

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO : 2024-047424

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

SIGNATURE

DATE 5/6/25

In the matter between:

TV

Applicant

and

ZLV

Respondent

JUDGMENT

FRANCK AJ:

- [1] The Applicant and Respondent are married to each other and in the midst of divorce proceedings. There are two minor children born of the marriage between the Applicant and Respondent, being two daughters currently aged 7 and 10.
- [2] The children primarily reside with the Respondent, being the mother of the children. The Respondent approached the Children's Court, Randburg for an order seeking contact to the minor children during 2023. The parties concluded a parenting plan which was made an order of court on the 18th of October 2023.
- [3] The relevant portions of the parenting plan for the purposes of this judgment read as follows:

"The Father shall exercise his rights of contact as follows

1. *Every alternate weekend from Friday 18:00 until Sunday 17:00.*
2. *Public holidays to alternate between the parties.*
3. *The parties will share the December 2023 school holidays. The father will have the first half of the school holidays from 06 December 2023 until 26 December 2023. The Mother will have the second half of the school holidays from 27 December 2023 onwards. Thereafter the parties will alternate school holidays on an annual basis.*
4. *The Father to spend his birthday with the children. If it falls on*

the Mother's weekend; the parties are to swap weekends.

5. *The Father to spend time with the children on their birthdays. If the children's birthday falls on a weekday, the Father to spend time with the child from after school until 17:00. If it falls on a Mother's weekend; the parties are to swap weekends.*
6. *On Mothers Day; the children will spend the weekend with the Mother and spend the Fathers Day weekend with the Father. If the Mothers Day weekend falls on a Fathers Day weekend; the parties are to swap weekend vice versa.*
7. *Daily telephonic and/or Video calls contact from 18:00 until 20:00.*

CONDITIONS AND UNDERTAKINGS

- (a) *Both parties shall furnish the other party with twenty days' notice, save in exceptional circumstances, of his/her intention to take the minor children on a holiday within (sic) the outside of Gauteng but within the Republic of South Africa and shall simultaneously furnish the other with the itinerary, details of any third parties in whose care the minor child may be during that period and flight details where applicable.*
- (b) *Both parties shall furnish the other party with thirty days' notice, save in exception circumstances, of his/her intention to take the minor child on a holiday outside the Republic of South Africa, which consent shall not be unreasonably withheld, and shall simultaneously furnish the other with the itinerary, details of any third parties in whose care the minor child may be during that period and flight details where applicable."*

[4] The Applicant has issued an application for contempt of court in terms of which he seeks the following relief:

- "1. *That a declaratory order be made finding the Respondent in contempt of the order of the Randburg Children's Court made on 18 October 2018 under case number 14/1/4/2-276/2024.*
2. *That a fine, such as is deemed appropriate by this court, be imposed upon the Respondent regarding such contempt,*

alternatively

3. *That a period of imprisonment, such as is deemed appropriate by this court be imposed on the Respondent by this court, such period of imprisonment to be suspended on conditions deemed appropriate by this court.*
4. *Further that the Respondent be compelled to comply with the parenting plan incorporated within the court order in respect of care and contact with the minor children forthwith.*
5. *That the Respondent pay the costs of this application on a punitive scale."*

[5] It is clear from the affidavits filed by both parties, that the Respondent was aware of the terms of the parenting plan and that both parties agree, that the notice period for holidays outside the province of Gauteng, but within the borders of the Republic of South Africa is twenty days and that the notice period for holidays outside the Republic of South Africa is thirty days.

[6] The Applicant claims that the Respondent is in contempt of court for the following reasons:

[6.1] The Respondent frustrated his rights of contact to the minor children during the first half of the December 2023 holidays.

[6.2] That the Respondent unilaterally and without the consent of the Applicant removed the minor children, not only from the province of Gauteng but from the Republic of South Africa

during the latter part of the December 2023 holiday and travelled with the minor children from Johannesburg, to Durban and from Durban to Mauritius, Reunion and Mozambique.

- [6.3] That the Respondent prevented the Applicant from exercising contact to one of the minor children on her birthday on 10 January 2024.
- [7] The Applicant states that he was scheduled to have contact with the children from 10 December 2023 to 26 December 2023. However, due to work commitments, he was not able to spend the entire period with them as his leave only began on 20 December 2023. He consequently returned the minor children to the Respondent after weekend contact and requested the Respondent's consent to travel with the minor children for the period 20 December 2023 to 26 December 2023, to Durban.
- [8] Ultimately, the Respondent refused to provide her consent, based on the fact that the request fell outside the 20 day period provided for in the parenting plan. The Applicant avers that he was prevented from exercising contact to the minor children in the Gauteng province, during that time.

[9] The Applicant, further, avers that the Respondent unlawfully removed the minor children from Gauteng during the latter part of December 2023 and travelled with them abroad. The Applicant also states that the Respondent denied him contact as per the parenting plan on his daughter's birthday.

[10] In the Respondent's answering affidavit, the Respondent states *inter alia* the following:

[10.1] She is a practising attorney and as such she states that she holds herself *"to a higher standard than a normal litigant, in that I have additional obligations and responsibilities to the Court. I have complete respect for the authority of this court. I respect the rule of law, and further understand the importance of complying with Court orders, as well as the implications of non-compliance."*¹

[10.2] The Respondent states that, she was not aware that the Respondent would not be exercising contact during the entire first half of December until 26 December 2023 and that the Applicant delivered the minor children back to her residence, without communicating this to her.

[10.3] The Respondent complains that the application for contempt of court was not properly served as, she states with reference to her CCTV footage, that a bundle of documents was served by the sheriff on her helper, that day, but that the application was not amongst the documents received. The Applicant, however, served a notice of set down on her in respect of a court date allocated in August 2024 which made her aware of the contempt proceedings and as a result of which, the proceedings were postponed and the Respondent was granted an opportunity to file an answering affidavit. On that occasion, the Respondent was represented at court by counsel, who filed a practice note in August 2024

[10.4] The Respondent categorically denies that she went on holiday with the minor children from 27 December 2023 onwards, that she left the Gauteng province or that she travelled abroad. In this regard, the Respondent states that she advised the Family Advocate on 26 September 2023 that she did not intend travelling overseas with the minor children as the travel documentation was not approved and therefore the planned holiday could not proceed.²

[10.5] The Applicant further states that she is well aware of the

requirement to give notice to the Respondent as well as the provisions of the First Amendment of the Immigration Regulations 2014 which entails that the Applicant give consent for the minor children to travel abroad.³

[10.6] She states that, the minor children were staying with one of her friends, during the Applicant's contact period and that the Applicant was aware of the identity and contact details of this friend. The Respondent attaches no confirmatory affidavit nor does she identify her friend to whom she repeatedly refers in her affidavit.

[10.7] The Respondent states:

"100. If I had travelled outside the country with the minor children, which I deny that I have, there would be travel documentation and stamps in their respective passports to this effect. Further, any co-parent of any minor child can approach the relevant government department and request travel records for their minor child.

101. Further, the First Amendment of the Immigration Regulations, 2014 regarding the travel of minors with a single parent across the borders of the Republic of South Africa are very stringent. The Applicant's written permission through the completion and signature of the parent consent form, attested to in front of a practising notary public, alternatively a court order would be required for me to travel with the minor children out of the Republic.

102. Instead of attaching proof of my alleged breach to this application, if it were to exist, the Applicant makes wild

allegations intended to besmirch my reputation and character.”

[10.8] Whilst the Applicant states, that his daughter phoned him from an unknown number on her birthday in order to speak to him on her birthday, the Respondent avers that it is *“exceptionally telling that the minor child herself had to call her own father to speak to him on the afternoon of her birthday”*.

[11] The Respondent attaches as Annexure “LV4”, a screenshot of a WhatsApp conversation with the Applicant. What is evident from this annexure, is that:

[11.1] The Respondent blocked the Applicant as a contact on 29 September 2020. She unblocked him on 19 December 2023.

[11.2] On 28 December 2023, the Applicant sends a message requesting the Respondent to let him know when and where he could call his children and informing the Applicant that he has called the house as per the parenting plan *“but the phone rings with no answer”*.

[11.3] On the 10th of January 2024, on the parties’ eldest daughter’s birthday, the Applicant sends the Respondent a message

stating "... I want to see my kids today. You have prevented me from seeing them and even talking to them. Please stop this. Today is A... birthday and I have as much right as you to them."

[12] On the next day, there is a further request to speak to the minor children. At no point, does the Respondent respond to any of these messages.

[13] The Applicant's replying affidavit, however, states that his attorneys issued subpoenas to both South African Airways ("**SAA**") and MSC Cruises ("**MSC**").

[14] Pursuant to the subpoenas, SAA responded on 25 September 2024 with an e-mail confirming that the Respondent, with her business partner, friends and the minor children flew from Johannesburg to Durban on 27 December 2023 and returned from Durban to Johannesburg on 8 January 2024.⁴

[15] MSC responded to the subpoena via their attorneys and provided confirmation that a booking was made by the Respondent along with travel dates, locations and stops. The documentation proves that the Respondent travelled with the minor children from Johannesburg to Durban, thereafter to Mauritius, then to Mozambique and Reunion

before returning to Durban and thereafter Johannesburg.⁵

[16] In light of the documentation uncovered as a result of the subpoenas, it would appear that the Respondent's averments and denials set out hereinabove, are a fiction.

[17] In the matter of **Fakie NO v CCII Systems (Pty) Limited**⁶, the leading authority on contempt of court proceedings, the Supreme Court held that the applicant must prove the requisites of contempt, being the existence of an order, service or notice, non-compliance, wilfulness and *mala fides* beyond a reasonable doubt. But, once the Applicant has proved the order, service or notice and non-compliance, the Respondent bears an evidential burden in relation to wilfulness and *mala fides*. Should the Respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful or *mala fide*, contempt will have been established beyond reasonable doubt.

[18] In **Pheko and Others v Ekurhuleni Metropolitan Municipality**⁷, in a unanimous decision, the Constitutional Court found that:

"[30] 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 brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. ...

[31] *Coercive contempt orders call for compliance with the original order that has been breached, as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law.*

[32] *The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (ad factum praestandum), the following elements need to be established on a balance of probabilities —*

- (a) *the must order exist;*
- (b) *the order must have been duly served on, or brought to the notice of, the alleged contemnor;*
- (c) *there must have been non-compliance with the order; and*
- (d) *the non-compliance must have been wilful or mala fide.*⁸

[19] Both the **Fakie** judgment as well as the **Pheko** judgment, confirms that, this court may grant an order of imprisonment as a sanction.

[20] In the matter of **Matjhabeng Local Municipality v Eskom Holdings Limited and Others**⁹ the Constitutional Court found *inter alia* the following:

"[15] It is important to note that it 'is a crime unlawfully and intentionally to disobey a court order'. The crime of contempt of court is said to be a 'blunt instrument'. Because of this, '(w)ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence'. Simply put, all contempt of court, even civil contempt, may be punishable as a crime. The clarification is important because it dispels any notion that the distinction between civil and criminal contempt of court is that the latter is a crime, and the former is not.

[51] ...

[52] Although contempt is part of a broader offence, it can take many forms, even though its essence 'lies in violating the dignity, repute, or authority of the court'. Traditionally, contempt of court has been divided into two categories according to whether the contempt is criminal or civil in nature. These types of contempt are distinguished on the basis of the conduct of the contemnor. Criminal contempt brings the moral authority of the judicial process into disrepute and as such covers a multiplicity of conduct interfering in matters of justice pending before a court. It thereby creates serious risk of prejudice to the fair trial of particular proceedings. ...

[53] Civil contempt, in contrast, involves the disobedience of court orders. The continued relevance of the distinction between civil and criminal contempt also seems to lie, on occasion, in the ability to settle the dispute and to waive contempt.

[54] Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamuses, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest. In the pertinent words of Cameron JA (as he then was) for the majority in Fakie:

'(W)hile the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants

enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.'

[55] *In Fakie the Supreme Court of Appeal had occasion to consider the nature of an application for contempt of court where the Auditor-General had partly failed to comply with an order of the Pretoria High Court. He was later held in contempt of court and was sentenced to imprisonment, wholly suspended. This is an example of the use of committal as a remedy and effective sanction for contempt of court."*

[21] In the current matter, the Applicant has proven that an order exists, that the order and its terms were brought to the notice of the Respondent and that there has been non-compliance with the order.

[22] The Respondent has not discharged her evidential burden in relation to wilfulness and *mala fides*. On the contrary, the contents of the Applicant's replying affidavit proves that the Respondent's non-compliance was wilful and *mala fide* in respect of:

[22.1] refusal of contact for the period 20 to 26 December 2023;

[22.2] a breach of the order of court insofar as the Respondent did not give the Applicant notice of travel with the minor children outside the province of Gauteng and outside the borders of the Republic, thirty days before such travel would take place; and

[22.3] failure to provide the Applicant with contact to the eldest minor

child, on her birthday, on 10 January 2024.

[23] The Respondent has not sought the leave of the court to file a further affidavit dealing with the damning allegations made against her as well as the proof attached to the replying affidavit. Neither has she filed a practice note or heads of argument. The Applicant has submitted that, the Respondent has not co-operated in the filing of a joint practice note in this matter in terms of the practice directives of the High Court either.

[24] The application was properly set down before the court for hearing and allocated to 10h00 on Wednesday the 4th of June 2025. At 10h00, only the counsel for the Applicant appeared. The matter was stood down in order for the Respondent's legal representative to be contacted. In order to accommodate the non-appearance of the Respondent's counsel, the matter was stood down until 12h00.

[25] At 12h00, a counsel appeared who was briefed to explain to the court that there was some misunderstanding about the matter and referred me to without prejudice correspondence exchanged in middle May 2025 which correspondence had been uploaded onto CaseLines. She requested that the matter be removed from the roll. The Court indicated to the Respondent's counsel that such evidence which was

in the nature of without prejudice correspondence was in any event not before the court. The Respondent's counsel confirmed that the parties had not reached any settlement.

[26] The Respondent's counsel requested a stand down to later in the week. There was no application for a postponement before the Court. The matter was allowed to stand down until 14h00 in order to proceed at 14h00. The Respondent's counsel indicated that she was not available to proceed with the matter but would advise the Respondent that the matter will be proceeding at 14h00.

[27] During the lunch break, both counsel approached me in chambers. The Respondent's counsel requested leave to be excused. She confirmed that she was only briefed to remove the matter from the roll or to stand the matter down. I excused her from the matter.

[28] When the matter was recalled at 14h00 the Respondent was represented by a different counsel. After hearing the Applicant's address in full, she objected to the attachments to the replying affidavit as hearsay evidence, as SAA and MSC did not file confirmatory affidavits. As the documentation was procured pursuant to subpoenas duces tecum, the documentation was ruled as being admissible as evidence before the court.

[29] Counsel for the Respondent then advised the court that she held instructions from the Respondent, to admit that she is in contempt of the court order and to tender the costs of the application on the scale of attorney and client. Upon seeking clarification, it was confirmed by counsel that the Respondent admitted all instances of contempt of the court order complained of by the Applicant. It was submitted on behalf of the Respondent that arrest would be a severe penalty.

[30] In considering the matter, I had full regard to the answering affidavit filed by the Respondent.

[31] On the Respondent's own version, she is an admitted and practising attorney and an officer of the court who holds herself to a higher standard as a normal litigant. So does this court.

[32] The contempt displayed by the Respondent is blatant and has violated the dignity, repute and authority of the court. As a result of the evidence obtained under subpoena from SAA and MSC, it is clear that the Respondent is in wilful and *mala fide* disregard of an order of court. As a result, as well as the belated admission made by the Respondent's counsel, the version of the Respondent is rejected.

[33] The Respondent has also committed the offence of perjury. In terms of

Section 9 of the Justices of the Peace and Commissioner of Oaths Act 16 of 1963, any person who in an affidavit made before a person competent to administer an oath, has made a false statement knowing it to be false, shall be guilty of an offence and liable upon conviction to the penalties prescribed by law for the offence of perjury.

[34] The breaches of the court order, have happened historically and as such, a coercive order is not appropriate in this matter. Notwithstanding, I will order the Respondent to comply with the provisions of the court order, in full in future. It is appropriate in this matter, to impose a committal to jail as a sanction for the reasons set out hereinabove. It is also appropriate, for that sanction to be wholly suspended for a period of 5 years on the proviso, that the Respondent not be found guilty of contempt of court, again during that period.

[35] As I deem a criminal sanction appropriate, even though it is wholly suspended, I will issue a *rule nisi* in order to give both parties the opportunity to address the court regarding the nature, duration and implementation of the sanction.

[36] I direct that a copy of this judgment be referred to the National Prosecuting Authority, to investigate a possible prosecution for the offence of perjury and to the Legal Practice Council, for the same

reason as well as the other finding in this judgment.

- [37] Despite the fact that, this contempt of court application is the result of an order granted pursuant to a parenting plan and a matrimonial dispute, I find no reason why the costs should not follow the result and that the Respondent should bear the costs of the application on the scale of attorney and client. The punitive costs order reflects the court's disapproval of the egregious conduct of the Respondent in this matter.

Wherefore I make an order in the following terms:

- [1] The Respondent is found to be in contempt of the order of the Randburg Children's Court made on 18 October 2018 under case number 14/1/4/2-276/2023 ("**the court order**").
- [2] The Respondent is ordered to comply with the provisions of the parenting plan incorporated in the court order in respect of the care and contact with the minor children.
- [3] A *rule nisi* is issued calling on the Respondent to show cause by no later than the **28th of July 2025** why the following order should not be made final:

- [3.1] The Respondent is committed to 90 days' imprisonment suspended for 5 years on condition that the Respondent complies with the provisions of the court order.
- [3.2] The Respondent does not commit the offence of contempt of court within a period of 5 years from the date of this order.
- [3.3] A warrant of arrest is authorised in respect of the Respondent with such warrant to be executed in the event of the Respondent failing to comply with the order of court.
- [4] The Applicant and Respondent are granted leave to file affidavits dealing with the sanction as per order 3, that is the subject of the *rule nisi*, with such affidavits to be delivered within 14 days of the date of this order.
- [5] The Respondent shall pay the costs of the application as taxed or agreed, to date, on the scale of attorney and client.



FRANCK, A J

Date of hearing : 4 June 2025

Date of judgment : 5 June 2025

Legal representation :

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- 1 Replying affidavit, paragraph 117 and 118
 - 2 Answering affidavit, paragraph 68
 - 3 Answering affidavit, paragraph 70
 - 4 Replying affidavit, paragraph 11 and Annexure "T2", CaseLines 02-131 to 02-132
 - 5 Replying affidavit, paragraph 12 and Annexures "T3" to "T7", CaseLines 02-133 to 02-167
 - 6 2006 (4) SA 326 (SCA)
 - 7 2015 (5) SA 600 (CC) at [30] to [32]
 - 8 **Fakie** above at paragraph 12
 - 9 2018 (1) SA 1 (CC)