



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 011890/24

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE 30 March 2026

SIGNATURE

In the matter between:

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

Applicant

and

J[...] M[...]

Respondent

NEUKIRCHER J:

1] The parties *in casu* were previously married. Two minor children were born of their marriage. The marriage irretrievably broke down and on 27 November 2018 the court granted a decree of divorce and the parties' settlement agreement (the Agreement)¹ was made an order of court.

2] The paragraphs of the Agreement pertinent to the issues before me are set out in paragraph 2 of the Agreement, and they read as follows:

“2.1 The Defendant undertakes to pay maintenance in respect of the two minor children...at the rate of R10 000.00 per month per child from the 1st day of the first month subsequent to the granting of a final decree of divorce and on or before the 1st day of each and every successive month thereafter, which maintenance shall be paid by the Defendant directly to the Plaintiff or at such other place as the Plaintiff may, from time to time, advise the Defendant in writing...

2.2 Over and above the payment of maintenance as aforesaid, the Defendant hereby undertakes to, as soon as the minor children are enrolled in a pre-primary school, to pay an amount proportional to the parties' respective gross incomes in respect of the TWO minor children's reasonable pre-primary school fees, primary school fees and secondary school fees [at a private school unless specifically otherwise agreed upon between the parties in writing], prescribed school books, prescribe[d] school stationery, prescribed school uniforms, prescribed school tours, reasonable after care school fees, reasonable extramural activities [limited to two activities per annum, unless otherwise specifically agreed upon between the parties in writing], and

¹ Signed on 7 September 2018

reasonable extramural activity equipment, which expenses the Defendant shall pay directly to the appropriate service provider and deliver documentary proof of the payment thereof to the Plaintiff on demand.

2.3 ...

2.4 The amount payable in paragraph 2.1 above, shall escalate annually on the anniversary of the date of the divorce, by the percentage change in the Headline Consumer Price Index ["CPIX"]..."

3] It is also common cause that:

- a) the respondent has never applied CPI to the maintenance he pays in terms of clause 2.1 of the Agreement;
- b) the parties have yet to determine the "amount proportional to the parties' respective gross incomes" in respect of the children's schooling and other listed school-related expenses as set out in clause 2.2 the Agreement.

4] It is common cause that, as from the end of May 2019, and by agreement between them, the respondent began to deduct R3 000 from the cash portion of the maintenance payable in terms of clause 2.1 of the Agreement. The R3 000 represented the applicant's contribution towards the children's school fees² until her proper *pro rata* portion was properly calculated.

5] The applicant alleges that the respondent was to have applied the following CPI rates to the maintenance payable:

² Payable in terms of clause 2.2 and as an interim measure

- a) 1 December 2019 = 4.1%
- b) 1 December 2020 = 3.3%
- c) 1 December 2021 = 4.3%
- d) 1 December 2022 = 6.7%
- e) 1 December 2023 = 6.3%³

6] Unfortunately, the source of the information was neither identified nor corroborated by an expert who had properly calculated the resultant maintenance increases. The respondent denies the applicant's calculations and has attached a report penned by Mr Gilbey of Gilbey Forensic and Financial Services. It is unfortunate that no confirmatory affidavit by the author of this report was attached to the respondent's affidavit either. The point is that neither party gives an inch vis-à-vis the calculation.

7] The applicant alleges that, as a result of the respondent's failure to increase the maintenance payable by the relevant CPI yearly, he is in willful default of the court order and she seeks the following relief:

- a) that he be found to be in contempt of court;
- b) that he be committed to jail for a period of six months suspended on condition that he complies with the order of 27 November 2018 within 14 days of the date of contempt order.

8] The respondent has filed a counter-application in which he seeks, *inter alia*:

³ The CPI rates were only available until October 2023

- a) to vary, retroactively and as from 27 November 2018, paragraph 2.2 of the Agreement by deleting the words “proportional to the parties’ respective gross income” and to substitute it with “equal to 50%”; and
- b) to exact payment of R473 636 from the applicant in respect of her portion of the school fees that he alleges she should have contributed since the children started school in 2019.

9] Contempt of court is the deliberate, intentional refusal or failure to comply with a court order.⁴ For the applicant to succeed in the contempt application, she must prove, beyond reasonable doubt,⁵ that a valid order exists, that the respondent has knowledge of the order, that there was non-compliance with the order and that the non-compliance was willful and *mala fide*.

10] It is clear on these papers that a valid order exists, that the respondent has knowledge of the order and that the respondent has not applied CPI to the maintenance payable. However, the issue is whether this court can find that the respondent’s non-compliance is willful and *mala fides*. The respondent bears an evidentiary burden in relation to willfulness and *mala fides*.⁶

11] The crux of it all is that it is common cause that the parties’ minor children⁷ at the time of their divorce were three and one years old. The Agreement makes provision for the applicant to pay her *pro rata* portion of their school fees from the time they are enrolled in pre-primary school. Given that they agreed to deduct

⁴ *Consolidated Fish Distributors (Py) Ltd v Zive* 1968 (2) SA 517 (C) at 522B-C

⁵ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (6) SA 326 (SCA) (Fakie NO)

⁶ *Els v Weideman and Others* 2011 (2) SA 126 (A) pars 66-67

⁷ Now 10 years and 8 years old

R3 000 from the children's maintenance as from end May 2019, I must assume that – at least by this stage – the children were in pre-primary school.

12] It is also clear from these papers that despite much to-ing and fro-ing and demands from each that the other make full financial disclosure, that never took place. Thus it is abundantly clear that, without a full financial disclosure from each, no cogent calculation of the applicant's *pro rata* portion of the school fees can take place.

13] Even were one to find that, irrespective of this, CPI should have been applied to the maintenance the respondent did pay⁸, the issue is whether this non-compliance satisfies the test of willfulness and *mala fides*.

14] In *Fakie NO*, Cameron JA stated:

“[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide’. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself, entitled to act in the way claimed to constitute contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

[10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader distinction of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the

⁸ I.e. the agreed R20 000 less R3 000 = R17 000

deliberate and intentional violation of the court's dignity, repute and authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

15] In *Consolidated Fish Distributors (Pty) Ltd v Zive and Another*⁹ (Zive) it was stated:

"...That is to say, even though a respondent may be wilful, and admittedly so, he may yet escape liability if he can show he was bona fide in his disobedience, that is, that he genuinely, though mistakenly, believed that he was entitled to commit the act, or the omission, alleged to be contempt of Court."¹⁰

16] As was pointed out in *Zive*¹¹, in *Wickee v Wickee*¹²

"...a divorced husband, against whom an order for maintenance had been made by consent, paid such maintenance less certain sums which he claimed to be entitled to deduct and which had been perforce paid by him, being debts incurred by his ex-wife, of which he had been unaware at the time he agreed to the maintenance order being made against him. His ex-wife applied for his committal. The Court (Tindall, J.) holding that the ex-husband was not in law entitled to make the deduction nevertheless refused to commit him because he believed genuinely, though mistakenly, that he was entitled to make the deductions."

17] The court in *Wickee*¹³ ultimately stated:

"In the case of an order to pay maintenance I do not think that the disobedience can be said to be wilful where the spouse himself believes he has a goof ground for not

⁹ 1968 (2) SA 517 (C) at 524 C-D

¹⁰ Also see *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T) at 691; *Haddow v Haddow* 1974 (2) SA 181 (C) at 183; *Gold v Gold* 1975 (4) SA 237 (D) at 239D-G that the inference of willfulness and *mala fides* would be rebutted by evidence establishing that the order was not intentionally disobeyed

¹¹ At 523D – 524A

¹² 1929 WLD 145 at 148

¹³ At pg 148

making the payment ordered. This view has been taken in previous cases in this Court...¹⁴But, of course, the *onus* lies on the spouse who has been ordered to pay maintenance to satisfy the Court that his failure does not amount to contempt of Court.”

18] *In casu*, the issue pertaining to the *pro rata* calculation of the children’s school fees has effectively led to an agreed deduction of the respondent’s maintenance payments under clause 2.1 of the Agreement. On his version, once the parties finally agree how much the applicant will have to contribute to the children’s schooling, his maintenance obligation will be further reduced.

19] In my view however, the cash maintenance component set out in 2.1 of the Agreement and the payment of the school fees set out in 2.2 of the Agreement are two completely separate issues. And it is very clear from paragraph 2.4 of the Agreement that that CPI is linked to paragraph 2.1 of the Agreement. But what is also clear is that the parties themselves conflated the two clauses by agreeing that the R3 000 should be deducted from the cash component of the maintenance payable by respondent. In doing so it is therefore not at all surprising that the respondent has adopted the view that he has.

20] Applying the principles set out in *Plascon Evans*, and given the background, the facts and the parties’ conduct, I cannot find that the respondent’s version is so far-fetched or untenable that it should be rejected. Even though he may be incorrect, I cannot find that he has been willful and *mala fide* in his conduct. At best, I can find

¹⁴ Case citations omitted

that he is incorrect in his interpretation of clause 2.4 as read with clause 2.1 of the Agreement, but that does not found a finding of willfulness or *mala fides*.

21] This being so, the contempt application must be dismissed.

The Counter-application

22] The respondent did not persist with his counter-application before the court. Instead, he informed the court that “the matter” was before the Maintenance Court and that the hearing was imminent. What he sought was an order that the counter-application be removed from the roll.

23] But I am not inclined to do that. At the outset, the respondent argued that the disputes of fact on the papers before the court were of such a nature that they were irresoluble and that the matter should be referred to oral evidence. This being so, and the issues of maintenance and school fees being inextricably intertwined in both applications, it does not behove the respondent now to suddenly change his view – this he does by asking for a removal. All that this will achieve is that the counter-application will be set down in due course in the Family Court once more and a motion court burdened with issues better suited to hearings in the Maintenance Court.

24] In my view, the High Court is unsuited to hear issues pertaining to the determination of children’s maintenance and school fees post divorce – that should be determined by a Maintenance Court where the parties can conduct a full evidentiary hearing and ventilate their issues.

25] In any event, the dispute of fact as regards the counter-application itself cannot be resolved in this application or in motion proceedings as a whole. Given this, the counter-application must be refused. I emphasize that the counter-application has not been adjudicated on its merits as no argument was presented on it and an order merely removing it from the roll was sought.

26] As neither application has been successful, each party shall pay his/her own costs.

ORDER

1. The application for contempt of court is dismissed.
2. The respondent's counter-application is refused.
3. Each party shall pay his/her own costs in respect of both the contempt application and the counter-application.

**B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 March 2026.

For the Applicant	:	Adv M Fabricius
Instructed by	:	Salome Eilers Attorneys
For the Respondent	:	Adv de Wet SC
Instructed by	:	Moumakoe Clay Inc Attorneys
Matter heard on	:	3 March 2026
Judgment date	:	30 March 2026