to be argued.

[41] I also mention that the file on CaseLines reads as “Duplicate” and no Compliance Statement is uploaded and whilst there is another file on CaseLines not marked Duplicate, the file is empty.

COSTS OF THIS APPLICATION

[42] Notwithstanding my finding that Dad is not guilty of Contempt of Court, it does not necessarily follow, that costs ought to be awarded against Mom.

[43] I am of the view that these Contempt proceedings should not have reached the stage that it did and that in light of Dad’s decision to comply with the Order of *07 February 2025* at a very advanced stage of the Application and argument, he ought to have accepted Mom’s Tender presented on the morning of the second day of hearing and that his failure to have accepted the Tender, in the circumstances, resulted in unnecessary argument and legal costs.

[44] In the result, I am not inclined to grant costs in favour of Dad.

ORDER GRANTED

[1] I accordingly make the following Order in respect of the Counter Application:-

- 1.1. condoning and dispensing with the non-compliance with the forms, time limits and service provided for in the Uniform Rules of Court and that the matter is enrolled and heard as an urgent Application in terms of Uniform Rule 6(12);
- 1.2. Respondent’s points *in limine* are not upheld, either in respect of lack of jurisdiction nor in respect of urgency;
- 1.3. no order as to costs.



F. MARCANDANATOS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: *19 and 20 February 2025*
Judgment: *28 February 2025*

Appearances

For Applicant: Attorney J Crone
Tel: 010 594 5011
E-mail: jonet@fhinc.co.za

Instructed by Falcon & Hume Incorporated
Ref: J Crone/W Wiersma
E-mail: jonet@fhinc.co.za
Cell: 072 779 6680

For Respondent: Adv G Olwagen-Meyer
Cell: 082 880 8253
E-mail: gmeyer@law.co.za

Instructed by SKV Attorneys
Ref: J Hudson
E-mail: jhudson@skvattorneys.co.za
Tel: (011) 781-2392