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

Not reportable / Reportable

Case no: 2358/2024

In the matter between

M[...] B[...]

APPLICANT

(ID No: 87[...])

And

W[...] A[...] B[...]

RESPONDENT

(ID No: 81[...])

Neutral citation: *B[...] v B[...]* (2358/2024) [2025] ZAFSHC 256 (25 August 2025)

Coram: Daniso J

Heard: 8 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 25 August 2025.

Summary: Contempt of court – failure to comply with court order – all elements of contempt proven by the applicant beyond reasonable doubt – willfulness and mala fides presumed. Respondent failed to discharge the evidentiary burden to rebut the presumption with evidence that establishes a reasonable doubt that non-compliance not willful or *mala fide* – respondent found in contempt – principles restated.

ORDER

1 The respondent is found in contempt of the court order granted by Majosi, AJ on 6 June 2024.

2 The respondent is sentenced to imprisonment for a period of 90 days. The sentence is suspended for a period of five years on condition that the respondent complies with the order of the court granted by Majosi AJ on 6 June 2024 within 30 days from the date of this order.

3 Leave is granted to the applicant to approach this court on the same papers, duly amplified, for putting into operation the period of the suspended imprisonment in the event that the respondent fails or neglects to comply with this order.

4 The respondent shall pay the costs of this application including the costs of counsel on scale B.

JUDGMENT

Daniso J

[1] The parties are biological parents of two minor children currently embroiled in divorce proceedings. On 6 June 2024, this court per Majosi AJ issued an order in terms of which the respondent was ordered *pendete lite* to pay maintenance to the applicant and the minor children in the amount of R28 000 per month and in addition, '*the respondent shall continue to pay*' the expenses relating to the municipal account, security, short term insurance, annual car services, costs for the applicant's cellular phone, children's school fees, their extra mural activities including medical aid contributions and related costs not covered by the medical aid.¹

[2] In these opposed proceedings, the applicant seeks an order that the respondent be found in contempt of the said court order with ancillary relief which includes that he be committed to imprisonment for 90 days suspended with conditions for a period to be determined by the court and that the applicant be granted leave to approach the court on same papers duly amplified for the purpose of putting into operation the period of suspended imprisonment in the event the respondent fails to comply with the order of this court.

[3] In addition to the determination of the merits of the application, the respondent's

¹ Paragraph 6 to 7 (including 7.1. to 7.14) of the order.

answering affidavit was accompanied by an application for condonation for the late filing of the answering affidavit which was due on 28 February 2025 but only filed 15 days later, on 25 March 2025.

[4] The delay was attributed to the respondent's lack of funds to instruct an attorney to oppose the application and that, when he came to some funds during February 2025, his attorney was unavailable due to his (the attorney's) mother's hospitalization until 15 March 2025. It was the respondent's case that if condonation is not granted, he will be severely prejudiced due to the imminent incarceration. Condonation was opposed essentially on the grounds that the respondent could have appointed another attorney.

[5] A party who seeks an indulgence of the court to condone its ineptitude must show sufficient cause entitling it to the court's indulgence. An explanation for the delay and prejudice to the party seeking condonation is but one of the factors determining whether it would be in the interests of justice to grant condonation or not. Conjunctively, factors such as the prospects of success in the main application, the importance of the matter to the respondent, prejudice to the applicant including the effect of the delay on the administration of justice also play a role.²

[6] The delay of 15 days is extreme. Except to fleetingly aver the prejudice that would befall him in the event that his late answering affidavit is not condoned, the respondent has made no averments pertaining to his prospects of success on the merits of the application including the importance of the subject matter to him. As correctly pointed out by counsel for the applicant, the unavailability of an attorney is not a valid reason for condonation.

[7] Despite the substantial ineptitude and scantily pleaded grounds for condonation, I took into account that no prejudice was indicated by the applicant due to the late answering affidavit, the applicant had also filed her replying affidavit and held that due to the nature of the main proceedings, it would be in the interests of justice and that of the parties that the matter is advanced. I accordingly exercised my discretion in favour of condoning the respondent's late answering affidavit.

[8] Turning to the merits of the application, the principles applicable in the

² *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) para 50.

determination of applications of this nature are now well established: the onus is on the applicant for committal for contempt of court to prove all elements of contempt beyond reasonable doubt, namely, the court order, service of notice, non-compliance, willfulness and mala fides on the respondent's part. Once the applicant has done so, willfulness and mala fides are presumed. The onus is on the contemnor to rebut this presumption with evidence that establishes a reasonable doubt as to whether his non-compliance was willful and mala fide.³

[9] On the papers it is common cause that at all material times hereto the respondent was aware of the existence of the court order and that he has also somewhat complied with it. Accordingly, what remains to be determined is whether the respondent's explanation for failing to comply with the court order raises a reasonable doubt with regard to willfulness and mala fides.

[10] It is the applicant's case that the respondent was in arrears with his maintenance payments for the applicant and the minor children in the amount of R49 000, which amount has since escalated to R118 000 as at the date the respondent deposed to his answering affidavit. The respondent has also failed to pay the expenses pertaining to the municipal account in the amount of R30 877.22. The last payment made was in December 2024. Furthermore, the applicant's cellular phone account is in arrears in the sum of R5 493.65, R2000 is outstanding in respect of the children's swimming lessons and the medical aid contributions are also in arrears in the amount of R5 810.00 with the result that the medical aid was suspended. The respondent had also failed to reimburse the applicant's optometrist costs, in the amount of R1 793.00. As proof therefore, the applicant has attached statements and invoices in relation to the municipal, cellular phone and optometrist's accounts as annexures 'B', 'C1,' 'C2' and 'C5' and WhatsApp messages from the medical aid broker and the swim school teacher as annexures 'C3' and 'C4.'

[11] It is the applicant's case that whenever she enquired from the respondent regarding the outstanding payments the respondent would either tell her that she must call him or send a letter from her attorneys. When the applicant's attorneys sent him letters, he

³ *Fakie N.O. vs CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42(3) and 42(4); *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Other* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) para 37 quoting with approval *Fakie N.O. v CCII*.

ignored them.

[12] It is argued by the applicant's counsel that the respondent has willfully disobeyed the court order. There has been no attempt made by the respondent to explain to the applicant and/or her attorneys the reasons for not adhering to the court order. Instead, he went ahead and secured funds to oppose this application, but cannot secure funds to pay the arrear maintenance. In this regard, the application ought to succeed with costs. On the other side, though, the respondent contends that this application is motivated by malice as the applicant has an alternative remedy in the form of a writ of execution which she can execute.

[13] The respondent admits that he has not paid maintenance in accordance with the court order. He denies that his non-compliance is willful. He attributes it to financial constraints due to his diminished source of income resulting from the destruction of his farm by veldfires and the applicant's defamation of his character. He submits that he has, nevertheless, been paying what he can. He states that he did consider launching a rule 43(6) application for the variation of the order, but due to the fact that the finalization of the divorce was imminent, such being due to be heard in June or July 2025, he was thus of the belief that it would not have a practical effect and would also result in wasted costs.

[14] With regard to the expenses, it is the respondent's case that the order does not state that he is also liable to pay the arrears and pay them as when the applicant so demands. He submits that at the time the order was granted, the account was in arrears with an amount of R46 070.29 he has since managed to reduce the arrears to R30 877.22. He denies that the account for the applicant's cellular phone is in arrears and points out that the documents relied upon by the applicant as proof thereof, do not constitute statements of accounts. They are not even dated, and they clearly show current balances. As regards the unpaid swimming lessons, it is his explanation that he was not aware that the children had resumed their swimming lessons and that the account was in arrears until he was served with these proceedings. He has since made arrangements to settle the arrears. However, due to his financial position he has not been able to make the required payments. The respondent insists that the medical aid contributions are up to date, the medical aid has not been suspended and as proof thereof, he refers to annexure 'BW15' which confirms that premiums have been paid since 01 September 2024 up to 01 January

2025. It is the respondent's case that in terms of the order, in addition to the premiums, he is also obligated to pay reasonable medical expenses not paid by the medical aid. The optometrist's charges claimed by the applicant relate to sunglasses. He is not obliged to pay for sunglasses as they do not constitute reasonable medical expenses.

[15] Counsel for the respondent contends that having regard to the pleaded facts on the papers, there is a clear dispute of facts including new evidence raised by the applicant in her replying affidavit in that, in the founding affidavit the applicant alleges that the arrear maintenance due is an amount of R49 000 whereas in the replying affidavit, an amount of R118 000 is alleged. The applicant's insistence in her reply that the respondent has not paid the municipal account since December 2024, that the respondent is obligated by the court order to also pay the arrears on the municipal account as well as her optometrist's account, constitute new evidence. Counsel argues that these disputed facts cannot be resolved on the papers and since the applicant did not seek a referral to oral evidence, the respondent's version should be accepted, namely that his non-compliance with the court order is not, in fact, willful, but that he is unable to pay the maintenance as ordered. The application must be dismissed with costs.

[16] I am not persuaded that the respondent's explanation of how his non-compliance with the court order came about, dispels his willfulness and mala fides. The fact that the applicant can execute on the debt is not a valid defence to contempt of court proceedings as they are not intended to be a debt a collection mechanism, but to vindicate the court's authority by compelling and punishing those who unlawfully and intentionally defy its orders. It was explained in *Bannatyne v Bannatyne* (Commission for Gender Equality, as *Amicus Curiae*)⁴ (*Bannatyne*) that s 31(1) of the Maintenance Act 99 of 1998⁵ provides both civil and criminal remedies against maintenance defaulters.

[17] Similarly, the respondent's inability to pay does not entitle him to choose when to comply with the order and to what extent. Financial circumstances do change, it is for that

⁴ *Bannatyne v Bannatyne* (Commission for Gender Equality and *Amicus Curiae*) 2003 (2) SA 363 (CC) (*Bannatyne*) para 4.

⁵ Section 31(1) provides thus: '. . . any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.'

reason that Uniform rule 43(6) provides for a variation of the existing order in the event of a material financial change occurring. In this matter, no attempt whatsoever has been made by the respondent to seek a variation of the order. On the respondent's own version, he was aware that he could do so, he chose not to do so.

[18] There is nothing ambiguous about the provisions of the order in relation to the respondent's obligations to pay the expenses relating to the municipal account and medical related expenses. With regards to the municipal account, it is common cause that the respondent has always been responsible for the payment of the household expenses, as the applicant has never been employed. His contention that the order did not specify that he must also pay the arrears is accordingly unsound. It is also clear from the optometrist's invoice that the applicant underwent eye tests and was also prescribed prescription glasses in addition to the sunglasses. As correctly pointed out by the applicant in reply, the proof of payment of the medical aid contributions does not show whether the contributions for the month January and February 2025 have been paid. A detailed statement of account evidencing the arrears on the applicant's cellphone account has been provided in rebuttal as annexure 'MB12' of the applicant's replying affidavit.

[19] The assertion that he only became aware of the outstanding swimming lessons when he was served with these proceedings is also fallacious. On the available facts, these proceedings were served on the respondent on 23 January 2025. Approximately two weeks earlier on 8 January 2025, in his lengthy vitriolic WhatsApp voice note response to the applicant's query regarding the outstanding payments, he states that: 'Jy het laasjaar November maand Shani hulle se rekening gevat, jy het die swemrekening gevat om daaryby te voeg, ek het nooit toestemming gegee dat my kinders weer kan swem nie.' It is thus clear that, already on the first week of January 2025, the respondent was aware that the children were attending swimming lessons and that the account was due.

[20] The respondent's non-compliance with his child maintenance obligations undermines his children's best interests⁶ and their rights to receive maintenance from a parent.⁷ The respondent's conduct is not only prejudicial to the minor children's best

⁶ In terms of s 9 of the Children's Act 38 of 2005, a child's best interest is of paramount importance. This is not only a statutory duty, but also a constitutional obligation in terms of s 28(2) of the Constitution.

⁷ The parental responsibilities and rights of a parent include the responsibility and the right to care for the child

interests but also constitutes a criminal offence for which he can be sentenced to imprisonment or ordered to pay a fine.⁸

[21] As correctly argued by counsel for the applicant, instead of paying maintenance the respondent sought funds to appoint counsel to oppose these proceedings. The respondent's mala fides can also be deduced from his utterances, on 8 January 2025. He ended his WhatsApp voice note by remarking: 'you and your company don't have the money to fight me.' However, it was pointed out in *Bannatyne* that:

'Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step 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 no 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.'⁹

[22] On the facts germane to this matter, the fact that the respondent has not adhered to the terms of the court order is not in dispute. The evidence put up by the respondent in opposition does not constitute bona fide factual disputes. In the circumstances, I hold that the respondent has failed to discharge the onus to prove that his disobedience of the court order is not willful and mala fide on a preponderance of probabilities. His conduct is thus contemptuous. The applicant is entitled to the relief she seeks. On the costs aspect, I see no reason why costs should not follow the result.

Order

[23] I make the following order:

1 The respondent is found in contempt of the court order granted by Majosi, AJ on 6

by maintaining the child. See *ibid* s 18(2)(a).

⁸ *Bannatyne* para 4.

⁹ *Ibid* para 32.

June 2024.

2 The respondent is sentenced to imprisonment for a period of 90 days. The sentence is suspended for a period of five years on condition that the respondent complies with the order of the court granted by Majosi AJ on 6 June 2024 within 30 days from the date of this order.

3 Leave is granted to the applicant to approach this court on the same papers, duly amplified, for putting into operation the period of the suspended imprisonment in the event that the respondent fails or neglects to comply with this order.

4 The respondent shall pay the costs of this application including the costs of counsel on scale B.

DANISO J

Appearances

For the applicant:	J Els
Instructed by:	Honey Attorneys
For the respondent:	N van Niekerk
Instructed by:	Symington de Kok