



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D317/2019**

In the matter between:

L[...] L[...] K[...]

APPLICANT

and

P[...] K[...]

RESPONDENT

Coram: Mossop J
Heard: 19 August 2025
Delivered: 19 August 2025

ORDER

The following order is granted:

1. The applicant's application to declare the respondent to be in contempt of the order granted by Kruger J on 1 October 2019 is dismissed.
 2. The respondent's counter application to vary the order granted on 1 October 2019 is granted and the order is set aside.
 3. Each party shall pay their own costs in the applicant's application and the respondent's counter application.
-

JUDGMENT

MOSSOP J:

[1] This is an ex-tempore judgment.

[2] The applicant seeks the committal of the respondent, presently her husband, for contempt of court. The respondent, in a counter application, seeks an order that his obligations in terms of an order granted in terms of Uniform Rule 43 (rule 43) be varied.

[3] The applicant and the respondent were married to each other in March 2014. Their marriage is one in community of property and there are no children born of it. Their relationship having crumbled and failed, they ostensibly are now intent on divorce, and, to this end, the applicant has issued out a summons against the respondent in which she claims a decree of divorce and, inter alia, 'rehabilitative maintenance' for herself in perpetuity at the commencement value of R30 000 per month, and the appointment of a liquidator to attend to the division of the joint estate. In his plea, the respondent concedes that the marriage has irretrievably broken down and, in a claim in reconvention, seeks an order that the applicant forfeit the benefits of the marriage in community of property. The issues are, therefore, relatively confined, defined and crisp.

[4] After commencing divorce proceedings against the respondent, the applicant issued out rule 43 proceedings against him and secured an order by default on 1 October 2019 from Kruger J (the order), directing the respondent to pay:

- (a) Maintenance to her in respect of herself in the amount of R7 500 per month;
- (b) The monthly premiums necessary to retain her on the respondent's medical aid benefit scheme, and any expenses not covered by that scheme; and
- (c) The monthly instalments of, and certain defined associated expenses related to, a motor vehicle used by her.

[5] It is alleged by the applicant that the respondent has not complied with the order and is in contempt of it and that he accordingly falls to be sanctioned for his wilful disobedience of it. She asserts that at the time that she deposed to her affidavit in this application (30 September 2022), the respondent was in arrears in his obligations to her in the total amount of R249 500.

[6] To this, the respondent says that the applicant knows full well that he lost his employment with Transnet during May 2021 after disciplinary proceedings were initiated, and concluded, against him by his employer. Since then, he has had to make ends meet by performing odd jobs. If he has not complied with the order, it is because he was unable to do so.

[7] The respondent tellingly makes the point that the finalisation of the divorce action has taken unnaturally long and that the personal circumstances of both himself and the applicant have significantly changed over the six years that this matter has simmered between them. He alleges that during this period in which the action has inched its way forward at glacial speed, the applicant has become self-supporting precisely at the time that he has become progressively more financially fragile.

[8] It is necessary to consider the history of this matter in order to consider, and determine, the future of the applicant's application and the respondent's counter application:

- (a) The applicant's summons initiating the divorce action was issued on 21 January 2019 and was served upon the respondent personally four days later;
- (b) The respondent delivered his plea and claim in reconvention on 13 August 2019;
- (c) The applicant pleaded to the respondent's claim in reconvention on 3 September 2019;
- (d) Three years later, on 7 November 2022, the parties got around to holding a Uniform Rule 37 conference (the rule 37 conference) and there are signed minutes in the court file revealing that such a meeting did, in fact, occur; and

(e) Nearly two years after the rule 37 conference, on 30 September 2024, the applicant's legal representative delivered a certificate of trial readiness in which it was recorded that five days would be necessary for trial.

[9] The applicant states that the respondent is guilty of contempt of court. Contempt of court is the wilful and mala fide refusal to comply with an order of Court.¹ While the remedy for contempt of court has evolved to only be available for orders of court that are *ad factum praestandum*,² an order demanding payment of maintenance, which has all the attributes of an order *ad pecuniam solvendam*, is considered, in fact, to be an order *ad factum praestandum*³ and thus orders for the non-payment of maintenance may be enforced through contempt proceedings.

[10] The Constitutional Court observed in *Pheko v Ekurhuleni City*⁴ that:

'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.'

[11] This is, indeed, so. It is equally so that contempt proceedings are inherently urgent. Plasket J stated in *Victoria Park Ratepayers' Association v Greyvenouw CC*⁵ that:

'[C]ontempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has wilfully and in bad faith ignored or otherwise failed to comply with a court order. This added element provides to every such case an element of urgency.'

¹ *Clement v Clement* 1961 (3) SA 861 (T) at 866A; *Consolidated Fish (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C) at 523A; *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 at 691A-D; *Frankel Max Pollak Vinderine v Menell Jack Hyman Rosenberg* 1996 (3) SA 355 (A) at 367H.

² *Metropolitan Industrial Corporation v Hughes* 1969 (1) SA 224 (T).

³ *Ferreira v Bezuidenhout* 1970 (1) SA 551 (O) at 553D-H.

⁴ *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) para 28.

⁵ *Victoria Park Ratepayers' Association v Greyvenouw CC (Victoria Park)* [2003] ZAECHC 19; [2004] 3 All SA 623 (SE); 2004 JDR 0498 (SE) paras 26 and 27.

[12] Plasket J went on to state in *Victoria Park* that:

‘... it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency. This, in my view, is the starting point: all matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances, and the dictates of fairness, allow.’

[13] Generally speaking, there are three reasons that underpin contempt of court proceedings. Firstly, such proceedings are designed to impose a penalty to notionally vindicate the court’s lost honour arising out of the disregard of its order. Secondly, they are designed to compel performance in accordance with the order. And thirdly, such proceedings may be pursued for the sole purpose of punishing the respondent.⁶

[14] From the relief claimed in the notice of motion by the applicant in her application, it appears that she relies upon the third reason just mentioned, for she only seeks the respondent’s imprisonment for a period of 30 days.

[15] But it seems to me that whichever of these alternatives motivates an applicant to bring contempt proceedings, those proceedings should be brought as soon as the non-compliance with the court order becomes evident. That is clearly not what has occurred in this matter. The order was issued on 1 October 2019. The applicant alleges in her founding affidavit that the respondent almost immediately fell into default, made few payments to her and made his last payment in November 2020. Since then, he has paid nothing further. The applicant’s contempt application was issued by the registrar of this court on 5 October 2022. Why did she wait two years before bringing the contempt application? Why did she wait another three years before setting her application down for adjudication? Nearly five years have now run their course since the respondent’s last payment and his consequent breach of the order.

⁶ *Protea Holdings v Wriwt and Another* 1978 (3) SA 865 (W) at 878B; *Sparks v Sparks* 1998 (4) SA 714 (W) at 725H-I; *Bruckner v Bruckner and Another* [1999] 3 All SA 544 (C) at 549i-j and 550a.

[16] The applicant has given no explanation for this excessive delay. Indeed, she has not even attempted to do so. But the respondent has provided an explanation of sorts: he alleges that the applicant simply does not want to settle the action, alleging that he has made numerous offers of settlement, none of which have found favour with her. It seems to me, in the absence of any other explanation from the applicant, that there may be more than a grain of truth to what the respondent alleges.

[17] Besides this inordinate delay, there are other aspects of this matter that concern me. The first is why the parties are not already divorced. As already established, the issues are not complex and there appears to be no reason why the applicant and the respondent should unnecessarily remain shackled to each other in their apparent joint misery.

[18] A further concern is the adulteration of the rule 43 procedure. An order granted in terms of Uniform Rule 43 is granted pendente lite. 'Pendente lite' means 'while the action is pending'.⁷ What was intended by the introduction of this rule was that whilst the parties were pursuing their divorce action against each other, the less well-resourced party should be able to maintain a reasonable standard of living pending the final severing of the bonds of marriage. To ensure that occurred, the better resourced party may be directed to pay maintenance to the other party.

[19] Given that a court action has both a beginning and an end, an order granted pendente lite was not to be in place for all time but only whilst the parties advanced their action. It was, thus, considered to be entirely temporary in nature. That this must be the case is to be recognised from the fact that awards of maintenance under rule 43 are made on brief affidavits that lack true precision and are presented at a brief hearing. No oral evidence is considered and thus no precision is capable of being achieved by an order in terms of rule 43. It is a rough estimation of what the successful party requires, based upon the underlying assumption that it will only apply temporarily.

⁷ Black's Law, 9th Edition.

[20] In this instance, the order has been in place for over six years, an extraordinarily long time given the limited issues that exist between the parties. Neither of the parties appear to have taken the lead and attempted to get their rancorous dispute before the court. Such lethargy on the part of both litigants is to be deprecated.

[21] High Court litigation can be frustratingly slow. But I can discern no particular reason why this action should have dragged as it has. In my view, any potential sympathy for the applicant's position has dissipated through her own inaction and has been replaced by the incipient realisation that the bringing of this application now may be the consequence of the furtherance of an undisclosed strategy pursued by her. Why should the court now be interested in considering an issue of alleged non-compliance with an order, or devote scarce judicial resources to considering that issue, when the applicant herself was not desirous of immediately enforcing the court order when the default first occurred?

[22] The respondent has offered up an explanation as to why he has not made the payments that he was ordered to make. The explanation advanced, namely an inability to pay, appears to be likely at the very least given the fact that the respondent indisputably lost his employment at Transnet, a fact that the applicant herself accepts. In the circumstances, I am not persuaded that the respondent was in wilful contempt of the order, and I decline to grant the relief sought by the applicant.

[23] I have considered the respondent's counter application. The notice of counter application is a shambles. The relief sought in the counter application proposes that a different order to the one granted by Kruger J should now be granted due to the change in the respondent's circumstances. The notice proposes that an alternative order be granted in terms of paragraph 2 of the notice of counter application. There is, however, no paragraph 2 in the notice of counter application. I accordingly had no idea of what order the respondent proposed.

[24] In order to try and advance this moribund state of affairs, I requested that the complete order sought by the respondent be handed up, and this was eventually done. The missing paragraph proposed that no maintenance should be payable by

the respondent. It is plain that the respondent alleges that there has been a material change in his circumstances, namely the loss of his employment, which has been conclusively established by a certificate issued by his erstwhile employer.

[25] For a party to establish a right to maintenance, a need for such maintenance must be presented as well as an ability by the other party to meet that need. The applicant has conceded that she is now able to sustain herself and thus there is no need. I am, moreover, satisfied that the respondent has established that he presently does not have the means to meet the order. I am, therefore, inclined to grant the counter application.

[26] I conclude therefore that the applicant's application to declare the respondent in contempt of the order must be refused and that the respondent's counter application must be granted. In the exercise of my discretion, I direct that each party shall pay its own costs.

[27] I therefore grant the following order:

1. The applicant's application to declare the respondent to be in contempt of the order granted by Kruger J on 1 October 2019 is dismissed.
2. The respondent's counter application to vary the order granted on 1 October 2019 is granted and the order is set aside.
3. Each party shall pay their own costs in the applicant's application and the respondent's counter application.

MOSSOP J

APPEARANCES

Counsel for the applicant:

Ms L Zibani

Instructed by:

Mopeli Attorneys
Muckleneuk

Locally represented by:

Mboto and Associates
19 Hurst Grove
Clifton Place
3rd Floor, Office 304
Musgrave
Durban

Counsel for the respondent:

Ms Cele

Instructed by:

Siza Incorporated
22 Oxford Road
Windermere
Durban