

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case no: 5955/2022

In the matter between:

**M[...] J[...] M[...]
(Born P[...])**

Applicant

and

T[.] S[...] M[...]

Respondent

Neutral citation:

Coram: Mbhele, DJP

Heard: 19 September 2024

Delivered: 19 March 2025

Summary: Contempt of Court – Whether non-compliance with the order was willful and *male fide* – Respondent guilty of contempt of court.

ORDER

1. The respondent is found to be in contempt of the Court order issued out of this Honourable Court on 03 February by Tsangarakis, AJ.
2. The respondent is to be committed to imprisonment for a contempt of Court for a period of 30 (thirty) days with an option of a fine of R600.00, which sentence is suspended in its entirety for a period of 2 (two) years, on condition that the respondent complies with the order granted on 03 February 2023 in respect of the applicant's maintenance within 14 days of the granting of this order.

3. Should the respondent fail to comply with paragraph 2 of this order,
 - 3.1 The performance and the execution of the Writ of Committal for contempt of Court is hereby authorised.
 - 3.2 The first respondent should submit himself to the South African Police Services at Park Road precinct, failing which the South African Police Service should take all necessary steps to ensure that the first respondent is delivered to the keeper of prisons in order to be committed in terms of this order.

4. The counter application succeeds only in respect of paragraphs 2- 4 of the order of Tsangarakis, AJ *pending divorce*:
 - 4.1 The Respondent is awarded care and primary residence of the minor child as contemplated in section 18(2)(a) of the Children's Act 38 of 2005;
 - 4.2 The Applicant is awarded contact with the minor child as contemplated in Section 18(2)(b) of the Children's Act 38 of 2005 as follows:
 - 4.2.1 Contact on alternative weekends from Friday at 17h00 to Sunday at 17h00;
 - 4.2.2 Short school holidays to alternate between the parties;
 - 4.2.3 Long school holidays to be shared equally between the parties;
 - 4.2.4 Contact on the Applicant's birthday from 09h00 to 16h00;
 - 4.2.5 Contact on Mother's Day from 09h00 to 16h00.

5. The respondent to pay the costs of this application on an attorney which cost should include the costs of Counsel.

JUDGMENT

Mbhele, DJP

INTRODUCTION:

[1] The applicant brought an application seeking to declare the respondent in contempt of an order granted by Tsangarakis, AJ (the order) on 03 February 2023.

[2] The parties are married to each other and the marriage still subsists with divorce proceedings pending before this court. On 03 February 2023 this court granted an order in terms of Rule 43 pending the finalisation of divorce. The relevant terms of the order are stated below:

‘1. The Respondent be ordered to pay maintenance in respect of the Applicant in the amount **R5,200.00** per month, the first payment to be made on the **7th of MARCH 2023** and thereafter on the **1st** day of each succeeding month until finalisation of the divorce action;

2. The Applicant is awarded care and primary residence of the minor child as contemplated in section 18(2)(a) of the Children’s Act 38 of 2005;

3. The Respondent is awarded contact with the minor child as contemplated in Section 18(2)(b) of the Children’s Act 38 of 2005 as follows:

3.1 Contact on alternative weekends from Friday at 17h00 to Sunday at 17h00;

3.2 Short school holidays to alternate between the parties;

3.3 Long school holidays to be shared equally between the parties;

3.4 Contact on the Respondent’s birthday from 09h00 to 16h00;

3.5 Contact on Father’s Day from 09h00 to 16h00;

4. The Respondent is to pay maintenance in respect of the minor child in the amount of **R5 000.00** per month, the first payment to be made on the **7th of MARCH 2023** and thereafter on the **1st** day of each succeeding month until finalisation of the divorce action;

5. The Respondent is ordered to contribute to the Applicant’s legal costs in the amount of **R5 000.00** payable in instalments of **R500.00** per month. The first payment to be made on the **7th of MARCH 2023** and thereafter on the **1st** day of each succeeding month up and until the amount of **R5 000.00** is paid;

6. The costs of this application shall be cost in the main action.’

[3] The applicant initiated these contempt proceedings against the respondent following the respondent’s failure to comply with the court order. As discussed below, the non-compliance with the court order is not denied by the respondent. The respondent filed a counter application in terms of rule 43(6) wherein he seeks variation of Court

order. At the centre of his application is that care and primary residence of the minor child be awarded to him with ancillary prayers relating to access by the applicant. He further seeks the variation of the maintenance order in respect of both the applicant and the minor child.

[4] The non-compliance which the applicant alleges are short payments of cash maintenance for the months of September 2023 and October 2023, and complete non-payment from November 2023 up to the date of hearing this matter in respect of the minor child. From June 2024 the respondent stopped paying maintenance towards the applicant. From September 2023 to October 2023 the respondent made part payments of R500.00 in respect of the minor child as opposed to R5 000.00. As a result of the respondent's failure to honour the court order, the minor child left the applicant to stay with him.

[5] The respondent denies that he was in willful default. He attributes his failure to pay the R5 000.00 ordered by the court to the advice he received from his legal representative that he should deduct school fees from the maintenance amount which R4 150.00 as at August 2023. It is not clear why an amount of R4 500.00 was deducted. The Rule 43 record shows that the minor child's school fees were R1 390.00 per month. The other reason he advanced for non-compliance was that the Family Advocate's report issued on 17 November 2023 recommended that he be the primary care giver with the applicant awarded contact rights. This version is untenable. The Family Advocate's report was issued 2 months and 27 days after the respondent had started defaulting on the maintenance of the minor child.

[6] Respondent contends that he stopped paying the applicant's maintenance because the applicant moved back to their marital home in May 2024, and further that the applicant owns a vehicle registered in her name which vehicle is operated as a taxi. These assertions are vehemently denied by the applicant. The applicant's version is supported by affidavits confirming that she had been staying with her sister in Gauteng since December 2023 and that the vehicle referred to is being used by a third party who continued to pay instalments because the applicant could not afford paying for it. The *etoll* invoice attached to the answering affidavit is not sufficient proof that the said vehicle is operated as a taxi by the applicant. There is no indication that the applicant owns a license to operate public transportation or a taxi.

[7] Contempt of court is defined as “the deliberate, intentional disobedience of an order granted by a court of competent jurisdiction. The respondent’s knowledge of the order, non-compliance thereof and that he owns two companies through which he operates businesses in the construction sector are common cause. Once order, non-compliance and service have been established the next step is to determine whether the respondent’s non-compliance was not willful and *mala fide*.”¹ If the respondent fails to provide evidence raising a reasonable doubt as to whether non-compliance was willful and *mala fide*, he has to be found guilty of contempt of the relevant court order. See: *Fakie NO v CCII Systems (Pty) Ltd*²; *Matjhabeng Local Municipality v Eskom Holdings Ltd & others*; *Mkhonto & others v Compensation Solutions (Pty) Ltd*³

[8] It is common cause that the respondent has not paid to the applicant the maintenance as ordered by this Court on 03 February 2023. He is of the view that he was under no obligation to fully comply with the Court order for reasons advanced above. Owing to the respondent’s failure to comply with the Court order the applicant had to allow the minor child to return to the respondent as she could no longer afford to take care of his daily needs. This explains the frustration that the applicant had to endure while armed with a Court order. The Family Advocate’s report is not a court order. Respondent, having been legally represented throughout the proceedings, should have approached Court for variation, he did not do so, instead he resorted to self-service. Failure to comply with the court order by the respondent left the applicant with a difficult choice, whether to continue starving with the minor child or allow the child to stay with the respondent where there were resources that he was withholding from the applicant in violation of a Court order.

¹ *Compensation Solutions (Pty) Ltd v Compensation Commissioner* [2016] ZASCA 59; (2016) 37 ILJ 1625 (SCA)

‘The question which then arises is whether the appellant proved that the Commissioner’s failure to comply with the [consent order] amounted to civil contempt of court, beyond a reasonable doubt to secure his committal to prison. An applicant for this type of relief must prove (a) the existence of a court order; (b) service or notice thereof; (c) non-compliance with the terms of the order; and (d) willfulness and *mala fides* beyond reasonable doubt. But the respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that his non-compliance was not wilful and *mala fide*. Here, requisites (a) to (c) were always common cause. The only question was whether the Commissioner rebutted the evidentiary burden resting on him.’

² *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 14.

³ *Matjhabeng Local Municipality v Eskom Holdings Ltd & others*; *Mkhonto & others v Compensation Solutions (Pty) Ltd* [2017] ZACC 35; 2018 (1) SA 1 (CC) at par 67 and 85-88.

[9] In *Fakie*⁴ Cameron, JA asserted that it is a crime to unlawfully and intentionally disobey a court order. Flagrant disrespect of court orders threatens the rule of law. The rule of law is at the center of constitutional democracy and needs to be protected and advanced. Contempt proceedings serve as one of the tools to protect the authority and honour of the courts.

[10] In *K.P.T and Others v A.P.T* the court remarked as follows:

‘[95] 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 the spouse has failed to put up evidence which should have been available to him to support a claim of unaffordability. In the present case, the husband acted in a high-handed and disdainful way in giving effect to the proposals in his attorneys’ letter of 28 April 2016. I conclude that his evidence does not raise reasonable doubt. Contempt in the respects identified above has thus been established.’⁵

[11] Failure to comply with maintenance court orders can have devastating impact on the affected child. As it was apparent in the current matter, it hindered the child’s access to essential needs while in the care of the mother. A closer look into how things unfolded in the current matter, reveals that the applicant was staying with the minor child until non-compliance with the court order frustrated her right to primary care and residence of the minor child. This shows how a party armed with a court order can be bullied into submitting to the demands of a party in control of resources. The applicant, due to lack of resources, had to allow the child to go back to the respondent in violation of the court order because she was under pressure and could not provide the minor child with essential needs. This has to be frowned upon. Should it be allowed to flourish, respondents who did not win cases in court will continue to bypass court orders by withdrawing resources to a party whom a court has appointed as the primary care giver of the minor child.

⁴ 2006 (4) SA 326 (SCA).

‘it is a crime unlawfully and intentionally to disobey a Court order. This type of contempt of Court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the Court. The offence had, in general terms, received a constitutional ‘stamp of approval’, since the rule of law — a founding value of the Constitution — ‘requires that the dignity and authority of the Courts, as well as their capacity to carry out their functions, should always be maintained.’

⁵ *K.P.T and Others v A.P.T* (1215/2019) [2020] ZAWCHC 110 (2 October 2019).

[12] The respondent does not raise affordability as the reason for non-compliance. It is clear that he could afford to pay maintenance in full, he just did not want to pay the amount ordered by the Court. In *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others*⁶ Nkabinde, J held as follows:

‘[1] 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] Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In 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. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord.’

[13] The Constitutional Court has also warned against recalcitrant maintenance defaulters who use legal processes to sidestep their obligations towards their children. The Constitutional Court remarked as follows:

‘Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to sidestep their obligations towards their children. The respondent was entitled to apply for a variation of the maintenance order. But whatever excuse he might have had for failing to comply with the existing order, there was not excuse for his failure to pay even the reduced amount that he contended should be substituted for it. The respondent appears to have utilized the system to stall his maintenance obligations through the machinery of the Act. It appears from the evidence of the CGE that this happens frequently in the maintenance courts. The hardships experienced by maintenance complainants need to be addressed and the proper implementation of the provisions of the Act is a matter that calls for the urgent attention of the Department of Justice.’⁷

⁶ *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others* ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015) at par. 1-2.

⁷ *Bannatyne v Bannatyne (Commission of Gender Equality, as Amicus)* [2002] ZACC 31; 2003 (2) SA 363 at par. 32.

[14] In my view, the respondent has failed to rebut the inference that his non-compliance was not willful and *mala fide*. In the circumstances I find that the respondent is in contempt of the Court order of Tsangarakis, AJ of 03 February 2023. I am unable to find that there is change in the applicant's personal circumstances warranting variation of her maintenance order pending divorce.

[15] I have considered the Family Advocate's report and noted that its author holds a view that the other child already stays with the father and that he has a strong bond with the minor child. He further recommends that care and primary residence of the minor child be awarded to the respondent pending divorce.

[16] Section 9 of the Children's Act 38 of 2008 provides that the standard to apply to all matters concerning the care, protection and well-being of a child, is that of the child's best interests. In *Potgieter v Potgieter*⁸ the Supreme Court of Appeal stated that the determination of the best interests of the child, 'in any particular case involves the High Court making a value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children'.

[17] The evidence before me shows that the applicant has relocated to Gauteng since December 2023 while the minor child remained with his father in Bloemfontein. The minor child has been staying with the respondent and his brother since November 2023 and attending school in Bloemfontein. I do not see it prudent to interfere with this arrangement. It is in the best interest of the child to remain with the respondent until finalization of the divorce.

[18] Costs are in the discretion of the court. The respondent's non-compliance with the court order left the applicant and the minor child in a precarious situation. The applicant was left out of pocket and desolate. Costs should follow the event.

[19] I, therefore, make the following order.

ORDER:

⁸ *Potgieter v Potgieter* [2007] 3 All SA 9 (SCA); 2007 (5) SA 94 (SCA).

1. The respondent is found to be in contempt of the Court order issued out of this Honourable Court on 03 February by Tsangarakis, AJ.
2. The respondent is to be committed to imprisonment for a contempt of Court for a period of 30 (thirty) days with an option of a fine of R600.00, which sentence is suspended in its entirety for a period of 2 (two) years, on condition that the respondent complies with the order granted on 03 February 2023 in respect of the applicant's maintenance within 14 days of the granting of this order.
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 - 4.2.3 Long school holidays to be shared equally between the parties;
 - 4.2.4 Contact on the Applicant's birthday from 09h00 to 16h00;
 - 4.2.5 Contact on Mother's Day from 09h00 to 16h00.

5. The respondent to pay the costs of this application, which cost should include the costs of Counsel on scale B.

MBHELE, DJP

Appearances:

For the Applicant: Adv E. Ngantweni

Instructed by: Thulo Attorneys
Bloemfontein

For the Respondent: Mr. W Phalatsi

Instructed by: NW Phalatsi & Partners
Bloemfontein