

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: Yes |

Date: **3rd October 2022** Signature:

CASE NO: 8285/2022

DATE: 3rd October 2022

In the matter between:

K, F

Applicant

and

K (born S) T INT

Respondent

Heard: 16, 17 and 25 March, 13 and 29 April, Heads of Argument filed on 24 May 2022

Delivered: 03 October 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 03 October 2022.

Summary: Contempt of court – urgent application – duty to comply with court orders – disobedience of court order – a contemnor's non-compliance must

have been deliberate and *mala fide* – whether requirements for contempt of court proved beyond reasonable doubt – respondent held to be in contempt of court.

ORDER

- (1) The respondent is held to be in contempt of the order of this Court, granted on 8 March 2022 by Moorcroft AJ, in that she *inter alia* (1) failed to disclose to the applicant, the physical address where the two minor children born of the marriage were residing during March 2022 and subsequently; (2) failed to comply with the care and contact provisions of Moorcroft AJ's *pendente lite* order, in that she in particular refused to allow the children to spend alternate weeks with the applicant; and (3) refused the applicant electronic or telephonic contact with the children at 18:00 on each day that the children was in the care of the respondent.
 - (2) The respondent is committed to imprisonment for a period of one month for her contempt of court, which sentence is hereby suspended on condition that the respondent purge, with immediate effect, her aforementioned contempt and comply fully with the Court Order of Moorcroft AJ
 - (3) The respondent shall pay the applicant's cost of this application.
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JUDGMENT

Adams J:

[1]. On 8 March 2022 this Court (per Moorcroft AJ) granted an order, which, in the relevant parts, reads as follows: -

'(1) The respondent is directed to disclose the physical address where the minor children, S D S-K and S N S-K, reside, and any future or alternative temporary or permanent physical address, to the applicant.

(2)

(3) *Pendente lite* the children's care and contact with the applicant and the respondent shall be as follows:

(3.1) The children shall spend alternate weeks with the applicant and respondent, commencing with the applicant collecting the children from school on Monday, 14 March 2022 and returning them to school on Monday, 21 March 2022 from where they will return home with the respondent, to be collected by the applicant again the following Monday, and so on.

(3.2) It shall be the responsibility of the parent in whose care the children are to ensure that they attend school.

(3.3) If the children are for any reason not attending school, the parent in whose care the children are at the time shall immediately inform the other parent of the reason and of the precise whereabouts of the children or the child in question.

(4) Each party shall have daily electronic or telephonic contact with the children at 18h00 on each day that the children are in the other party's care.

(5) The applicant shall have the children for the second half of the March/April 2022 school holiday period.

(6) The applicant shall have the children for the first half of the July/August 2022 school holiday period.

(7) The applicant shall have the children for the second half of the September/October 2022 school holiday period.

(8) The applicant shall have the children for the second half of the December 2022/January 2023 school holiday period.

(9)

[2]. Following the granting of the aforementioned order, the respondent failed to comply with same. Firstly, she refused to disclose to the applicant the address where she was residing with the children at the time. And secondly, on Monday, 14 March 2022, she refused to allow the applicant to receive the children into his care for that week. In fact, what she did was to keep the children out of school for that week. This forced the applicant, in order to enforce his contact rights in respect of the children, to launch an urgent contempt of court application, which he did on the same day, namely 14 March

2022, with the urgent application set down for hearing on Wednesday, 16 March 2022.

[3]. In this urgent application, which is presently before me and which was referred to oral evidence on 16 March 2022, the applicant applies for an order declaring the respondent to be in contempt of court and for an order of committal for such contempt. Additionally, and presumably on the basis that the respondent's failure to comply with the previous court order should be sanctioned, the applicant applies for an order granting him primary care of the children and for them to reside primarily with him, with the respondent's contact limited to alternate weekends.

[4]. Simply put, the question for determination in this application is whether the respondent's non-compliance with the court order was wilful, *mala fide* and unreasonable. The aforesaid question is to be considered in the light of the background facts which, in turn, are to be distilled from the affidavits filed on behalf of the parties and the evidence led during the trial, pursuant to the matter being referred to oral evidence. In that regard, it was decided to have the matter referred to oral evidence primarily due to the interest of the minor children being paramount and also, because, when the matter served before me in the urgent court on 16 March 2022, the respondent appeared in person and she raised a number of issues which had not been raised *per se* in her answering affidavit. It was therefore thought prudent by the court and in the interest of justice and that of the two minor children to have the matter referred to oral evidence. The applicant himself gave evidence as did the respondent, as well as the nanny of the children, who was in fact living with the respondent at the relevant time.

[5]. The respondent opposed the urgent application on the basis that her non-compliance with the Court Order was not wilful nor *mala fide*. For example, her case regarding her refusal to disclose their address, is to the effect that that was for safety reasons. At some point in her papers, she mentioned that she even suggested that they could meet at a neutral place where they could hand over the children to each other. As regards her refusal to allow the applicant to exercise care and contact of the children, she alleges that it is for their safety.

For many years during the subsistence of the marriage, so the respondent alleges, the applicant was abusive, both physically – against her and the children – and verbally, so much so that during February 2022, she had to flee with the children from the applicant, who she describes as a fugitive and a paedophile, who allegedly allowed the children to starve when they were left with him during December 2021. This is denied by the applicant.

[6]. The respondent has not complied with the court order of Moorcroft AJ – that much is common cause. The respondent in fact admits to deliberately refusing to comply with the provisions of the court order, which order she admits to being in possession of and aware of. The respondent confirmed this in her answering affidavit and during her oral evidence before court.

[7]. The main factual dispute between the parties relates directly to the well-being of the children whilst in the care of the applicant. The respondent in her answering affidavit and whilst giving *viva voce* evidence in court, painted this picture of an uncaring father, who, in addition, poses a threat to the physical and mental well-being of the children, who, according to the respondent, should not be left alone with them. There were also suggestions by the respondent of inappropriate behaviour, of a sexual nature, on the part of the applicant.

[8]. These allegations and accusations by the respondent are however belied by a number of factors, notably: - (1) At some point during the divorce settlement discussions the respondent was quite happy to agree to a shared residency regime, which is wholly inconsistent with her allegations of abuse; and (2) The evidence of the nanny, Judy Nyirenda, who confirmed that the applicant was a loving father.

[9]. Ms Nyirenda, who impressed as an honest witness, also testified that the applicant was not abusive towards the respondent but that the parties argued – as do any married couple – with one another. She further testified that she had never witnessed any abuse by the applicant against the children; that the applicant would never hurt the children; that he treated all of the children, including L[...] (the respondent's child from a previous relationship), the same; that he would take and fetch them from school; that the children had asked her

to call their father; that she had no problems staying with the applicant; that he was not abusive towards her and was not rude to her; and that she would completely contradict the allegations made by the respondent to the contrary. Her evidence was also to the effect that she would have no difficulty to go and look after the children whilst they are in the care of their father, the applicant, and when they are staying with him.

[10]. On 13 April 2022, being the second day of oral evidence before Court, the applicant informed the court that Ms Nyirenda had contacted him and asked him if she could return to his employ. He agreed and subsequent she left the employ of the respondent and commenced employment with the applicant.

[11]. There are also a number of material discrepancies and anomalies in the version of the respondent, most notably is the fact that the version appears to have a life of its own, developing further variations as the time goes by. Her version is also contradicted by contemporary communications between the parties, which contradict the claims by the respondent of abuse by the applicant. Moreover, in her evidence, the respondent confirmed that the parties personally entered into not one, but two, written and signed settlement agreements in terms of which they *inter alia* settled the issues arising out of the irretrievable breakdown of their marriage relationship and their parental responsibilities and rights, including a shared residence regime, in respect of their minor children. She claimed, however, that she signed both settlement agreements under duress. The point is simply that, if it is accepted that she entered into these agreements willingly – as I do – then, here version is highly improbable, bordering on the ridiculous.

[12]. My inclination is therefore not to accept the version of the respondent.

[13]. For contempt of court to exist, the contemnor's non-compliance with the court order must have been deliberate and *mala fide*. So, for example, the Supreme Court of Appeal in *Fakie v CCII Systems (Pty) Ltd*¹, held as follows: 'The essence of contempt of court *ex facie curiae* is a violation of the dignity, repute or authority of the court. ... Deliberate disregard is not enough, since the non-complier

¹ *Fakie v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA).

may genuinely, albeit mistakenly, believe that he is entitled to act in the way he claimed to constitute the contempt. ... Even a refusal to comply that is objectively unreasonable, may be *bona fide*.’

[14]. It is trite that the applicant was required to prove three requirements in order to succeed with his contempt of court application, that being wilfulness, *mala fides* and unreasonable non-compliance, which has to be *bona fide*, before it can be said that the conduct of the respondent constitutes contempt of court. As regards the question of the unreasonableness of the non-compliance, see *Consolidated Fish (Pty) Ltd v Zive*².

[15]. In *Fakie* (supra), Cameron JA held that the applicant in civil contempt of court proceedings is required to prove beyond a reasonable doubt the following requirements: the Court Order, service thereof and / or actual knowledge thereof. Once these are established, so Cameron JA held, the respondent then bears an evidential burden to rebut wilfulness and *mala fides*, by raising only a reasonable doubt, which is the test applicable in criminal matters.

[16]. In that regard, I understand the respondent to contend that her non-compliance was not *mala fide*. She is of the view that, if she were to comply with the court order, she would be placing the children, whose interest is paramount, in mortal danger. In my view, the respondent has not presented credible evidence in support of her aforesaid claim – far from it. Her version in that regard lacks credibility. In any event, the defences raised by the respondent to the contempt application appear to be misdirected. The point is simply that there is in place a court order, which should be complied with. If one is unhappy with a court order, the right approach to be adopted is to apply for a rescission of such order. And, until that order is set aside, it should be complied with in accordance with the doctrine of the Rule of Law.

[17]. For all of these reasons, I am persuaded that the applicant has made out a proper case of contempt of court against the respondent. I do however not believe that the applicant has made out a case for a variation of the order granted by Moorcroft AJ.

² *Consolidated Fish (Pty) Ltd v Zive* 1968 (2) SA 517 (CPD) at 524D;

[18]. What remains is the issue of the costs of the application. In that regard, the general rule is that the successful party should be granted his costs. *In casu*, I cannot think of any reason why this general rule should be deviated from. I therefore intend granting costs in favour of the applicant against the respondent.

Order

[19]. Accordingly, I make the following order: -

- (1) The respondent is held to be in contempt of the order of this Court, granted on 8 March 2022 by Moorcroft AJ, in that she *inter alia* (1) failed to disclose to the applicant, the physical address where the two minor children born of the marriage were residing during March 2022 and subsequently; (2) failed to comply with the care and contact provisions of Moorcroft AJ's *pendente lite* order, in that she in particular refused to allow the children to spend alternate weeks with the applicant; and (3) refused the applicant electronic or telephonic contact with the children at 18:00 on each day that the children was in the care of the respondent.
- (2) The respondent is committed to imprisonment for a period of one month for her contempt of court, which sentence is hereby suspended on condition that the respondent purge, with immediate effect, her aforementioned contempt and comply fully with the Court Order of Moorcroft AJ.
- (3) The respondent shall pay the applicant's cost of this application.

L R ADAMS
*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON: 16, 17 and 25 March, 13 and 29 April, Heads
of Argument filed on **24 May 2022**

JUDGMENT DATE: 3rd October 2022

FOR THE APPLICANT: Advocate Melanie Feinstein

INSTRUCTED BY: Clarks Attorneys, Johannesburg.

FOR THE RESPONDENT: Mr Neshavi

INSTRUCTED BY: Bongani Dyani Attorneys, Johannesburg.
