

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

CASE NO: 2023-024319

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

F. MARCANDONATOS

04 September 2025

In the matter between:

M.M

Applicant

and

M.F

Respondent

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JUDGMENT

MARCANDONATOS AJ:

INTRODUCTION

- [1] The Introductory remarks by the Constitutional Court in **Pheko & Others V Ekurhuleni Metropolitan Municipality (II)**¹ sets the stage for these proceedings 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] This is an opposed Application in terms of which Applicant seeks an Order declaring Respondent to be in contempt of Court for the failure to adhere to an Order granted in accordance with Uniform Rule 43 by Justice Senyatsi on **22 January 2024 (“the Order”)**.²

FACTUAL BACKGROUND

- [3] In terms of **the Order**, Respondent is ordered to pay monthly maintenance, *pendente lite*, in respect of Applicant and the parties’ three and a half year old son (**“the child”**), as follows³:-

¹ [2015] ZACC 10

² FA, annexure “FA2” – Court Order in accordance with Rule 43 proceedings dated 22 January 2024, CL 13-26 to CL 13-29

³ Supra footnote 2

- 3.1. payment of R45 000.00 per month in respect of Applicant and ***the child***;
- 3.2. payment of all costs relating to ***the child's*** education, which includes tuition fees, registration fees, special levies and related educational expenses, extra-mural activities, sporting activities in and out of school, together with the required equipment and outfitting and school functions, tours and outings;
- 3.3. payment of the costs associated with the retention of Applicant and ***the child*** on Respondent's medical aid scheme, payment of the premiums thereof and payment of all medical costs in respect of Applicant and ***the child*** not covered by the medical aid scheme;
- 3.4. payment of all costs associated with Applicant's motor vehicle, including insurance, licensing, repairs, tyres and maintenance;
- 3.5. payment of a contribution towards Applicant's legal costs in the amount of R50 000.00.

[4] According to Applicant, as at the date of her deposing to the Founding Affidavit, being **02 March 2025**, Respondent was in arrears in respect of the monthly cash contributions, ***the child's*** school fees, ***the child's*** attendance at Madressa (*Islamic studies*) and ***the child's*** extra-mural activities, additional educational costs, medical aid premiums, additional medication not covered by the medical aid, Vitality, vehicle insurance and the contribution to legal fees, in the amount of R722 454.47.⁴ Respondent's total contribution of R46 000.00 between the period **February 2024** to **February 2025**, has been allocated and included in the calculation of the arrear maintenance as at **02 March 2025**.⁵

ISSUE IN DISPUTE

⁴ FA: par 15 CL 13–9, annexure "RA5" – schedule of maintenance arrears, CL 13-497 to 13-498

⁵ FA: par 15 CL 13-9, annexure "RA5" – schedule of maintenance arrears, CI 13-497 to 13-498

- [5] The identified issue in dispute is whether Respondent is in wilful and *mala fide* contempt of ***the Order***.

ISSUE FOR DETERMINATION

- [6] The issue for determination is whether Respondent's non-compliance with ***the Order*** was wilful and *mala fide*.

PRINCIPLE SUBMISSIONS BY APPLICANT AND RESPONDENT

- [7] Applicant contends that Respondent has failed to comply and make full payments in respect of his monthly maintenance and that he is in arrears therewith as referred to in paragraph 4 above.

- [8] Applicant therefore seeks an Order in the following terms:-⁶

- 8.1. Respondent is declared to be in contempt of ***the Order***;
- 8.2. Respondent be committed to prison for contempt of ***the Order*** for a period of 30 (*thirty*) days;
- 8.3. alternatively to the above, the operation of the committal is suspended on condition that Respondent complies with ***the Order*** with immediate effect alternatively on such conditions as this Court deems appropriate;
- 8.4. the Maintenance Officer of the Johannesburg Maintenance Court, alternatively the Registrar of the above Honourable Court, is directed to furnish Respondent's personal particulars to the Credit Bureau, namely Experion, Trans Union, ITC, VCCB (*Vericred Credit Bureau*), XDS (*Xpert Decision Systems*) and Compuscan, for the purpose of recording Respondent's contempt of the offence of not making payment

⁶ NOM: CL 13-2 to 13-3

of **the Order** as provided for in Section 31(4) of the Maintenance Act, 99 of 1998;

8.5. Respondent to pay the costs of the Application on the attorney and client scale, inclusive of the costs of Counsel.

[9] Respondent opposes the Application by stating:-

9.1. he is unable to afford payment in terms of **the Order**;⁷

9.2. he is unable to comply fully with **the Order**, resulting in there being arrears in respect thereof;⁸

9.3. he instituted Appeal proceedings against **the Order** on **13 February 2024**;⁹

9.4. he instituted variation proceedings in the Maintenance Court on or about **13 November 2024**;¹⁰

9.5. he has not made payment of the amounts directed in **the Order**, as a result of his inability to do so.¹¹

LEGAL PRINCIPLES

[10] The matter of **Fakie N.O. v CC11 Systems (Pty) Limited**¹² crystallises the trite requirements for contempt as follows:-

10.1. the existence of a Court Order;

10.2. service or notice thereof on the alleged contemnor;

⁷ AA: par 84, CL 13-218

⁸ AA: par 93, CL 13-219

⁹ AA: paras 17 and 19, CL 13-206, annexure AA2, CL 13-309 to CL 13-315

¹⁰ AA: par 62, CL 13-214, annexure AA25, CL 13-339 to CL 13-357

¹¹ AA: par 95, CL 13-220

¹² [2006] ZASCA 52; [2006 (4) SA 326 (SCA)] at par 42

10.3. non-compliance with the terms of Court Order by the alleged contemnor; and

10.4. wilfulness and *mala fides* on the part of the contemnor.

[11] The law on “Civil” contempt of Court is well established. In the seminal Judgment of **Pheko & Others V Ekurhuleni Metropolitan Municipality (II)**¹³ the Constitutional Court in a unanimous Judgment explains what is meant by civil contempt as follows:

“[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. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings mero motu.”

[12] **Bannatyne v Bannatyne**¹⁴ deals with the competence of a Court to enforce money judgments by way of contempt proceedings:-

“[18] Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief is competent.”

¹³ Supra footnote 1

¹⁴ (CCT 18/02) [2002] ZACC 31, par 18

- [13] In **Matjhabeng Local Municipality v Eskom Holdings Limited & Others, Mkhonto and Others v Compensation Solutions (Pty) Limited**¹⁵ the Constitutional Court summarised ***Fakie*** and ***Pheko*** and stated as follows:-

“Summing up, on a reading of Fakie, Pheko II, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual’s freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.”

- [14] Accordingly, the Constitutional Court held in **SS v VV-S**¹⁶ that a person who has not purged his contempt should not be entertained by a Court and where, the Honourable Justice Kollapen AJ as he then was, stated as follows:-

“[35] Those interests will not be best served and will be undermined if the applicant is allowed to proceed and deal with the merits of the appeal in the absence of him remedying his conduct by complying with the August Order. It will dilute the potency of the judicial authority and it will send a chilling message to litigants that orders of court may well be ignored with no consequence. At the same time, it will signal to

¹⁵ 2017 (11) BCLR 1408 (CC), par 67

¹⁶ 2018 (6) BCLR 671 (CC)

those who are the beneficiaries of such orders that their interests may be secondary and that the value and certainty that a court order brings counts for little. For all these reasons, and in particular that the subject matter of this litigation involves the best interests of the child, the interests of justice strongly militate against the applicant's pursuing his application. Proceeding with the hearing of this matter, where adequate compliance with the August Order, which sought to ensure payment of the basic maintenance for K, is in doubt, would create "[c]ontinued uncertainty . . . [which] cannot be in the interests of the child" and does not further the interests of justice."

CONTEMPT OF THE ORDER

[15] Applicant bears the onus of proof and to demonstrate in respect of the contempt, that:-

15.1. a Court Order was made;

15.2. the Order was served or Respondent has knowledge of the Order;

15.3. non-compliance with Order.

[16] The terms of **the Order** are clear, unambiguous, not disputed and Respondent does not dispute knowledge of **the Order**.¹⁷

[17] It is common cause that Respondent has not complied with **the Order**.¹⁸

[18] Applicant contends that she has met her onus in regard to the foregoing.

[19] In addition, Applicant submits that she pursued every alternate avenue available to her for the enforcement of **the Order** before she persisted with the contempt Application in terms whereof:-

¹⁷ FA: par 19, CL 13-9, AA: par 85, CL 13-218

¹⁸ FA: par 15, CL 13-8, AA: par 93, CL 13-219

- 19.1. on or about **31 March 2024**, Applicant caused a Writ of Execution to be issued attaching Respondent's First National Bank account, account number: 7[...] in an amount of R48 154.40,¹⁹ which attached was effected on **04 April 2024**,²⁰
- 19.2. given Respondent stating that the Writ could not be executed upon given his Application for Leave to Appeal, Applicant approached Court on an urgent basis for interdictory relief to safe-guard the funds in Respondent's First National Bank account in line with the Writ of Execution issued, in terms whereof an Order was granted in terms of which the FNB funds were interdicted from release, pending the Application for Leave to Appeal, however, just prior to the release of the funds held in the aforesaid FNB bank account, an Interpleader Notice was served by an entity described as Greyrock Holdings (Pty) Limited claiming that the funds held in FNB bank account were subject to a cession;²¹
- 19.3. during **October 2024**, Applicant caused a Writ of attachment on Respondent's Honda Civic motor vehicle with registration number Z[...],²² however, upon attachment and removal of the motor vehicle by the Sheriff, Respondent claimed that the motor vehicle had been sold to his mother during **August 2024**.²³

WILFULNESS AND MALA FIDES

[20] There is a presumption of *mala fides* and wilfulness when the first three elements of the test in **Fakie** have been established. In **Pheko** (*supra*) the Court held that:

¹⁹ FA: par 36, CL 13-14, AA: par 36, CL 13-209, annexure "AA12", CL 13-286

²⁰ AA: par 37, CL 13-209

²¹ FA: paras 36, 37 and 39, CL 13-14 to CL 13-15

²² FA: par 41, CL 13-15

²³ FA: par 42, CL 13-16

“[36]... Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.”

- [21] The question that requires to be answered is therefore whether Respondent's non-compliance was indeed because of unaffordability, as alleged by him. Although an evidentiary burden rests on Respondent to allege facts to create doubt, Applicant bears the onus to prove beyond a reasonable doubt that Respondent's non-compliance was wilful and *mala fide*. Differently put, the ultimate burden rests on Applicant that if on a conspectus of all the evidence it is reasonably probable that Respondent's non-compliance was wilful and *mala fide*, Respondent cannot be subject to criminal sanctions.
- [22] Courts draw a sharp line between a parent who will not pay and one who cannot pay. Where inability is convincingly proven, contempt will not be established. The onus is on the defaulter to show *bona fides* – for example a genuine lack of means, coupled ideally with attempts to seek a reduction of the Order or at least partial payments as a sign of good faith.
- [23] On **13 February 2024**, Respondent served an Application for Leave to Appeal **the Order**, which was withdrawn pursuant to Senyatsi J confirming on **23 September 2024**, that there was no Appeal against an Order arising from the Rule 43 proceedings and that Respondent's Application for Leave to Appeal **the Order** was irregular, thus resulting in Respondent withdrawing the Application for Leave to Appeal on **12 November 2024**.²⁴
- [24] On or about **13 November 2024**, Respondent then instituted an Application for variation of **the Order** in the Johannesburg Magistrate's Court²⁵ in which Application Respondent claims that he is a salaried employee earning a nett

²⁴ FA: par 58, CL 13-18

²⁵ FA: par 46, CL 13-16, AA: par 62, CL 13-214, annexure “AA25”, CL 13-339 to CL 13-357

salary of R14 827.00 and an income from Uber of R7 500.00, i.e. a total monthly income of R22 327.00,²⁶ and claims that his monthly expenses are R18 721.00 and seeks that **the Order** be reduced to an amount of R5 500.00 per month in respect of **the child**.²⁷

[25] Simply put, Respondent's submissions are that to the extent that Applicant disputes his ability to pay the ordered amounts, this is an issue that is already before the Maintenance Court and in such instance it would be necessary for the Maintenance Court proceedings to first conclude, prior to there being a conclusive finding regarding Respondent's ability, to make payment of **the Order** in full. Respondent therefore states that Applicant acted prematurely in bringing the Contempt Application whilst the maintenance Application is pending. He submits further that the variation Application in the Maintenance Court currently under way will fully ventilate the financial position of Respondent, as well as his ability to pay the amounts as per **the Order**. In summary, Respondent says that the issue regarding his inability to make payment in terms of **the Order** is currently pending before the Maintenance Court and will be fully ventilated therein, meaning that due process needs to be followed in **that** forum, and whatever concerns Applicant raises regarding Respondent's financial situation and/or his ability to pay, can be tested in such forum.²⁸

[26] No explanation is, however, tendered by Respondent as to how the shortfall of R1 894.00 will be funded nor does Respondent therein provide details, inclusive of bank account statements and supporting documentation as to how and what changes and/or material changes there are in his financial position from **January 2024** when **the Order** was granted, to **November 2024** when he applied for the variation.

²⁶ AA: annexure "AA25", CL 13-342

²⁷ AA: annexure "AA25", CL 13-339 to CL 13-343

²⁸ Respondent's HOA: paras 37 to 44, CL 16-59 to CL 16-60

[27] Furthermore, no explanation is tendered by Respondent as to why he did not approach the above Honourable Court for a variation in terms of Rule 43(6) and instead having done so in the Magistrate's Court.

[28] Applicant provides documentation evidencing the following:-

28.1. posts by Respondent on his social media accounts dated **10** and **12 September 2024**, advertising his business, The Meat Cart;²⁹

28.2. posts by Respondent on his social media accounts dated **15** to **22 January 2025**, advertising his business, BWT (*B[...]* *W[...]* *T[...]*);³⁰

28.3. a Take-a-lot debit order instruction and statement for SA Water Wellness (Pty) Limited completed by Respondent as "*Manager*" on **31 July 2025**;³¹

28.4. photographs of the business vehicles with Meat Cart branding,³² which Respondent admits to using;³³

28.5. Respondent's Standard Bank account statements reflecting payments from Water Reimm and Meat Cart;³⁴

28.6. that Respondent continues to receive bank statements for Versatile Safety Supplies (Pty) Limited;³⁵

28.7. that since the granting of *the Order* on **27** and **29 February 2024**, Respondent purchased event tickets from Ticket Pro in an amount of

²⁹ FA: annexure "FA9.1" and "FA9.2", CL 13-71 to CL 13-72

³⁰ FA: annexure "FA9.3" to "FA9.10", CL 13-73 to CL 13-81

³¹ RA: annexure "RA13", CL 13-602

³² RA: annexure "RA13", CL 13-602

³³ RA: par 163, CL 13-460

³⁴ SA: annexure "SA4", CL 13-169

³⁵ SA: annexure "SA2", CL 13-164

R23 240.00³⁶ and he travels internationally purchasing airline tickets for R12 888.46 on **17 March 2024**.³⁷

[29] The foregoing allegations by Applicant are not disputed, alternatively not significantly and/or adequately challenged by Respondent.

THE LAW

[30] Irrespective of Respondent's view or purported defences, a Court Order is binding until varied or set aside.³⁸

[31] It is trite that Respondent is required to make a full disclosure yet he has only seen fit to annex the Application for a variation to the Maintenance Court with limited information.

[32] With such limited information, this Court is unable to assess Respondent's defence insofar as it pertains to affordability. He has not taken this Court into his confidence. The obligation to pay maintenance is serious, as was held in **JD v DD**³⁹ where Kollapen J remarked:-

"The obligation to pay maintenance is a serious and indeed onerous one and in my view the very generalized nature of the respondent's assertions of being in a constant financial crisis falls considerably short of what is expected of him in discharging the evidentiary burden that rests upon him."

[33] Although Respondent did not adopt a passive approach altogether, it would have been expected that he at least produce documentary evidence to support his contentions.

³⁶ SA: annexure "SA1", CL 13-157

³⁷ SA: annexure "SA1", CL 13-158

³⁸ Bezuidenhout v Patensie Sitrus Beeherend Bpk 2001 (2) SA 224 (e) at 229 B to D, Department of Transport v Tasima (Pty) Limited 2017 (2) SA 622 (CC)

³⁹ JD v DD 2016 JDR 0933(GP) at par 11

- [34] Respondent is also required to make disclosure about the nature and extent of any business dealings in which he has an interest either directly or indirectly, which will enable the Court to determine whether, in fact, Respondent is unable to satisfy **the Order**, as he alleges, to show lack of *mala fides* and wilfulness. Respondent failed to do so.
- [35] A Court must remain wary of any “*wilfully and mala fide engineering of a decrease in salary or termination of employment to the extent that (the Respondent) is for all intents and purposes unemployed simply for the purpose of deliberately frustrating the Court’s Order*”.⁴⁰
- [36] This is in particular where there is no documentary evidence to substantiate a claim that Respondent’s income and/or that it has been reduced.
- [37] Rogers J, remarked in **KPT v APT**⁴¹ that the failure to provide the bank statements is a critical gap in circumstances where reasonable doubt is to be shown. Also in **CN v TN**⁴² Dlodlo J, stated that there was no full disclosure regarding the nature and extent of business dealings as well as personal financial position and remarked further:
- “One would have for instance expected that the respondent should have provided details regarding the profit sharing arrangement... There is no explanation about all this. The respondent’s failure to provide documentary evidence supports the applicant’s assertion that the respondent has failed to make a full disclosure of his personal financial position...”
- [38] To reiterate, a recurrent judicial refrain is that an Order must be obeyed until properly varied or set aside. A party who finds an Order burdensome must approach the Court for a variation in the appropriate forum (*i.e. under Rule 43(6) for interim Orders or Section 8 of the Divorce Act for final consent*

⁴⁰ AG v DG at par 28

⁴¹ KPT v APT (1215/2019) WCHC (2 October 2020) par 89

⁴² 2017 JDR 0951 (WCC) at par 17

Orders or via the Maintenance Act in Maintenance Court) rather than engage in self-help. Unilateral reduction of maintenance payments is almost *per se* wilful disobedience. Furthermore, attempts to side-step the correct forum, will be viewed as evidence of bad faith and there are several cases explicitly stating that a contemnor will not be heard on a variation Application while in contempt.

- [39] Sparse or misleading disclosure will count against a Respondent where Respondent fails to fully explain his financial circumstances. A Respondent in contempt proceedings can avoid conviction by demonstrating a lack of wilfulness or bad faith, such as a genuine inability to comply, in which Respondent must show that he genuinely lacked the resources despite trying his best or there being substantial compliance.
- [40] The burden on Respondent is not a full persuasive burden but is to raise reasonable doubt and if his or her explanation meets that threshold, the Court should refuse to find contempt.
- [41] An inability defence requires Respondent to come forward with evidence, for example, bank statements, that convinces a Court that non-compliance was not a choice but a constraint.
- [42] Furthermore, it is trite that the purpose of Rule 43 is to provide for expeditious and inexpensive relief and a Rule 43 Order can be varied by a Rule 43(6) Application. Importantly, Rule 43 is there for the benefit of women and children, who are usually in the more inferior position and the failure to enforce maintenance Orders will negatively impact upon them.
- [43] Respondent attempted to appeal **the Order** and choose a course in terms of a variation Application in the Maintenance Court. Rule 43 Orders, which are Interim Orders, are not appealable, yet he did so. Furthermore, he approached a Maintenance Court, which by its nature is not an expeditious process, as opposed to a Rule 43(6) Application being the forum provided for in terms of Rule 43 and intended to be expeditious.

- [44] Respondent does not explain why he chose to approach the Maintenance Court as opposed to an Application in terms of Rule 43(6) being the very mechanism provided for to vary a Rule 43 Order.
- [45] It is therefore my view that Respondent has used a backdoor approach and has thereby “*utilised the system to stall his maintenance obligations*”⁴³ and has thereby been disrespectful, cavalier and clandestine towards this Court, including by making payment of an arbitrary amount of maintenance, in the absence of demonstrating a genuine inability to pay and has therefore not passed the muster to demonstrate lack of *mala fides* and wilfulness.
- [46] As an aside, it is common cause that Respondent has been represented throughout the proceedings, including in terms of the Application for Leave to Appeal ***the Order***, these proceedings and the variation Application in the Magistrate’s Court, yet he does not explain how he has afforded same and it does beg the question as to his ability to afford same, on the one hand, but not afford to pay maintenance in terms of ***the Order***, on the other hand.
- [47] The Constitutional Court has warned against recalcitrant maintenance defaulters who use the legal process to side-step their obligations towards, *inter alia*, their children, wherein the Constitutional Court states:

“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 utilised 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

⁴³ Bannatyne: par 32 – Supra – footnote 13

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.”⁴⁴

- [48] Contempt of Court proceedings exist to protect the Rule of Law and the authority of the judiciary. Contempt of Court is not an issue between the parties, but rather is an issue between the Court and the party who has not complied with a mandatory Order of Court.⁴⁵
- [49] I do not agree with Respondent’s contention that it is necessary for the Maintenance Court proceedings to first conclude, prior to there being a conclusive finding regarding Respondent’s ability to make payment of **the Order** and/or in full. I furthermore do not agree with Respondent’s contention that Applicant acted prematurely in bringing the Contempt Application whilst the Maintenance Application is pending and/or that the Maintenance Court will fully ventilate the financial position of Respondent as well as his ability to pay the amounts as per **the Order**, which averment I view, as nothing less than another disguised attempt by Respondent to appeal **the Order**. I reiterate that Rule 43, being an interim measure pending the finalisation of a divorce action, provides its own mechanism to vary such order.
- [50] Furthermore, and against the backdrop and the very purpose of Rule 43 proceedings, i.e. being interim and expeditious, coupled with the fact that a Rule 43 Order is not appealable, I disagree with the submissions of Respondent’s Counsel that a Rule 43 Order can be varied in the Magistrate’s Court. Respectfully, if this were the case, it would defeat the objective of the interim remedy provided for in terms of Rule 43, pending divorce proceedings. Practically, the result of such an approach, would mean that it could delay the matter indefinitely. Approaching the Magistrate’s Court for a variation of a Rule 43 Order, I submit, is an abuse of the process in the circumstances,

⁴⁴ Bannatyne: par 32 – Supra – footnote 13

⁴⁵ SJCI v Zuma: paras 26 and 27 and E. K. v P. K. & Others [2023] ZAGPPHC 69, 53105/201 9 February 2023

more specifically, whereby this Court is seized of the matter and lies in the face of the object and nature of Rule 43 proceedings, including Rule 43(6).

[51] I am, after contemplating the foregoing as well as the considerations in the aforesaid authorities, satisfied that Respondent's failure to comply with ***the Order***, is wilful and ***mala fide***.

[52] Respondent's attempt to appeal the Rule 43 Order in circumstances wherein it is trite that Rule 43 Orders are not appealable and the Application for a Variation in the Maintenance Court as opposed to doing so in this forum in terms of Rule 43(6), is in my view, indicative of his cavalier approach to this matter. He has failed to have proper regard for the seriousness of the consequences of his actions. Accordingly, my view is that the Application for a variation in the Maintenance Court, ought to be suspended and the order I intend to make, will be reflective thereof.

[53] What is more astounding is that Respondent filed a Supplementary Affidavit on 11 August 2025,⁴⁶ two days prior to the hearing hereof, consisting of some 87 pages (*with annexures*) to ostensibly add material and relevant information and evidence given that raised by Applicant in her Replying Affidavit, which filing was not opposed to by Applicant, yet Respondent still does not address and provide this Court with evidence of his alleged inability to comply with ***the Order***, this despite Applicant having raised same in her Replying Affidavit.

[54] Section 165(5) of the Constitution is said to "*lie at the heart of the Rule of Law*" and enjoins all persons to whom a Court Order applies to obey the terms thereof.

THE SANCTION

[55] The Constitutional Court in ***Pheko & Others V Ekurhuleni Metropolitan Municipality (supra)*** identifies wilful disobedience of an Order made in civil

⁴⁶ CL 17-89 to CL 17-171

proceedings as a criminal offence. The Court in **Bannatyne** (*supra*) stated that Section 8(1) of the Constitution provides:

“The Bill of Rights applies to all law and binds the legislature, the Executive, the Judiciary and all organs of State”. Section 38 of the Constitution states: “Anyone listed in this Section has the right to approach a competent Court, alleging that a right in the Bill of Rights has been infringed or threatened and the Court may grant appropriate relief, including a declaration of rights...”. In terms of Section 8 of the Constitution: “the Judiciary is bound by the Bill of Rights. Courts are empowered to ensure that Constitutional rights are enforced. They are thus obliged to grant “appropriate relief” to those whose rights have been infringed or threatened.”.

- [56] The Constitutional Court has emphasised that if litigants decide which Orders they obey and which to ignore, our Constitution is not worth the paper upon which it is written.
- [57] Applicant sought in her Notice of Motion that Respondent is committed to prison for contempt for a period of 30 (*thirty*) days or such alternate period as this Honourable Court deems appropriate.
- [58] At the hearing of the matter Applicant’s Counsel handed an amended Order seeking, *inter alia*, that Respondent be committed to prison for contempt for a period of 30 (*thirty*) days alternatively, the operation the committal is suspended on condition that Respondent complies with ***the Order*** with immediate effect.
- [59] In considering an appropriate sanction, I am mindful that in contempt proceedings, the sentence to be imposed should contain both a punitive and coercive element and in exercising this Court’s discretion, it is to impose a sentence that is also just and equitable in the circumstances.

[60] Although Respondent averred that he could not afford to make payment in terms of ***the Order***, he has been economical with the information he deemed necessary to place before this Court concerning his financial affairs.

[61] As previously stated, the onus rests on Respondent to persuade this Court that he could not afford the payment in terms of ***the Order*** to demonstrate that his reduction of the monthly amount was not *male fide* or wilful. He has failed to do so.

CONCLUSION

[62] Respondent cannot unilaterally change the terms of ***the Order*** and pay an amount he deems appropriate. I am of the view, that had Respondent taken the Court into his confidence fully, this Court might have been in a position to consider the matter differently.

[63] This Court, on the facts presented by Respondent amplified by that argued by Applicant, is unable to assess his level of affordability.

[64] Until such time as ***the Order*** is varied, it remains in place. As guardians of the Constitution, Courts jealously guard Orders and ensure compliance “*by all and sundry*”.⁴⁷ It is said that “*in doing so, Courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting guardians of the Constitution, assessing the authority in the public interest*”.⁴⁸

[65] It is my view that Respondent’s actions have proven himself not to be prepared to respect this Court’s Order.

[66] I am satisfied that his actions are contemptuous and this Court is left with no option but to issue a coercive Order.

⁴⁷ Pheko (*supra*)

⁴⁸ Pheko (*supra*)

[67] I am satisfied that all the elements for contempt as enunciated in **Fakie** (*supra*) are met and therefore Applicant ought to succeed in her Application.

COSTS

[68] It is trite that a cost order follows the result. Applicant contended that costs on an Attorney and client scale is warranted if regard is had to the fact that Respondent has been provided an opportunity to purge the contempt. Furthermore, it was argued that Respondent is not reasonable and *bona fide* in his belief to approach the Maintenance Court as opposed to Rule 43(6).

[69] After carefully considering the complexity of the matter, its value and importance to the parties, in the exercise of my discretion, I am persuaded and of the view, costs on an attorney and client scale, is justified.

THE ORDER:

[70] After having heard Counsel for Applicant and Counsel for Respondent and having considered the documents filed on Record, the Court directs that the following Order is made:-

70.1. non-compliance with the Uniform Rule of Court is condoned and Respondent Supplementary Affidavit is permitted;

70.2. Respondent is found to be in contempt of ***the Order*** of this Court made on **22 January 2024** under case number: 2023-24319;

70.3. Respondent be committed to prison for a period of 30 (*thirty*) days, which committal is suspended for a period of 1 (*one*) year on condition that he complies with ***the Order***, granted by this Honourable Court on **22 January 2024** within 3 (*three*) ordinary days from date of this Order;

70.4. should Respondent fail to comply with paragraph 70.3 of this Order:-

70.4.1. the performance and execution of the Warrant of Committal for Contempt is hereby authorised; and

70.4.2. Respondent must submit himself to the South African Police Services at Sandton Precinct, failing which the South African Police Services, Sandton should take all necessary steps to ensure that Respondent is delivered to the keeper of Prisons in order to be committed in terms of this Order;

70.4.3. the Registrar of the above Honourable Court is directed to furnish Respondent's personal particulars to the Credit Bureau, namely Experion, Trans Union, ITC, VCCB (*Vericred Credit Bureau*), XDS (*Xpert Decision Systems*) and Compuscan, for the purpose of recording Respondent's contempt of the offence of not making payment of **the Order** as provided for in Section 31 of the Maintenance Act, 99 of 1998;

70.5. the Application pending in the Johannesburg Magistrate's Court, is suspended pending the granting of a Decree of Divorce;

70.6. Respondent be and is hereby ordered to pay the costs of this Application on the attorney and client scale, including the costs of Counsel.

F. MARCANDONATOS

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:

14 August 2025

Judgment:

04 September 2025

Appearances

For Applicant: **ADV L GROBLER**

Instructed by: **SHAHEED DOLLIE INCORPORATED**

For Respondent: **ADV L DE WET**

Instructed by: **S.T ATTORNEYS**