

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 21300/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>25/09/2025</u> 	
DATE	SIGNATURE

In the matter between:

T [F...] [C...]

Applicant

and

B [J...] [C...]

Respondent

This judgment was handed down electronically by circulation to the parties' and or the parties' legal representatives by email and by being uploaded to CaseLines. The date for the hand down is deemed to be 25 September 2025.

JUDGMENT

ABRO AJ

Introduction

- [1] The applicant in this application seeks an order declaring the respondent to be in contempt of an order granted by Mahomed AJ in rule 43 proceedings on 25 January 2024. In terms thereof, the respondent was to pay the applicant the sum of:
- 1.1 R18 000.00 per month for her maintenance *pendente lite* on the first day of the month; and
- 1.2 R300 000.00 to the applicant's attorneys for legal costs of the action within 2 weeks of the order ("the rule 43 order").
- [2] The elements of contempt – the order, service or notice thereof and non-compliance therewith must be established by the applicant beyond a reasonable doubt as set out in *Fakie*.¹ Once the applicant has done so the onus shifts, and the respondent bears an evidential burden to advance evidence that establishes on a balance of probabilities that his non-compliance with the order was not wilful nor *mala fide*.² Should he do so, wilfulness and *mala fides* will not have been established beyond a reasonable doubt and he cannot be found to be in contempt of the order.³
- [3] It is common cause that save for a payment of R1000.00 on 1 March 2024 and a further payment by the respondent of the sum of R36 000.00 on 25 July 2025 in accordance with an order handed down on said date, the respondent has not made any other payments in terms of the rule 43 order.
- [4] According to the respondent he paid the R1000.00 on 1 March as above in order "*to prove that I am not in wilful default and that my conduct is not mala fide*".
- [5] It is further common cause that that the respondent has knowledge of the court order which order, and judgment, was served on the respondent's attorneys, Ningiza Horner Attorneys Inc, by the applicant's counsel Mr MP Zwane on 25

¹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA [2006] ZASCA 52; 326 (SCA) at [42].

² *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) at [37].

³ See n1 at [41].

January 2024.⁴ The respondent's attorneys confirmed receipt of the mail and attachments thereto on said date.

- [6] The respondent in his answering affidavit at paragraph 26 admitted that the first three requirements of contempt are not in dispute and that the dispute was only whether his non-compliance was wilful and *mala fide* beyond a reasonable doubt.
- [7] In the circumstances, the only question to be decided on the evidence adduced by the respondent, is whether he has raised a reasonable doubt to avoid a finding of contempt.

Relief sought

- [8] The contempt application was launched almost immediately following the grant of the rule 43 order during February 2024. The applicant initially approached the urgent court for relief. The application was struck for lack of urgency by Adams J on 12 March 2024.
- [9] The applicant then amended her notice of motion on 5 April 2024, by way of deleting the urgency prayer. She thus seeks an order in the following terms –
- 9.1 declaring the respondent to be guilty of contempt of paragraphs 2 and 3 of the rule 43 order;
 - 9.2 an order directing the respondent to comply with the aforesaid paragraphs of the rule 43 order;
 - 9.3 an order sentencing the respondent to 30 days imprisonment for contempt of court of the rule 43 order which sentence is to be suspended on condition that the respondent complies with paragraph 9.2 above;
 - 9.4 an order that a warrant of arrest is to be issued committing the respondent to imprisonment for contempt of court for the aforesaid period of 30 days which warrant shall only be executed should the

⁴ Mr Zwane is an advocate with a Trust Account in terms of section 32(2)(a)(iii) of the Legal Practice Act 28 of 2024.

respondent fail to make the requisite payments within 7 days of the date of the order finding the respondent to be in contempt; and

9.5 costs of the application on the scale as between attorney and client.

Litigation history

[10] On 2 February 2024, being the day after the respondent was to make the first maintenance payment of R18 000.00 to the applicant in terms of the rule 43 order, correspondence was addressed by the respondent's attorneys to Mr Zwane wherein it was recorded that the respondent would be bringing an application in terms of rule 43(6) on or before 9 February 2024. The respondent intended to honour the order, however:

"he could not find such funds on account that the children returned to school in the month of January 2024 and our client has committed himself to and incurred costs which he believes are in the best interests of the minor children".

It was further recorded that the applicant does not contribute to the minor children's maintenance, and that the respondent does not have disposable income to discharge the order.

[11] Thereafter, and on 4 February 2024, the applicant received a WhatsApp message from an unknown number indicating that the respondent would not be complying with the order. Whilst I do not repeat the profanities contained in the WhatsApp message, or those contained in a previous email addressed by the respondent to the applicant on 21 December 2023, the content of the messages points to the respondent's attitude towards the applicant and this court's order and serves to enhance the respondent's contemptuous conduct.

[12] The respondent's email of 21 December 2023 addressed to the applicant reads as follows:

"I certainly don't wish you a pleasant Christmas. I actually wish you the worst ever Christmas of your life. I hope and wish those ARVs you're taking will choke you to death.

You can forward to your broke lawyer Zwane. There is nothing he can ever do about this. He has tried everything on me and failed. Did he also ... you, I wonder, judging by the way he's determined to bring me down.

Any way have a nightmare horror filled Christmas."

- [13] The WhatsApp message received by the applicant on 4 February 2024 subsequent to the rule 43 order reads as follows:

"No 18k for you ... and no 300k for your broke lawyer Zwane anytime soon, you celebrated too early. My lawyers will fight this until your stupid lawyer gives up and you are left alone with your broke ... boyfriend, I want this to drag until fibroids deal with you ..., I so hate you!!!! (followed by a vomit emoji)."

- [14] The respondent denied that this WhatsApp message emanated from his cellular telephone. He alleged that he did not know the number from which the message was sent from. He stated that he would provide the court with a report, to be introduced at a later stage, which report would be compiled after investigations to be undertaken by friends with I.T. expertise who would establish the origin and/or location of the number. Despite the effluxion of time no such report has materialised.

- [15] Whilst the respondent alleges that he is "*gravely remorseful*" for his comments directed at Mr Zwane in the email of 21 December 2023, he admits to dispatching the aforesaid email to the applicant.

- [16] On the principles set out in *Plascon-Evans*,⁵ I can accept the applicant's version in respect of the WhatsApp message in the face of the respondent's denial which denial is so far-fetched that this court is justified in rejecting the respondent's version and accepting that of the applicant. The consistency in the tone and language used in both the WhatsApp message and the email, together with the fact that the WhatsApp message repeats the terms of the order granted and the fact that it was sent to the applicant 10 days after the order had been handed down and 2 days after the respondent's attorney's

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

correspondence wherein it was made clear that the respondent would not be complying with the rule 43 order, do not assist the respondent.

- [17] Notwithstanding the aforesaid and whether or not the aforementioned WhatsApp message, and others sent to the applicant, emanate from the respondent or not, is really of no import. Factually, the respondent has not complied with the rule 43 order and has dragged out and increased litigation as threatened by the author of the WhatsApp message and the respondent in his email of December 2023.
- [18] The respondent did not deliver an application in terms of rule 43(6) on 9 February 2024 as threatened in the 2 February correspondence, and as such the applicant launched her contempt application on an urgent basis as aforesaid. The urgent contempt application which came before Twala J on 27 February was postponed by agreement in order to afford the respondent an opportunity to file an answering affidavit.
- [19] The respondent delivered his answering affidavit in the contempt proceedings on 1 March 2024 which affidavit included a counterapplication in terms of the provisions of Uniform rule 43(6). The respondent also delivered a fresh application in terms of rule 43(6) on 2 April 2024. The applicant delivered her replying affidavit in the contempt application on 6 March 2024.
- [20] The applicant was thereafter prevented from pursuing her contempt application by virtue of the respondent's elaborate efforts to avoid compliance with the rule 43 order.
- [21] The respondent launched an urgent application in terms of Uniform rule 45A to be heard on 7 May 2024 wherein he sought an order that the operation and execution of the rule 43 order be suspended pending the finalisation of his counterapplication in terms of rule 43(6). Todd AJ dismissed the respondent's application in terms of rule 45A with costs and held *inter alia* as follows:

"In my view, and as submitted by Mr MP Zwane for the respondent, the application is misconceived and may properly be characterised as an abuse of the processes of this Court. It is also not urgent, either on the grounds set out in the founding

papers or on the basis of principles established by this Court. It is an application that is not only misconstrued, but it serves an aggravated purpose of resulting in a proliferation of interlocutory application, which clog this Court's roll which require decisions on matters which are already before this Court in a separate application and which seek to pursue a purpose not envisaged or intended by the provisions of rule 45A.

Furthermore, in my view, the papers disclose no proper grounds at all for a stay of enforcement of an order and establish no grounds on which this Court can or should pre-empt the decisions that are going to be made by this Court in the opposed applications that are before it and will be decided by it in due course."

- [22] After several further delays, the respondent's application in terms of rule 43(6) eventually came before Pretorius AJ on 27, 28, 29 November 2024 and 5 December 2024. In this application the respondent sought to vary and set aside the rule 43 order. Notably, Pretorius AJ in her judgement dated 13 May 2025 found *inter alia* that:

"the issues complained of, and the manner of the presentation of these grievances by Mr C in this application, and which are alleged to constitute exceptional circumstances or to form the basis thereof, and in relation to proceedings before Mahomed AJ, which culminated in the Order and the accompanying written judgment, to which I have had regard, were clearly before Mahomed AJ at the time. Further, an analysis of Mr C's complaints against the Order, and associated written judgment, reveals that the essence of these grievances pertains to the alleged wrong conclusions of the facts and the law, failure to take certain facts into account and the incorrect interpretation of the law, by Mahomed AJ, which would respectfully fall within the domain of an appeal which, it is common cause, is impermissible in respect of Rule 43 orders by virtue of the operations of Section 16(3)(a) to (d) of the Superior Courts Act, 10 of 2013."

Pretorius AJ dismissed the rule 43(6) application with costs.

- [23] As above, and whilst the respondent persistently failed to comply with the rule 43 order, he relentlessly pursued the aforesaid applications during 2024.
- [24] Importantly, the parties are married to one another in community of property. The marriage and the joint estate are yet to be dissolved, and the divorce action

remains pending. The respondent is thus utilising funds which belong to a joint estate to litigate whilst, simultaneously, not making payment to the applicant of the contribution towards the applicant's legal costs as ordered by Mahomed AJ.

- [25] The contempt application finally came before me on my opposed roll in the Family Court during the week of 21 July 2025. I allocated the matter for hearing at 10am on Thursday morning, 24 July 2025.

The proceedings on 24 and 25 July 2025

- [26] On Thursday morning, 24 July 2025, Mr Zwane appeared on behalf of the applicant and Mr Ngcangisa, instructed by Ningiza Horner Attorneys, appeared on behalf of the respondent.
- [27] Mr Ngcangisa requested an opportunity to discuss settlement with Mr Zwane. The matter stood down until after the tea adjournment.
- [28] On returning to court, I was informed that the parties were still attempting to reach agreement and that they required further time to do so. As requested, I agreed to stand the matter down until 10am the following morning being Friday 25 July 2025. I informed the parties that no further indulgences would be granted and if no agreement was reached by 10 am the following morning, the matter would proceed.
- [29] I was informed on Friday morning, 25 July 2025, that no agreement had been reached. Notwithstanding, Mr Ngcangisa informed me that the respondent had offered to pay the applicant R106 000.00, R36 000.00 of which would be paid later that same day whilst the balance, being the sum of R70 000.00 would be paid on Monday 28 July 2025. This was however not acceptable to the applicant. The hearing thus began.
- [30] Mr Zwane correctly submitted that the applicant had proved beyond a reasonable doubt that there was a court order which the respondent was aware of and which the respondent had not complied with. Mr Ngcangisa confirmed that these elements were common cause.

- [31] Mr Zwane submitted further that the respondent's non-compliance with the rule 43 order was *mala fide* and deliberate as the respondent had made it clear from the outset that he was not going to comply with the order. Mr Zwane referred to the aforementioned WhatsApp and email communications received by the applicant and the correspondence of 2 February 2024 received from the respondent's attorneys.
- [32] Mr Zwane submitted that the respondent's attitude was that he would frustrate the applicant until she gives up. He submitted further that she does not have funds with which to litigate against the respondent in these proceedings or in the divorce action. The respondent on the other hand is dragging the divorce out in an attempt to force the applicant to settle and accept whatever proposals he makes. He pointed to the fact that the respondent amended his counterclaim during or about June 2023 to seek an order that the applicant is to forfeit the benefits of the joint estate.
- [33] Notably, Mahomed AJ in her judgment in the rule 43 proceedings during which proceedings she had ordered the respondent to make payment of the sum of R300 000.00 towards the applicant's legal costs, said the following at paragraph 7 thereof:

"The applicant submitted that she was unable to pay her attorney fees, he withdrew from her matter, whereupon he obtained a judgement for R28 000 for legal fees. She managed to persuade him to continue to represent her, whilst the respondent litigates at a much higher level, he has instructed two law firms to represent him, has been obstructive in his litigation of the divorce, has amended his plead, filed a counterclaim for a forfeiture of benefits and filed a R30 notice. It is alleged that he merely increases legal costs, and she is forced to respond to each of issues raised. Mr Zwane referred the court to correspondence in which he suggested that the dispute be mediated however the respondent held the view that the matter cannot be mediated. Counsel for the respondent submitted he did not know how much the respondent has spent on his fees to date and that the respondent was under no obligation to set this out. Mr Zwane submitted that the respondent uses funds that belong to the joint estate to fund his own litigation. The applicant will require legal representation to effectively protect her half of the joint estate as the counterclaim is for a forfeiture of the benefits of the marriage."

[34] Mr Ngcangisa in his address referred again to the respondent's with prejudice offer above referred. He submitted that the WhatsApp message and the correspondence of 2 February 2024 are open to different interpretations and cannot be construed as the respondent stating that he will defy the order.

[35] It was submitted that the respondent is financially constrained and as such incapable of complying with the order. When pressed Mr Ngcangisa conceded that the respondent's defence was one of unaffordability and further that the respondent was relying on the best interests of his children who were both in private schools. Mr Ngcangisa submitted that the respondent found himself between a rock and a hard place as he was enjoined by the Constitution to make sure that he improves the lives of his children and free their potential. The argument was essentially that if he were to comply with the rule 43 order, he would have to take his children out of private schooling. Notably, these submissions were made by the respondent in the rule 43 proceedings as recorded by Mahomed AJ at paragraph 12 of her judgment:

"Counsel proffered that if the respondent is ordered to pay maintenance, he would be forced to remove his eldest child from boarding school, and that his finances are in such a dire state that it would be impossible to comply if he is ordered to pay her maintenance."

[36] In support of his submissions, Mr Ngcangisa referred me to paragraph 53 of the respondent's affidavit wherein the respondent alleges that his net salary decreased between the years 2016 and 2017. I queried the relevance of these allegations as the rule 43 order was granted in January 2024 being some 8 years later. I then queried the veracity of payslips attached to the answering affidavit as annexures "AA7-9" upon which documents the respondent relied to evidence his inability to comply with the rule 43 order. The attachments are payslips rendered by 'Hewlett Packard South Africa Pty Ltd' for December 2016 and January and February 2017.

[37] There appeared to be some mischief afoot as on the respondent's own version in his answering affidavit he is "*a major male employed as the Managing Director of BOA Technologies*" and further that in order to meet his expenses he has taken out a director's loan from BOA Technologies. In this regard, He

attached a letter dated 2 February 2024 from the corporation's accounting officer which stated, "*we hereby confirm that the Director of BOA Technologies (Boas Chauke, ID No.7907105679087) has been taking loans from the company since financial year 2016 to 2023*". No allegations are made as to the terms or the loan, whether the loan attracts any interest, or when, if ever, the respondent has to repay the alleged loan and no confirmatory affidavit confirming the contents of the letter was attached.

- [38] The respondent is obviously not employed by 'Hewlett Packard South Africa Pty Ltd'.
- [39] In Mahomed AJ's rule 43 judgment, it is recorded that the respondent is the "*CEO of Boa Technologies CC*".
- [40] In the premises I asked where I would find evidence of the respondent's current income and current financial circumstances on which he based his unaffordability defence. Mr Ngcangisa could not direct me to any such evidence on the papers.
- [41] Suddenly, and quite unexpectedly, Mr Ngcangisa requested leave to file a supplementary affidavit. I was initially not inclined to entertain the request as this would result in a postponement which would be highly prejudicial to the applicant which prejudice in my view could not simply be cured by a costs order against the respondent. There are already numerous costs orders against the respondent which costs have not been satisfied.
- [42] Mr Ngcangisa then referred me to the judgment of the Supreme Court of Appeal in *S v SH*⁶ and submitted that I was bound by said judgment to grant the respondent a postponement in order for him to file a supplementary affidavit and provide information in respect of his financial circumstances in circumstances where he faces the loss of his freedom.
- [43] The appellant in *S v SH* had failed to comply with a maintenance order handed down pursuant to divorce proceedings in the Western Cape Division of the High Court. The respondent brought an urgent application for payment of the

⁶ *S v SH* [2023] ZASCA 49.

outstanding amount which was successful, and the appellant was ordered to comply with the previous order and make payment of the outstanding amount by no later than 17h00 on Friday 18 December 2020 failing which the respondent was granted leave to set the matter down on 48 hours' notice for an order that the appellant be declared to be in contempt of court, that a warrant be issued for his arrest and that he be committed to prison for a period to be determined by the court.

[44] The appellant did not comply with the order of the urgent court, and the respondent launched contempt proceedings. The application for committal was heard on 2 March 2021, and the high court was satisfied that the respondent had made out a case for the relief that she sought and ordered that the appellant be declared in contempt of the order and be committed to a period of three months' imprisonment. An application for a postponement and leave to file an affidavit brought by the appellant on the day of the hearing was dismissed.

[45] The appellant argued that the high court erred in refusing him a postponement in order to provide him with an opportunity to file a further affidavit in response to a supplementary affidavit filed by the respondent. The refusal of the postponement was thus the focus of the appeal.

[46] The Court said the following in conclusion at paragraphs 20 and 21 of the judgment:

“[20] It has been recognised by our courts that where a committal is ordered, the standard of proof in civil contempt matters has to be the criminal standard. In those circumstances, wilfulness and *male fides* have to be shown beyond reasonable doubt. Put differently, the contemnor has an evidential burden to create a reasonable doubt as to whether his conduct was wilful and *male fide*. There is a different standard of proof where no criminal sanction is sought; then, the standard of proof is that of a balance of probabilities. While all wilful disobedience of a court order made in civil proceedings is a criminal offence, civil mechanisms that are designed to induce compliance without resorting to committal, are competent when proved on a balance of probabilities. The hybrid nature of contempt proceedings which results in committal, combine civil and criminal

elements. But this does not mean that contemnors are not afforded the substantive and procedural protections which apply to any individual facing the loss of his freedom.

[21] It is in the light of the above that the refusal of the postponement must be considered. Whether or not the request for postponement was merely a delaying tactic, once there is the potential of an individual's loss of liberty, it was incumbent on the court to ensure that the appellant's conduct was *male fide* and wilful beyond a reasonable doubt. Whether the failure to meet his financial obligations to the respondent was intentional, or as a result of the deterioration of his financial circumstances, was not an issue that was considered by the high court, despite the appellant having raised it in his application for postponement. Nor was this aspect considered by Mudau J, who left that question open and merely stated '[w]hether or not that explanation is truthful is irrelevant to the first part of this application, paragraphs 1 and 2 of the relief sought by the applicant remains uncontested'. Paragraph 1 referred to the urgency of the matter, while in paragraph 2, the respondent sought an order that the appellant comply with Samela J's order of 29 July 2013, by making payment of the sum of R138 413.90, into the trust account of the respondent's attorneys by no later than 17h00 on 18 December 2020. This means that whether the conduct of the appellant was wilful and *male fides* beyond reasonable doubt has not been determined. Such an exercise must take place before there is an order for his committal."

[47] The appeal was upheld and the order of the Western Cape Division of the High Court, Cape Town was set aside and substituted with an order granting the postponement and directing the appellant to file his answering affidavit in the application for committal within 15 days of the order whereafter the respondent could file a replying affidavit within 10 days of receipt of the answering affidavit.

[48] In the face of the judgment of the Supreme Court of Appeal, I was constrained not to afford the respondent an opportunity to file a supplementary affidavit. I was, however, concerned that this was a delaying tactic on the part of the respondent whilst his non-compliance with the rule 43 order persisted which I could not simply ignore. In the circumstances, in order to ensure compliance

with the court order and in an attempt to ensure the court's integrity, I granted an order on 25 July 2025 in the following terms ("the July order"):

- "1. The postponement of the contempt application in order for the respondent to file a further affidavit as sought by the respondent's counsel, during his address, and from the bar, is granted.
2. The respondent shall comply with clause 3 of the order of Mahomed AJ dated 25 January 2025 and shall make payment of the sum of R300 000.00 as follows:
 - 2.1 R36 000.00 by 16h00 on Friday 25 July 2025;
 - 2.2 R132 000.00 by 16h00 on Monday 28 July 2025; and
 - 2.3 R132 000.00 by 16h00 on Wednesday 30 July 2025.
3. The aforesaid payments shall be made into the Trust Account of the applicant's legal representative, Adv MP Zwane, with account details:

XXXX
4. The applicant is hereby granted leave to set the matter down in the urgent family court on 48 hours' notice to pursue her contempt application and for an order declaring the respondent to be in contempt of court in the event of non-compliance by the respondent with paragraphs 2.1, 2.2 or 2.3 above.
5. Upon compliance with paragraph 2 and the sub-paragraphs thereto the respondent is hereby granted leave to file a further affidavit by noon on Monday 4 August 2025 which affidavit is limited to the provision by the respondent of his updated financial circumstances in order to pursue his defence of unaffordability as raised by him in the contempt application under the above case number.
6. The applicant may file an affidavit in response thereto by noon on Monday 11 August 2025 whereafter she may reenrol the contempt application for hearing.
7. The wasted costs of Thursday, 24 July 2025 and Friday, 25 July 2025 occasioned by the postponement, and the indulgence sought as aforesaid,

are to be paid by the respondent on the scale as between attorney and client.”

[49] I remain fortified in the soundness and the underlying basis of the July order especially having had regard to the judgment of Kollapen AJ in *SS v VV-S*⁷(SS case) wherein the Constitutional Court was approached for leave to appeal an order of the High Court in Pretoria authorising the issue of a warrant of execution against the applicant’s immovable property in circumstances where the applicant had not-complied with his maintenance obligations which was undisputed. The Court was concerned that, in affording the applicant a hearing would, in the circumstances, undermine the Court’s integrity.

[50] As such, the Court held that the applicant’s admitted non-compliance could not simply pass without consequence and held that:

“[18] The judicial authority vested in all courts, obliges courts to ensure that there is compliance with court orders to safeguard and enhance their integrity, efficiency, and effective functioning, and further that:

[21] The applicant does not face the consequences of either a finding of civil or criminal contempt but his conduct, if left unaddressed by this Court, would undermine judicial integrity. Analogous considerations to formal contempt proceedings arise. In this regard, counsel for the applicant was certainly amenable to the matter being postponed to enable the applicant to remedy the consequences of his failure to pay. It was a stance which was wisely and correctly taken given the significant and ongoing nature of the failure by the applicant to comply with his maintenance obligation towards his minor child. A court’s role is more than that of a mere umpire of technical rules, it is “an administrator of justice . . . [it] has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.

[22] A further factor which fortifies the conclusion that this Court was not only entitled but obliged to have raised and dealt with the non-compliance with

⁷ [2018] ZACC 5; 2018 (6) BCLR 671 (CC) 2018 JDR 0275 (CC).

the Order by the applicant, lies in the nature of the obligations that the Order and the settlement agreement which accompanied it evidenced.

[23] All court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all. Those interests include the protection of the rights of children and the collective ability of our nation to "free the potential of each person" including its children, which ring quite powerfully true in this context."⁸

[51] The Court in order to respond to the "*pressing need both to respect K's best interests and safeguard against potential damage to this Court's integrity*",⁹ postponed the proceedings before it on 29 August 2017 and ordered the applicant to make a payment of R150 000.00 to the respondent's attorneys and to make payment of his monthly maintenance obligations in accordance with the divorce order granted by the High Court.

[52] When the parties returned to Court on 8 November 2017 it became apparent to the Court that the applicant had not fully complied the provisions of the August order. The Court thus questioned whether hearing the applicant in the face of his failure to comply with the August order was warranted or whether to do so would in fact undermine the Court's judicial integrity further. The Court refused leave to appeal and dismissed the application with punitive costs as to hear the appeal "*would clearly run counter to the interests of justice, given the cumulative effect of the applicant's failure to respect K's best interests by paying the basic maintenance and his continued failure to respect this Court's integrity by flouting the August order.*"¹⁰

[53] The respondent *in casu* had sought an indulgence on 25 July to file a further affidavit in circumstances where his non-compliance was admitted. He was given an opportunity in the July order to purge at least part of his contempt and make payment of the contribution towards the applicant's legal costs as ordered by Mahomed AJ and thereby uphold the integrity of this court, at the very least

⁸ *Id* at [18] and [21] to [23].

⁹ *Id* at [28].

¹⁰ *Id* at [36]

in part. Having regard to the respondent's persistent litigation and that the applicant's inability to fund her opposition thereto, there was indeed a pressing need to have handed down the July order.

- [54] As follows hereunder, the respondent did not comply with the July order and did not even make payment of the R106 000.00 that Mr Ngcangisa had repeatedly referred to during his address on the 25th of July.

The hearing before Mazibuko AJ on 20 August 2025

- [55] As a consequence of the respondent's failure to comply with the July order the applicant, in accordance with clause 4 of the order, set the contempt application down on the urgent family court roll for the week of 18 August 2025. The notice of set down was served on the respondent's attorneys on said date. The notice was accompanied by a supporting affidavit deposed to by Mr Zwane wherein he briefly explained the litigation between the parties and provided an explanation for having set the matter down on the urgent roll as aforesaid.
- [56] Notably, the respondent had not at this stage filed the supplementary affidavit which he sought leave to file on 25 July 2025.
- [57] The contempt application came before Mazibuko AJ in the Family Court on Wednesday 20 August 2025.
- [58] I was informed from the bar at the hearing before me on 29 August that Mr Zwane for the applicant, and the court, were of the view that the contempt application was part heard before me and thus ought to be re-enrolled before me. Ms Leeuw for the respondent informed me that this was not, however, the respondent's position during the hearing.
- [59] Notably, the respondent did not file his supplementary affidavit or an affidavit in answer to Mr Zwane's supporting affidavit prior to the hearing before Mazibuko AJ on Wednesday 20 August 2025.
- [60] Mazibuko AJ declined to hear the contempt application and handed down an order removing the matter from her roll to be re-enrolled before me.

[61] Mr Zwane then addressed correspondence to the Acting Deputy Judge President, the Honourable Justice Mudau on 20 August 2025 wherein he explained the situation the applicant found herself in and requested an allocation before me.

[62] Mudau ADJP responded to the parties' respective legal representatives on Thursday, 21 August 2025 advising that the application must be enrolled for hearing before me on Friday, 29 August 2025 and further that, "*the date allocated for hearing is the **earliest** and **only** date available*". Mr Zwane was to serve the notice of set down for the hearing on 29 August by no later than noon on 25 August 2025. He did so.

The hearing before me on Friday 29 August 2025

[63] At approximately 20h00 on Thursday 28 August 2025 being the night before the date allocated by Mudau ADJP, the respondent uploaded an 'answering affidavit' to CaseLines which affidavit was deposed to by him on said date and which consisted of some 111 pages. Then, and during the morning of Friday 29 August at approximately 09h00, being an hour before the hearing before me was to commence, the respondent uploaded further documents to CaseLines which documents were not attached to any affidavit and which documents consisted of a further 60 pages.

[64] Mr Zwane informed me that he had only had sight of the respondent's 'answering affidavit' during the morning before court. Mr Zwane submitted that I ought to disregard to affidavit as the July order had afforded the respondent an opportunity to file a supplementary affidavit by 4 August 2025 which affidavit was to be limited to the provision by the respondent of his updated financial circumstances in order that he could pursue his defence of unaffordability. The respondent had elected not to do so. He submitted further that Mudau ADJP had informed the parties on 21 August that the matter was to be heard on 29 August. The notice of set down had been served and uploaded on 25 August as directed. As such the respondent had had ample time to file an affidavit and yet waited until the proverbial 11th hour to do so. He submitted that the applicant was prejudiced thereby as she could not reply thereto.

- [65] Ms Leeuw for the respondent apologised to the court for the late filing of the affidavit.
- [66] I informed Ms Leeuw that an apology from the bar for non-compliance with a court order and the rules of court did not suffice. I sought clarity as to why the respondent had not filed the affidavit sooner and why he did not file an affidavit before the appearance before Mazibuko AJ on 20 August. I further enquired as to why the affidavit was not accompanied by an application on notice in terms of rule 27 in the face of the respondent's non-compliance with the July order.
- [67] Ms Leeuw submitted that there was no application for condonation as this was an urgent application and as such the respondent was not required to seek condonation as the respondent was under the impression that these were urgent proceedings in which *"it could be filed up until the very last moment"*.
- [68] Ms Leeuw further submitted that because the respondent had not complied fully with the terms of the July order, on a reading of paragraph 5 of the order, the respondent could not have filed the supplementary affidavit.
- [69] Notably, this did not seem to concern the respondent when his 'answering affidavit' was uploaded to CaseLines at 8pm, the night before the hearing, without seeking condonation therefore.
- [70] The aforesaid submissions do not assist the respondent. Firstly, the contempt application was not brought on an urgent basis. It was set down on the opposed Family Court roll before me during the week of 21 July 2025. As above, the applicant had amended her original notice of motion to delete the prayer that the application be heard as an urgent application as far back as 5 April 2024 subsequent to Adams J striking the application for lack of urgency on 12 March 2024.
- [71] Ms Leeuw's attempt to rely on paragraph 4 of the July order to contend for urgency was misplaced. Paragraph 4 of the July order simply makes provision for the applicant to obtain a hearing on an urgent basis in the event of the respondent failing to comply therewith subsequent to the respondent having

been granted an indulgence to file a supplementary affidavit in said order. This does not translate into the contempt application being an urgent application.

[72] In the circumstances, neither party's counsel had addressed the issue of urgency in their respective heads of argument filed during the middle of July in anticipation of the hearing before me during the week of 21 July 2025.

[73] I do not accept the veracity of Ms Leeuw's second submission. Firstly, paragraph 5 of the July order only afforded the respondent an opportunity to file an affidavit "limited to the provision by the respondent of his updated financial circumstances in order to pursue his defence of unaffordability as raised by him in the contempt application", as such there can be no valid reason, notwithstanding the fact that none was provided, for having not filed the affidavit sooner and at the very least before the hearing before Mazibuko AJ on 20 August.

[74] Lastly, Ms Leeuw's attempt to persuade me that the respondent's affidavit was simply an answer to Mr Zwane's affidavit of 17 August which he had filed together with his notice of set down in order to provide an explanation as to how the matter found its way onto the urgent family court roll of the week of 18 August, does not assist the respondent in the face of his failure to file such 'answering affidavit' prior to the hearing before Mazibuko AJ.

[75] No explanation was provided for the respondent's failure to file his 'answering affidavit' after receipt of Mudau ADJP's correspondence of 21 August.

[76] Ms Leeuw argued that I must accept and have regard to the 'answering affidavit' whereafter the matter could simply stand down to a different date for the applicant to consider the affidavit and be afforded an opportunity to respond thereto. When pressed, Ms Leeuw reluctantly conceded that this would result in a postponement of the application.

[77] In the circumstances, taking into account the respondent's conduct and non-compliance with the July order which order granted him the indulgence he sought, I declined to accept the respondent's affidavit.

[78] The respondent had had over a month to file a supplementary affidavit and his attempt to do so in the manner that he did, and at the time that he did, was contrived to cause a further delay and yet another postponement of the contempt application. Accepting the respondent's affidavit in circumstances where he continued to disrespect the court's integrity would have further undermined the court's integrity and judicial authority.

[79] The Constitutional Court in SS dismissed the applicant's application for leave to appeal to that court in circumstances where the applicant continued to flout orders of court as the Court found that to grant "*leave to appeal in this matter would clearly run counter to the interests of justice...*".¹¹ Whilst my refusal to accept the respondent's affidavit might appear to run counter to the *audi alteram partem* principal or even possibly section 34 of the Constitution, I am bound by Kollapen AJ's judgment which provides as follows:

"[31] In *Burchell*, the High Court, upon finding that a party was in contempt of an order of court, ordered as part of the relief it granted that, unless the offending party purged his contempt, he faced the risk of being precluded from continuing with any litigation in the High Court. Such a sanction, which may at first sight appear to run counter to the right of access to courts enshrined in section 34 of the Constitution, is in my view wholly appropriate in circumstances when one is dealing with conduct that may be described as contemptuous of the authority of the order issued by a court. It can only be described as unconscionable when a party seeks to invoke the authority and protection of this Court to assert and protect a right it has, but in the same breath is contemptuous of that very same authority in the manner in which it fails and refuses to honour and comply with the obligations issued in terms of a court order."¹²

[80] I find that the respondent's conduct *in casu* to be indistinguishable with that of the applicant in SS. Simply put, the respondent cannot be permitted any further indulgences from this court when he is openly contemptuous of this court and its orders.

¹¹ See n7 at [36].

¹² *Id* at [31].

The respondent's non-compliance

- [81] The respondent's non-compliance and the arrears arise from historic non-payments of his maintenance obligations as ordered from the time of the granting of the order to date coupled with his failure to make payment of the contribution to the applicant's legal costs as ordered.
- [82] In the circumstances, the arrears calculated at R18 000.00 per month for a period of 19 months from 1 February 2024 to 1 August 2025 less the R1000.00 paid in March 2024 amounts to R341 000.00. As above, the respondent made payment of the sum of R36 000.00 in accordance with paragraph 2.1 of the July order. As such the respondent is in arrears in respect of the contribution towards costs in the sum of R264 000.00.
- [83] The respondent did not dispute the above quantification, and it was accepted that he was in arrears in the aforesaid amounts totaling R605 000.00.
- [84] Notably, the respondent had not, as a sign of good faith or in a genuine attempt to show *bona fides*, made partial payments of a lesser monthly amount or made payment of the balance of his tender of R106 000.00 made in open court on 25 July.

The respondent's defence

- [85] The respondent's defence was that his non-compliance was not wilful or *mala fide* as he did not "have the disposable income" to comply with the court order. In other words, his defence was one of unaffordability.
- [86] The question that was required to be answered was thus whether the respondent's non-compliance was indeed because of unaffordability as alleged by him.
- [87] In respect of an affordability defence in contempt proceedings, the authorities are clear – the respondent is required to make a full, and frank, disclosure of his financial circumstances which he alleges renders him unable to comply with the maintenance order.

[88] In *KPT and Others v APT*,¹³ the court importantly held that:

“Compliance with court orders is always important. There is a particular scourge in this country of spouses, particularly husbands, failing to pay judicially ordered maintenance. While a spouse facing a criminal sanction is entitled to the benefit of reasonable doubt, a court should not too readily find such doubt to exist where the spouse has failed to put up evidence which should have been available to him to support a claim of unaffordability.”

[89] Ms Leeuw, in support of her contention that the respondent’s failure to comply with the court order was neither wilful nor *male fide*, submitted that:

- 89.1 the order of 24 January 2024, the rule 43 order, was “*hot on the heels of a new calendar school year for the minor children*” who attend private school;
- 89.2 the fact that the children attend private school is not a choice “*but more of a necessity for these minor children because of the learning difficulties which they face*”;
- 89.3 as such the respondent “*became aware that he was not going to be able to meet what was ordered*”;
- 89.4 in the circumstances he instructed his attorney to address correspondence to the applicant’s attorney in order to notify the applicant of his inability to meet his court ordered obligations;
- 89.5 it was thus recorded in correspondence dated 2 February 2024 *inter alia* that “*though he sought funds, he could not find such funds on account that the children returned to school in the month of January 2024*”;
- 89.6 the respondent “*does not have disposable income in order to discharge the order*”;
- 89.7 the respondent did not pay anything towards the applicant’s maintenance as “*he needed to pay all the other expenses*” that he had; and
- 89.8 the respondent is the sole caregiver of the minor children and is solely responsible for their financial needs with no contribution from the applicant.

¹³ [2020] ZAWCHC 110 at [95].

- [90] That the children reside with the respondent and that he solely provides for their financial needs was the position at the time of the rule 43 application and the rule 43(6) application. Both courts took cognisance thereof and made their respective orders with that knowledge.
- [91] In respect of the 'private school fees argument', Ms Leeuw was unable to explain how the respondent had made payment of his children's school fees in full by the middle of the 2023 school year. She was further unable to explain how the respondent had paid these fees in large tranches and not monthly in circumstances where he allegedly had no disposable income. By way of example, from the statement from Cedarwood School it was evident that the fees for that school were paid in full by at least 1 July 2023 and that as at 6 December 2023 there was an amount of R138 562.34 due for fees in respect of the 2024 school year. From the statement from St Alban's College, it was evident that the fees for 2023 were paid in full and that as of 1 December 2023 the outstanding balance was R1 038.08. As of 23 February 2024, R111 238.00 was due for the first term.
- [92] Ms Leeuw could only refer me to one payment of R50 500.00 made by the respondent on 1 February 2024 to Cedarwood College from his FNB credit card. No other school payments were evident from the bank statements attached to the respondent's papers. Notably, this credit card has a limit, although maxed out on 29 February 2024, of R193 233.00. No further information or documentation relating to the children's school fees or the payment thereof for either the 2024 or 2025 school years was provided by the respondent.
- [93] The allegation was made that both children require assistance with their studies. Five invoices were provided for the period August 2023 to January 2024 which ranged from R2 250.00 per month to R4 500.00 per month for two of the months in respect of one child. The court was invited to have regard to a statement from Cedarwood which according to the respondent showed that he spent in excess of R100 000.00 on extra lessons for the other child. The period over which these extra lessons took place is not clear from the document itself.

[94] No information was provided by the respondent as to his monthly income. The three pay slips from 2016 and 2017 attached to the answering affidavit had no bearing on the period either before or after the granting of the rule 43 order or to the respondent's employment. No explanation was given as to why these purported pay slips were referred to by the respondent in his answering affidavit or attached thereto. No explanation was provided as to why they appeared to emanate from Hewlett Packard South Africa when the respondent, on his own version, was not employed by Hewlett Packard. This was conceded by Ms Leeuw.

[95] From the bank statements attached to the answering affidavit the following is evident:

- 95.1 for the period 12 July 2023 to 12 August 2023 the credit transactions were in the sum of R123 765.22 and the debit transactions were in the sum of R126 253.71;
- 95.2 for the period 12 August 2023 to 12 September 2023 the credit transactions were in the sum of R145 366.81 and the debit transactions were in the sum of R145 477.99;
- 95.3 for the period 12 September 2023 to 12 October 2023 the credit transactions were in the sum of R138 027.40 and the debit transactions were in the sum of R159 740.78;
- 95.4 for the period 12 October 2023 to 12 November 2023 the credit transactions were in the sum of R201 589.19 and the debit transactions were in the sum of R221 672.67;
- 95.5 for the period 12 November 2023 to 12 December 2023 the credit transactions were in the sum of R153 132.83 and the debit transactions were in the sum of R160 532.88;
- 95.6 for the period 12 December 2023 to 12 January 2024 the credit transactions were in the sum of R111 287.327 and the debit transactions were in the sum of R108 667.18;

95.7 for the period 12 January 2024 to 12 February 2024 the credit transactions were in the sum of R75 320.01 and the debit transactions were in the sum of R83 227.66.

- [96] No explanation whatsoever was provided by the respondent in respect of this income or his monthly expenses / expenditure.
- [97] The bond account which is held with Nedbank in both the applicant and the respondent's names was provided and evidenced a monthly bond payment of R12 579.74 up to and including 1 February 2024. As at that date the outstanding amount owing to Nedbank in respect of the mortgage bond was R713 968.74. Other than this fixed monthly payment no allegations were made or evidence provided as to the respondent's actual monthly expenses. It would appear that the respondent expected the court to trawl through his bank statements and to extrapolate his monthly expenses therefrom.
- [98] It was not in dispute that the jointly owned matrimonial home in which the respondent resides with his current partner is luxurious and was valued at R3 200 000.00. No information was provided by the respondent in respect of his partner and whether or not she contributes to the monthly expenses, whatever they may be.
- [99] The paucity of detail and evidence provided by the respondent in this application, notwithstanding the indulgence granted to him on 25 July to file a supplementary affidavit, was a risk the respondent was obviously willing to take. I can only rely on the objective evidence before me in order to determine whether the respondent has shown, on a balance of probabilities, that his non-compliance is not wilful or *mala fide*.
- [100] The respondent's failure to provide this court with evidence as to his alleged inability to comply with the order is clearly by design. I echo Mahomed AJ's sentiment at paragraph 23 of her judgement that:

"whilst both parties' financial disclosure was wanting in detail on their assets and expenses, the respondent has not complied with the practice directive, he has not annexed bank statements over 6 months and failed to set out details of debts

incurred in respect of the credit facilities. The parties bear the risk in that regard, the court must then rely on the objective evidence before it.”

[101] The respondent provided no explanation or information as to how he litigates on the scale that he does, briefing attorneys and counsel, if he has no disposable income to comply with rule 43 order. His affidavit is simply silent on this aspect.

[102] Ms Leeuw attempt to make submissions from the bar alluding to some or other agreement between the respondent and his attorneys or ‘favours’ that they may owe or do for each other, which according to Ms Leeuw, “*we have no knowledge of*” and as such “*it would be dangerous for us to assume that he has money to litigate.*” These submissions do not assist the respondent.

[103] Further, and as submitted by Ms Leeuw, the respondent was “*fully entitled*” to take the legal steps that he has.

[104] I pointed out to her that there was no reference in the judgments of Mahomed AJ, Todd AJ or Pretorius AJ to the respondent not having the ability to pay legal fees and yet there was an ongoing stream of litigation instituted by the respondent. Moreover, the respondent was litigating with funds which in fact form part of the joint estate whilst, simultaneously, failing to make payment of the contribution towards the applicant's legal costs as ordered by Mohammed AJ.

[105] Taking all of the above into account, I am in agreement with Mahomed AJ who found at paragraph 17 of her rule 43 judgment that the respondent:

“contends that he is too heavily indebted and therefore he cannot pay her interim maintenance nor can he contribute to her legal costs, however, he chooses to proceed by trial, incurring costs when he amended pleadings, raised a counterclaim for forfeiture, on facts that were already before him when he filed his plea, raised a R30 point, when he could have called the applicant's attorney to resolve the issue. He can “indulge” in litigation because he can afford to do so. The applicant is obliged to respond each time and she does not have the finances to do so. However, he does appear to have access to funds to pay for his litigation

although no figures are before this court to assess the level at which he litigates. He must bear the risk when he fails to fully substantiate his financial position.”

[106] It appears further from the judgment that the respondent’s counsel at the time had submitted that he did not know how much the respondent has spent on his fees to date and that according to him, the respondent was under no obligation to set this out.

[107] The respondent is mistaken in this belief and if this was the advice given to him by his legal representatives, they are similarly mistaken. The court, in *Anastassopoulos*¹⁴ held that the respondent’s deliberate refusal to set out his own legal expenses, both past and anticipated future expenses, was fatal to his opposition to the application for the payment by him of a contribution towards the applicant’s legal costs.

[108] The court, in *Van Rhyn*¹⁵ held that, in law the respondent’s obligation to contribute to the applicant’s legal cost is part of his maintenance obligation towards her. He has a legal obligation and it *“is not the respondent’s gift to give.”*

[109] Interestingly, and whilst such information was not provided to this court either, Mahomed AJ *“noted from the financial information furnished in the “supplementary answering” papers, the respondent has access to capital, as he services credit cards and overdraft facilities, and he pays a surplus into his bond account. Furthermore, I noted that his business has performed better in the past financial year, and that he can afford to contribute to her legal costs, pendente lite, in the sum of R300 000.00”*.¹⁶

[110] Ms Leeuw’s attempts to implore me to have regard to the fact that the respondent attempted after the July order to obtain a loan against the equity in the matrimonial property as evidencing good faith on the part of the respondent does not assist the respondent who was required to show on a balance of probabilities that his conduct in not complying with the rule 43 order handed

¹⁴ *Anastassopoulos v Anastassopoulos* (unreported case no. 17454/2016, Gauteng Division, Johannesburg (16 November 2018) at [7] - [8].

¹⁵ *van Rhyn v van Rhyn* (unreported case no 39047/2016, Gauteng Division, Johannesburg (7 June 2019) at [17].

¹⁶ Rule 43 Judgment of Mohamed AJ at [32].

down on 25 January 2024 was not wilful or *mala fide*. What the respondent attempted to do when facing the sanction of incarceration does not assist him in showing some level of good faith over a period of 19 months prior thereto.

[111] The respondent's answering affidavit does not disclose creditworthy evidence to support his defence of unaffordability.

The Law

[112] It is trite that court orders are to be obeyed and complied with until varied or set aside by a court of competent jurisdiction. There is a plethora of case law that underscores this principle.

[113] The Supreme Court of Appeal, in *Minister of Home Affairs and Others v Somali Association of South Africa EC and Another*¹⁷ emphasised that:

“...there is an unqualified obligation on every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order discharged. It cannot be left to the litigants themselves to judge whether or not an order of court should be obeyed. There is a constitutional requirement for complying with court orders, and judgments of the courts cannot be any clearer on that score.”

[114] In *Sepetla v Hlole*¹⁸ a judgment of a full bench in this division, Mia J stated the following in respect of whether the appellant had discharged the evidential burden to disprove wilfulness and *mala fides* in the face of his failure to make a full disclosure to the court which the court held is “*indicative of defiance of the maintenance order*”:

“[17] In view of what is stated above, the respondent bore the evidentiary burden to show, on a balance of probabilities, that he was not in wilful and *mala fide* non-compliance with the order. Counsel for the respondent already conceded that the application for debt review was not attached to the answering affidavit. The respondent would have disclosed his income and expenses to the court dealing with the debt review application. The

¹⁷[2015] ZASCA 35; 2015 (3) SA 545 (SCA) at [35].

¹⁸ [2022] ZAGPJHC 329 at [17] and [20].

application for debt review required his salary advice to be attached. The respondent did not disclose this before the court *a quo* when the onus was on him to show he was not in wilful contempt. The maintenance order would also have been attached to the application for debt review. The respondent did not take the court *a quo* into his confidence by attaching the application for debt review. Neither did the respondent explain why, based on the expenses listed in the application for variation of the maintenance order, he was unable to pay the maintenance in terms of the maintenance order.

[20] The respondent failed to prove before the court *a quo* that his financial circumstances served as an impediment to paying in terms of the maintenance order. Considering the application for variation and the absence of evidence tendered in relation to the debt review application, there was no evidence, as suggested by the respondent, which served as an impediment to complying with the maintenance order and this is indicative of defiance of the maintenance order. Where the respondent's subsequent commitments and the change in his circumstances reduced his capacity, he was required to adjust his circumstances to bring it according to his means. It was not evident that he did so, especially as there was no full explanation regarding his income and expenses and the adequate reasons why he could not comply with the maintenance order. In view of the above, it cannot be said that the court *a quo* erred in finding the respondent had not met the burden of proof that he was not in wilful and *mala fide* contempt of the court order."

[115] In *E.W v V.T.H*¹⁹ the court made a finding of contempt and held the following in respect of a defence of unaffordability:

"As previously stated, the Respondent must demonstrate a significant change in circumstances rendering him unable to comply with the court order which he has failed to do due to insufficient disclosure of his assets and those of associated trusts and entities, beyond the financial statements of Record Project Engineering and the Rossi Trust. This Court cannot assess the alleged impact of the change

¹⁹ [2024] ZAWCHC 310 at [31].

in income on the Respondent's ability to pay without adequate disclosure regarding the assets of the Respondent and the trusts under his control."

[116] In *E.V.A v J.V.A*²⁰ it was held in the context of contempt proceedings for arrear maintenance that:

"It is trite that the Respondent is required to make a full disclosure and has only seen fit to annex a letter from his Accountant. This court on the limited information is unable to assess the Respondents defence insofar as it pertains to affordability. He has clearly not taken the court into his confidence and as such, failed to discharge the evidentiary burden in this regard. The obligation to pay maintenance is serious as was held in *JD v DD*²¹ where Kollapen J remarked:

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

[117] The respondent's conduct goes beyond a mere disregard of the rule 43 order and the July order it constitutes a deliberate and intentional violation of this Court's dignity, repute and authority it also constitutes a deliberate and intentional violation of the applicant's right to dignity as enshrined in section 10 of the Constitution. The right to dignity is a fundamental right enshrined in the Constitution which asserts that, *"Everyone has inherent dignity and the right to have their dignity respected and protected"*.

[118] In this regard, the court, in *H v H*²² held that the right to equality enshrined in section 9 of the Constitution *"is at the heart of rule 43 matters because where one party cannot afford burdensome legal costs, he or she cannot make out his or her case effectively before a court, on an equal footing with the other party"*.

In the premises, the respondent's failure to comply with the rule 43 order is an affront to the applicant's dignity, who without payment by the respondent of the R300 000.00 contribution towards her legal costs, has to go cap in hand to Mr Zwane in order to fight for her right to 'equality of arms' and her ability to litigate

²⁰ [2024] ZAWCHC 299 at [33]

²¹ *JD v DD* [2016] ZAGPPHC 368; 2016 JDR 0933 (GP).

²² 2023 JDR 3899 (GJ).

against the respondent and protect her interests and rights in the divorce action, not to mention the ongoing stream of litigation pursued by the respondent.

In conclusion

- [119] The respondent has failed to take this court into his confidence and as such and in the circumstances, he has failed to discharge his evidentiary burden to establish a reasonable doubt as to whether his non-compliance was wilful and *mala fide* thereby rebutting the presumption of wilfulness and *mala fides*.
- [120] Instead, the respondent's conduct and failure to provide supporting evidence in the rule 43 application persists in this application.
- [121] The lack of detail and disclosure by the respondent is glaring and evidences a contemptuous attitude towards this court and its orders²³. He has failed to establish on a balance of probabilities that his non-compliance was not wilful and *mala fide*. Further, his propensity to litigate on the scale that he does is irreconcilable with a plea of lack of affordability.
- [122] Factually, the respondent has failed to comply with two court orders, the order of Mahomed AJ of 25 January 2024 and the order of 25 July 2025.
- [123] The respondent clearly has a propensity for simply disregarding court orders with impunity.
- [124] The court in *Consolidated Fish Distributors (Pty) Ltd v Xive and Others*²⁴ defined contempt of court as "*the deliberate, intentional (i.e. wilful), disobedience of an order granted by a Court of competent jurisdiction*".
- [125] On a conspectus of the evidence, it is therefore clear that the respondent is contemptuous of the court order/s and his disobedience thereof was deliberate and intentional i.e. wilful. His conduct in this regard has been shown beyond a reasonable doubt.

²³ *J.S.H v M.S.H* [2023] ZAWCHC 346.

²⁴ 1968 (2) SA 517 (C) at 522B cited with approval by the Constitutional Court in *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) at [2].

[126] The failure by the respondent to make any attempt to comply with the maintenance order, other than the R1000.00 paid by him during March 2024, points to a lack of good faith on his part.

[127] As was held in *JSH v MSH*²⁵:

“The respondent’s flagrant, repeated and ongoing refusal to comply with the court order cannot, however, be overlooked. His conduct evinces a complete disregard for the dignity of this court and respect for the order made by courts is an integral part of the effectiveness and success of any legal system and public order. The period of incarceration is at the discretion of a court and in maintenance matters it appears from the case law that the time period imposed can generally be said to vary between 1 week and 3 months in maintenance matters. I also take into consideration the amount that is in arrears and the serial nature of the breaches by the Respondent. In the event that it is not made clear to the Respondent that his contempt and disregard for orders of this court are wholly unacceptable there is a strong likelihood that his conduct will continue unabated. Moreover, if he is not to be punished in manner that brings home the seriousness of his misconduct, and it is not addressed by an appropriately severe punishment the integrity of the judiciary will be undermined.”

[128] In light of the respondent’s continued contempt and persistent non-compliance with the rule 43 order and the July order, coupled with his attitude towards this application, the dignity of the court and the applicant’s rights to dignity, equality, access to courts and her socio-economic rights, I am of the view that a punitive costs order is justified.

[129] I accordingly make the following order:

123.1 The respondent is found guilty of being in contempt of the court orders granted by Mahomed AJ on 25 January 2025 (the rule 43 order) and Abro AJ on 25 July 2025.

123.2 A warrant of arrest is to be issued forthwith committing the respondent to imprisonment for contempt of court for a period of 30 (thirty) days which warrant is to be executed within 7 (seven)

²⁵ See n23 at [50] – [52].

days of this order (inclusive of weekend days) in the event of the respondent not making payment of the sum of R605 000.00 (six hundred and five thousand rand) into the Trust Account of the applicant's legal representative, Adv MP Zwane, which account details the respondent has knowledge of, within 7 (seven) days (inclusive of weekend days) of this order.

[130] The costs of the application, excluding the costs of 24 and 25 July 2025 which costs are dealt with in the order of 25 July 2025, are to be paid by the respondent on the scale as between attorney and client.



ABRO AJ

**ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Date of hearing: 24 & 25 July 2025 and 29 August 2025

Date of Judgment: 25 September 2025

Appearances

For the Applicant: Adv MP Zwane

For the Respondent: Mr Ngcangisa/Ms L Leeuw

Instructed by: Ningiza Horner Attorneys