

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



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- | | |
|-----|------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: |
| (3) | REVISED: |

Date:

Signature:

CASE NO: 2014/2941

DATE: 23 November 2023

In the matter between:

P[...], L[...]

Plaintiff

and

P[...], R[...]

Defendant

Coram:

Heard on: 20 November 2023

Delivered: 23 November 2023

Summary: Contempt of Court – urgent application – duty to comply with Court orders – the defendant is in contempt of Court.

Appropriate sanction for crime of civil contempt – cohesive sanction – punitive costs

JUDGMENT

GUMBI, AJ:

INTRODUCTION

[1] This matter concerns the question whether the defendant is guilty of contempt of Court for failure to comply with the judgment and the orders that this Court made on 9 November 2023, per Thupaatlase AJ;¹ the order of 28 July 2014, per Tsoka J² (hereinafter referred to interchangeably as "*Thupaatlase's judgement or order*" and "*Tsoka's order*").

[2] The plaintiff does not persist with the relief she seeks in terms of the Tsoka's order, to compel performance in terms thereof, as it appears that a payment was made after the launching of this application.³ However, no payment was made in respect of the Thupaatlase's order. In the Thupaatlase's order, the following order was made:

[2.1] The defendant is directed to forthwith pay R711 337,63 towards the costs of the pending divorce trial action instituted under case number 2014/2941;

[2.2] Prayer 2 is hereby dismissed.

[2.3] The defendant's counterclaim is dismissed.

[2.4] The defendant to pay the costs of the application on an

¹ CaseLines, 032-20, Annexure "**FA1**"

² CaseLines, 032-30, Annexure "**FA2**"

³ CaseLines, 032-79, paras 12.29 to 12.30

attorney and client scale.

[3] Notwithstanding that order, the defendant did not pay R711 337,63, as aforestated.

[4] Consequently, the plaintiff now seeks an order from this Court in the following terms:

[1] Condoning the plaintiff's non-compliance with the Rules of this Honourable Court insofar as same may be necessary and directing that this Application be heard as one of urgency.

[2] The defendant is in contempt of the Court order handed down in this Honourable Court by the Honourable Acting Judge Thupaatlase on 9 November 2023.

[4] Directing that the defendant be found guilty of contempt of Court and sentenced according to the discretion of this Honourable Court and that the defendant be imprisoned for a period of 60 calendar days;

[5] Directing that the period of imprisonment be suspended for such period as this Honourable Court may deem meet, subject to compliance by the defendant with the orders of 9 November 2023, within 3 days of granting of this order.

[6] Postponing the trial action sine die.

[7] Granting the plaintiff leave to appeal for the striking out of the defendant's plea and counterclaim, on the papers duly supplemented, in the event of the defendant failing to comply

with the orders referred to in paragraph 2 and 5 above.

[8] *Granting the parties leave to approach the Deputy Judge President for a preferential date, upon the defendant purging his contempt.*

[9] *Directing that the costs of this application and wasted costs occasioned by the postponement, be paid by the defendant on the scale as between attorney and client, and*

[10] *Further and alternative relief.*⁴

[5] I have intentionally not made any mention of the Tsoka's order (28 July 2014) as the plaintiff has indicated to me that he is not persisting with the relief consequent upon it.

BACKGROUND FACTS

[6] On 31 October 2023, the plaintiff approached this Court on an urgent basis for an order, directing the defendant to forthwith contribute towards her legal costs in respect of the trial action instituted under case number 2014/2941, in an amount of R711 337,63, or in such other amount as this Honourable Court may deem meet.⁵ According to the plaintiff, that application was predicated upon the refusal by the defendant to provide her with a contribution towards her legal costs in respect of the divorce action, which was set down for trial on 20 November 2023. The plaintiff contends further that, she is entitled to be placed on an equal footing with the defendant by a way of funding, in pursuing and finalising the divorce action.

⁴ CaseLines, 032-1 to 032-2

⁵ CaseLines, 025-2, para 2

SUBMISSIONS BEFORE THIS COURT

Plaintiff

[7] The plaintiff submits that she is entitled to the relief, as aforesaid, because of the defendant's wanton disregard of the law by failing to purge his contempt and referred me to a compendium of cases in support of her submissions. Counsel for the plaintiff, Mr Nowitz, referred me to the judgments of **Fakie NO**⁶ and **Bannatyne**⁷ In **Fakie**, the Court made it clear that it is a crime to unlawfully and intentionally disobey a Court order.⁸ This type of contempt of Court is part of the broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute and authority of the Court.⁹ The offence has, in general terms, received a constitutional stamp of approval,¹⁰ since the rule of law – a founding value of the Constitution which requires that the dignity and the authority of the Courts, as well as their capacity to carry out their functions, should always be maintained.¹¹ I was also referred to **Bannatyne**, the relevant part which is also found in **Fakie**.¹² Mr Nowitz submitted further that a case has been made out in the founding affidavit

⁶ **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA)

⁷ **Bannatyne v Bannatyne** 2003 (2) SA 363 (CC) at para 18

⁸ **S v Beyers** 1968 (3) SA 70 (A)

⁹ Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) page 166: 'Contempt of court ... may be adequately defined as an injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated.' Cf **Attorney-General v Crockett** 1911 TPD 893 925-6 per Bristowe J: 'Probably in the last resort all cases of contempt, whether consisting of disobedience to a decree of the Court or of the publication of matter tending to prejudice the hearing of a pending suit or of disrespectful conduct or insulting attacks, are to be referred to the necessity for protecting the fount of justice in maintaining the efficiency of the courts and enforcing the supremacy of the law.'

¹⁰ **S v Mamabolo** [2001] ZACC 17; 2001 (3) SA 409 (CC) para 14, per Kriegler J, on behalf of the court (where contempt of court in the form of scandalising the court was in issue).

¹¹ Per Sachs J in **Coetzee v Government of the Republic of South Africa** [1995] ZACC 7; 1995 (4) SA 631 (CC) para 61, quoted and endorsed by the court in **Mamabolo** (above). In **Coetzee**, statutory procedures for committal of non-paying judgment debtors to prison for up to 90 days – which the statute classified as contempt of court – were held unconstitutional.

to demonstrate the alleged offence, committed by the defendant.

[8] He contrasted submissions made by counsel for the defendant, Ms Olwaghen-Meyer, on her reliance to **Coetzee**, “*that it is trite in law that seeking a contempt order and imprisonment is not competent relief in the event of non-compliance with money judgment*”¹³ – he submitted that **Coetzee** is distinguishable to this application for the following reasons: “*same dealt with the constitutionality of certain subsections of Section 65 of the Magistrates Court Act and as such, is distinguishable; we are concerned here with Contempt for non-compliance with a Court Order, as opposed to seeking to enforce a Judgment Debt; Coetzee is not a blanket prohibition, as highlighted in Fakie and Bannatyne supra; Fakie made it clear that Contempt Proceedings constitute the primary and sometimes the only method of enforcement of such Orders (see footnote 64).*”

[9] I invited Mr Nowitz to comment on the attempts being made by the defendant to purge his contempt, in particular by securing loans which were purportedly rejected and the fact that there was no evidence demonstrating that the defendant was able to pay forthwith the amount of R711 337,63, as ordered in Thupaatlase’s judgement. Mr Nowitz responded by saying that, had the defendant responded issuably to the concerns raised in their letter, “**FA6**” viz.

“1. Your letter of **15 November 2023** refers.

2. *It is not our intention to litigate by way of correspondence, suffice to say that:*

¹² “[63] ‘Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The Judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.’” (Emphasis added)

¹³ Ibid

- 2.1. *your letter raises more questions than it answers;*
 - 2.2. *it is very easy to have Loan Applications rejected, if one does not make a full disclosure. Whilst you have provided us with the rejections, you have failed to provide us with the Applications motivating the Loans;*
 - 2.3 *your letter fails to disclose that your client received **R1,4 million** from his late mother's estate **2021** and a further **R1.1 million** therefrom in **2022**, nor does it disclose what he did with the funds so received;*
 - 2.4. *your letter fails to take cognizance of the fact that the First L&D Account dated **May 2020**, held back **R6 million** for purposes of a Second Distribution, (of which your client would be entitled to 1/3) and does not deal with certain other assets such as shares and the inheritances arising from his late father's estate, as reflected therein;*
 - 2.5. *your letter does not deal with your client's watch collection, the flat in Cape Town and the immovable property in the UK, but to mention a few further items;*
 - 2.6 *your client is clearly not playing open cards and is not making a full disclosure.*
3. *Your client is clearly in Contempt of the Court Order and the Judgment and fails to recognize that his version (pleading poverty) was rejected by the Court in its Judgment of **9 November 2023**.*

4. *Our Client has a Judgment in her favour and there is absolutely nothing mala fide in enforcing same. There is also nothing mala fide in our Client launching Contempt Proceedings against your client.*
5. *Needless to say, our Client's Rule 43(6) Application was motivated by a need for a Contribution towards costs, in order to run the Trial, which Trial cannot proceed unless and until such Contribution, as per the Judgment, is paid.*
6. *Thus, she now has a Judgment in her favour which your client refuses to satisfy. Accordingly, the Trial cannot proceed, as scheduled on **20 November 2023**, precisely because your client refuses to comply with a Court Order.*
7. *Our instructions are to proceed with a Writ/Writs and to launch a Contempt Application, which will include a prayer for a Postponement of the Trial Action. A Punitive Costs Order has already been granted against your client and a punitive Costs Order will be sought once again.*
8. *Kindly advise per return, of what your client's attitude is regarding the Postponement afore- referred to.*
9. *Such further rights as are enjoyed by our Client remain reserved in toto."*

- they would not have insisted on proceeding with this application.

[10] Mr Nowitz contended further that, in any event, the Thupaatlase's judgment was made after the learned Judge, considered the defendant's financial position. According to him, the learned Judge found in favour of the plaintiff, the defendant's claimed impecuniosity notwithstanding.

[11] In seeking a postponement, Mr Nowitz submitted that in consequence of the failure by the defendant to purge his contempt, the plaintiff is unable to proceed with the trial as its attorneys were not put in funds, for the rendition of such further legal services.

Defendant

[12] Ms Olwagen-Meyer contended that the defendant is not in wilful and *mala fide* contempt and the defendant's the failure to purge his contempt was most certainly, not due to lack of trying.¹⁴ She questioned the timing of launching of this application, that it is not urgent as it was brought within days of the trial hearing date. So, the postponement application was orchestrated.

[13] She argued further that it is a trite principle in law that seeking a contempt order and imprisonment is not competent relief in the event of non-compliance with money judgments. This principle, according to her, was established by the Constitutional Court in **Coetzee**.¹⁵ Ms Olwagen-Meyer, further submitted that the relief sought by the plaintiff is fatally flawed in respect of seeking contempt and imprisonment relief against the defendant. As set out in the **Coetzee**, the plaintiff should follow the normal route of money judgments debt recovery against the defendant and have a warrant of execution issued to attach assets.

[14] I enquired from Ms Olwagen-Meyer as to when can the defendant reasonably purge his contempt and where the money would be sourced. Unfortunately she could not give me any undertaking in that regard but instead, she referred me to paragraph 12.12 of her heads of argument¹⁶ viz. "*My only other substantial asset is the R3.8 million from my pension fund held in trust under interdict by Court order*".

¹⁴ CaseLines 032-179, para 41

¹⁵ CaseLines 032-174, para 33

¹⁶ CaseLines, 032-177

[15] Ms Olwagen-Meyer raised other issues, which I should not concern myself with, as it is impermissible to grant party a relief it had not asked for.¹⁷

THE LAW

Is this application urgent?

[16] In ***Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others***¹⁸ it was held:

“[32] A similar point was made in *Victoria Park Ratepayers’ Association*,¹⁹ in which it was said that –

“[c]ontempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has wilfully and in bad faith ignored or otherwise failed to comply with a court order. This added element provides to every such case an element of urgency.”²⁰

[33] In that case, the Court went further to state that –

“it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings

¹⁷ ***Bel Porto School Governing Body and Others v Premier, Western Cape and Another*** 2002 (3) SA 265 (CC)

¹⁸ ***Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*** [2021] ZACC 18

¹⁹ ***Victoria Park Ratepayers’ Association v Greyvenouw*** CC 2004 JDR 0498 (SE)

²⁰ ***Victoria Park Ratepayers’ Association*** *supra*

urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency. This, in my view, is the starting point: all matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances, and the dictates of fairness, allow.”²¹

[17] By all accounts, the defendant has been extremely remiss in the manner in which it conducted all the litigation pertaining to this matter. Despite the intractable conflicting relationship between him and the plaintiff, which is understandable in matrimonial matters, however, he failed, *inter alia*, to respond issuably to letters seeking his compliance. Such is apparent from a perusal of “**FA3**”²² and “**FA6**” as aforestated. The harm of not being paid in accordance with an order, whilst the defendant is enjoying full legal representation, is indeed irreparable. This is a critical dimension of the factual matrix.

[18] If regard is also had to the previous tender made by the defendant to contribute R200 000,00 towards the plaintiff’s costs²³

“[16] *Solely in an effort to curtail the costs and expense of a Rule 43 application which our client might be forced to oppose and without conceding in any form or fashion that your client is entitled to as much as we tendered below, our client is prepared to offer your client a contribution toward her costs, on account in respect of any settlement reached, the amount of R200 000,00 plus VAT.*”

- it is plain, that the plaintiff is entitled to the utmost expeditious

²¹ *Victoria Park Ratepayers’ Association supra*

²² CaseLines, 032-32

²³ CaseLines, 010-29

procedures available. Based on the aforesaid authorities and the defendant's conduct, I find that this application is urgent.

The contempt application

[19] In ***Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of***²⁴ it was held:

“The importance of ensuring that court orders are obeyed

[59] *It cannot be gainsaid that orders of court bind all to whom they apply.*²⁵ *In fact, all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside.*²⁶ *This, in addition to typifying common sense, the Constitution itself enjoins. Section 165(5) of the Constitution itself provides that an order or decision binds all persons to whom it applies. The reason being that ensuring the effectiveness of the Judiciary is an imperative. This has been confirmed in multiple cases, including Mjeni, in which the Court stated that “there is no doubt, I venture to say, that [complying with court orders] constitutes the most important and fundamental duty imposed upon the State by the Constitution”.²⁷ On this, the then Chief Justice Mahomed, writing extra curially in 1998, said:*

“The exact boundaries of judicial power have varied from time to time and from country to country, but the principle of an

²⁴ Ibid

²⁵ ***Pheko II*** above at para 1 and ***Victoria Park Ratepayers' Association*** above at para 22.

²⁶ ***Culverwell v Beira*** 1992 (4) SA 490 (W) at 494A.

²⁷ ***Mjeni v Minister of Health and Welfare, Eastern Cape*** 2000 (4) SA 446 (Tk) at 452C-E, which was cited by Kirk Cohen J in ***Federation of Governing Bodies of South African Schools v MEC for Education, Gauteng*** [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) at 678G-679A.

independent Judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundations of the civilisation which it protects . . .

. What judicial independence means in principle is simply the right and the duty of Judges to perform the function of judicial adjudication through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any person or institution.”²⁸

[60] *As this Court held in Tasima I, “the obligation to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system . . . and is the stanchion around which a State founded on the supremacy of the Constitution and the rule of law is built”.*²⁹

[107] *Firstly, our jurisprudence signals that purely punitive orders of committal in contempt proceedings are possible. In Victoria Park Ratepayers’ Association, the Court, upon establishing that the respondent was in contempt, notably said the following:*

“I view the respondents’ contempt in a very serious light. It is brazen and disdainful of the rights of others. It seeks to bring the administration of justice into disrepute by undermining one of the most important foundations of an ordered and civilised society, respect for, and obedience to, the law. I would have considered sentencing Mr Melville to a term of imprisonment, without the option of a fine and without suspending it, but for

²⁸ Mahomed CJ in a speech published in (1998) 115 SALJ 111 at 112, as quoted in **Federation of Governing Bodies of South African Schools** id at 679C-E.

²⁹ **Department of Transport v Tasima (Pty) Limited** [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (Tasima I) at para 183.

*the fact that the applicant did not seek such a sentence in their notice of motion.*³⁰

[108] *This was in respect of a contemptuous respondent who ran a bar that caused a nuisance to the neighbouring residents, which nuisance persisted unabated contrary to an order requiring his desistance, resulting in contempt proceedings. I find myself confronted with a far more egregious factual matrix, coupled with the fact that Mr Zuma has failed to either contest his contempt or seek an opportunity to purge the contempt. This case cries out far louder for an unsuspended sentence than did Victoria Park Ratepayers' Association, where the Court was on the verge of granting one. Accordingly, I can see no reason why I should sit on any verge.*

[109] *In addition, it was said by Cameron JA in Fakie, that –*

“[civil contempt proceedings] permit a private litigant who has obtained a court order requiring an opponent to do or not do something (ad factum praestandum), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order.”³¹

It follows that a litigant is obviously entitled, in law, to approach a court seeking committal, even if committal is not the ordinary sanction. (my emphasis)

[110] *In any event, whether or not a litigant is entitled to approach a*

³⁰ *Victoria Park Ratepayers' Association* above n 25 at para 61.

³¹ *Fakie* above at para 7.

court seeking punitive relief has absolutely nothing to do with a court's competence to grant it.³² Indeed, Pheko II unequivocally held that a court can raise contempt mero motu (of its own accord).³³ In this context then, the process followed by the applicant says nothing about this Court's competence to make a purely punitive order of committal. In other words, nothing, including the process instituted by the applicant, could prevent this Court from determining the matter by exercising our right to raise the proceedings of our own volition.

Contempt order and imprisonment is not a competent relief

[20] Ms Olwagen-Meyer argued that a contempt order and imprisonment is not a competent relief in the event of non-compliance with money judgments; she relied on **Coetzee**.

[21] I had an opportunity of considering the judgment of **Coetzee** together arguments advanced by Mr Nowitz, as set out in paragraph 8 above.

[22] Having read **Coetzee**, I am wholeheartedly in agreement with Mr Nowitz's argument that this application is distinguishable to **Coetzee**. The fundamental difficulty at the heart of Ms Olwagen-Meyer's argument is precisely that.

[23] In **Coetzee**, the issues for determination, were:

“[6] Sections 65A to 65M of the Magistrates' Courts Act provide a system for the enforcement of judgment debts. Under the system a judgment debtor who has failed to satisfy the

³² Section 173 of the Constitution provides this Court with wide, inherent powers to protect and regulate its own process, taking into account the interests of justice.

³³ **Pheko II** above at para 2, where this Court said that “courts may, as is the position in this case, raise the issue of civil contempt of their own accord”.

judgment debt within 10 days of the date of the judgment can be required to attend a hearing at which an enquiry will be conducted by a magistrate into the financial position of the debtor, his ability to pay and his failure to do so. The magistrate may authorise property of or debts due to the judgment debtor to be attached in settlement of all or part of the debt, or the garnishing of emoluments which will accrue to the debtor from his or her employment. The debtor can also be ordered to pay the debt in full or in instalments. The system does not end there, however it also provides for the magistrate to issue an order to commit the judgment debtor to prison for contempt of court for failure to pay the debt. This last option of the magistrate is the issue which has given rise to the constitutional challenge.

...

[8] *... The system at issue is used most often for the collection of small debts usually of those who are poor and either illiterate or uninformed about the law or both. In the nature of things they do not enjoy legal representation. Imprisonment can and has been ordered without the debtor ever having notice of the original judgment or the notice to appear at the hearing. It can also be ordered without the uninformed or illiterate debtor having sufficient knowledge about the possibility of raising defences or the means of doing so. In the result, the provisions of the law can be used to imprison the debtor who is unwilling to pay his debt even though he has the means to do so, but can also be used (and they are indeed used) to imprison the debtor who simply is unable to pay the debt.”*

[24] A side by side comparison of the factual matrix of **Coetzee** together with the relief sought, is totally different to the facts and issues to be

determined in this application. By way of an example, this application has nothing to do with a collection of small debts usually of those who are poor and either illiterate or uninformed about law or both. Neither is imprisonment sought without the debtor ever having notice of the original judgment or the notice to appear at the hearing.

- [25] If a default position, is that the plaintiff should follow the normal route of money judgments debt recovery against the defendant and have a warrant of execution issued to attach assets, as set out in para [13] - not to institute contempt proceedings, what immediately springs to mind is to ask a rhetorical question, which is based on the material involved to the overall determination of contempt proceedings, viz, will this Court still retain its jurisdiction to deal with the contemptuous parties, if the basis for the contempt application relates only to money judgement/judgement debt or will its jurisdiction be ousted, in favour of a default position? - even in circumstances where the wanton disregard of the law is demonstrably evident and has been established? I venture to contend otherwise and hold that such case would be self-defeating.
- [26] Even if I am wrong that the defendant is entitled to rely on **Coetzee**, I have altogether less confidence that the proposition contended for on behalf of the defendant can hold good, formulated in a manner that it is at odds with the constitutional imperatives underlying Rule 43. I rather err on the side of constitutional compliance.
- [27] At best for the defendant, is an argument that generally speaking, punishment by way of fine or imprisonment for civil contempt of an order made in civil proceedings, is only imposed where it is inherent in the order made that compliance with it can be enforced only by means of such punishment³⁴ - not to contend that a contempt order and imprisonment is totally not competent relief in this application.

³⁴ *Cape Times Ltd v Union Trades Directorate (Pty) Ltd* 1956 (1) SA 105 (N) at 120D-E

[28] In any event, the claim for a contribution towards costs in a matrimonial suit is *sui generis*: an incident of the duty of support which spouses owe to each other³⁵ and –

*“The purpose of the remedy has consistently been recognised as being to enable a party in the principal litigation who is comparatively financially disadvantaged in relation to the other side to adequately place his or her case before Court.”*³⁶

[29] Rule 43 now regulates the procedure to be followed where a contribution to costs is sought, and is intended to provide for inexpensive and expeditious interim relief.³⁷

[30] The issues dealt with in **Coetzee**, pertaining to judgment debts do not fit easily with matrimonial matters and the policy imperatives underlying Rule 43.

The appropriateness of a cohesive order

[31] It is trite that an applicant who alleges contempt of Court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order.³⁸ Once these elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt.³⁹ A perusal of “**FA4**” and “**FA5**” demonstrate unequivocally that (a) an order was against the defendant; (b) the

³⁵ **Chamani and Chamani** 1979 (4) SA 804 (W) at 806F-H; **Van Rippen v Rippen** 1949 (4) SA 634 (C)

³⁶ **AG v LG** (WCC) 9207/2020, para 17

³⁷ **S v S** 2019 (6) SA 1 (CC)

³⁸ See **Phoko II** above at para 32; **Fakie** above at para 22; and **Consolidated Fish** above at 522E-H, which affirms **Southey v Southey** 1907 EDC 133 at 137.

defendant was served with the order and had knowledge of it and (c) the defendant failed to comply therewith. Besides, the defendant does not contend otherwise. Therefore, inevitably, willingness and *mala fides* are presumed.

[32] The issues raised in paragraph “**FA6**”, ought to have been a “*light bulb moment*”, for the defendant, warranting sufficient particularity being furnished. To me, a failure to deal issuably with those concerns is fatal to the evidentiary burden imposed on the defendant to establish a reasonable doubt – a lack of willingness and *bona fides*.

[33] A further significant lacuna in the defendant’s argument is his failure to provide any timeframes or (undertaking) within which he can purge his contempt. It was simply contended for on behalf of the defendant that, he is not only able to do so, but I was not proffered with no guarantee, that he will ever be able to purge his contempt. That was probably because precisely that outcome was foreseeable. By referring to R3.8 million from a pension fund held in trust as a means by the defendant to purge his contempt, such cannot stand on at least four grounds namely:

[33.1] It is hotly debated as to whether what is left thereof, belongs only to the defendant – “*He reneged on his undertaking (given in a letter dated 15 November 2016, namely, Annexure “FA2” hereto), not to touch the remaining 50% of the pension fund, pending the outcome of the trial action. He contended in Annexure “FA2” hereto that he could do what he wanted in terms of his 50% thereof. The clear implication thereof is that the other 50% would be preserved, potentially for my benefit, pending the final calculation of the accrual. It was his subsequent attempt to withdraw the remaining 50% which*

³⁹ **Fakie** id at paras 41-2 and endorsed by this Court in **Pheko II** id at para 36. Additionally, in **Uncedo Taxi Service Association v Maninjwa** 1998 (3) SA 417 (E) (Maninjwa) at 425C-G and 428A-C, it was held that the fundamental right to a fair criminal trial guaranteed by section 35(3) of the Constitution requires that, in order for an applicant in contempt proceedings to succeed, he or she must prove the elements of the offence beyond reasonable doubt. This principle was cited in **Victoria Park Ratepayers’ Association** above at para 17.

prompted the launching of my successful second urgent application and the granting of the order constituting Annexure "FA1" hereto."⁴⁰

- [33.2] There are allegations of dissipation of the defendant's pension fund which constitutes the major asset in the accrual (from R12 million to R3.8 million).
- [33.3] What amount in respect of the accrual, if any, should be paid to either the plaintiff or the defendant?⁴¹
- [33.4] That the defendant withdrew in excess of 50% of the pension fund.⁴²
- [34] It is in the first instance highly improbable that, bearing in mind the extremely remiss in the manner in which the defendant conducted all the litigation pertaining to this matter, as aforesaid, and the intractable conflicting relationship between the parties coupled with ongoing conflict, dating as far back as 2014, that any material difference would be achieved in ensuring that the defendant purges his contempt, in any other way, if not by a cohesive order. The best indicator for future conduct is past conduct.⁴³
- [35] However, in **S v Nel 1991 (1) SA 730 (A) at 733A-E**, the Court noted that a person convicted of contempt is not an "ordinary criminal in the everyday meaning of the word and he ought not to be treated as such". The purpose of considering meting out punishment in these cases—

⁴⁰ CaseLines, 010-6 to 010-7, para 8

⁴¹ CaseLines, 015-9

⁴² CaseLines, 015-22

⁴³ **MH v OT** 2023 (3) SA 159 at 170, para 51

“is to enforce the court’s authority . . . The extent of the punishment stays in the background; in the foreground is the esteem and authority of the court . . . The authority of the court is too precious to attempt to measure it against any punishment for any conduct which harms it. Esteem for the court cannot be achieved by heavier punishments for insults to the court.”

[36] The plaintiff had asked me to impose a sentence of 60 calendar days imprisonment, to be suspended, should I find in its favour. Even if I am of the view that the defendant’s conduct is reprehensible and his alleged impecuniosity is ventilated by bald allegations without any corroborating substantiation, the enquiry that I have to make in considering the plaintiff’s proposition, is fact specific and there are no general guidelines or principles. I have considered the fact that the defendant is quadriplegic, not an ordinary criminal in the everyday meaning of the word and he ought not to be treated as such. The sentence called for would not only be disproportionate, but will also not be commensurate with the offence committed. I venture to locate exceptionality in the defendant’s benefit. A period of thirty calendar days is appropriate.

[37] In these circumstances, the sustainable and cognisable rationale for the order sought is established by the plaintiff.

Postponement

[38] I did not see from the papers, or heard an argument being advanced that the amount sought by the plaintiff is unreasonable. In any event, the learned acting Judge, pronounced in paragraph 20 of his judgment,⁴⁴ the guiding principles applicable in considering claims for a contribution towards legal costs, as formulated in ***Van Rippen***⁴⁵ that *inter alia*:

⁴⁴ CaseLines, 028-5

⁴⁵ Ibid at page 639

“In the exercise of that discretion the Court should, I think have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties and in particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the Court. In any assessment the question of essential disbursements must necessarily be a very material factor. Equally it seems to me that it is inevitable in the procedure that the solicitor acting for the wife must run some potential risk, to this extent that he is not fully secured in advance; he has not, in the usual phrase, full cover for his fees. That appears to me unfortunate, but also to be inevitable.”

[39] My learned brother, made a full analysis of the defendant’s finances and made a finding that the defendant could afford the payment of R711 337,63 forthwith.

[40] It bears emphasis that Rule 43 proceedings should be considered through the lens of the Constitution and its concomitant imperatives.

“[93] For one, Davis AJ in AF v MF rejected the notion that a spouse is prohibited from claiming a lumpsum contribution to costs already incurred, expressly stating that like Donen AJ, I believe that constitutional imperatives support this conclusion. It was because of the constitutional right to equality and access to justice that Davis AJ held as a matter of principle, that a Court is entitled to take into account the legal costs already incurred, including that incurred to fund legal costs, in the assessment of an appropriate contribution to the costs in terms of Rule 43. Davis AJ in fact correctly noted that the contrary position would ignore the reality faced by spouses, more often women, who have to incur debt in order to meet legal costs. This is another significant aspect of the judgment because, as outlined above,

it is incontrovertible that women are often forced to enter debt in order to meet legal costs.”

[41] A different approach was adopted in the Western Cape Division to the question of whether past legal costs could be allowed in terms of Rule 43. In *Cary v Cary* Donen AJ carefully considered the authorities and the constitutional imperatives involved. He observed at the outset that he was obliged to exercise his discretion under Rule 43 in the light of the fundamental right to equality and equal protection before the law. He reasoned that there should be “*equality of arms*” in order for a divorce trial to be fair, and came to the conclusion that:

“... applicant is entitled to a contribution towards the costs which would ensure equality of arms in the divorce action against her husband. The applicant would not be able to present her case fairly unless she is empowered to investigate respondent’s financial affairs through the forensic accountant appointed by her. That is applicant will not enjoy equal protection unless she is equally empowered with ‘the sinews of war’. The question of protecting applicant’s right to and respect for and protection of her dignity also arises in the present situation, where a wife has to approach her husband for the means to divorce him. I therefore regard myself as being constitutionally bound to err on the side of the ‘paramount consideration that she should be enabled adequately to place her case before the Court’. The papers before me indicate that respondent can afford to pay the amount claimed and that he will not be prejudiced in the conduct of his own case should he be ordered to do so”.⁴⁶

[42] Based on the aforesaid authorities, it permits of little doubt that the plaintiff cannot be expected to proceed to trial in the absence of her attorneys being put in funds. Ultimately, the overriding principle is that

⁴⁶ *Cary v Cary* 1999 (3) SA 615 (C)

the applicant must be enabled adequately to place her case before the Court.

[43] Without her legal representatives, the plaintiff would not be able to adequately place her case before the Court, whilst on the other hand, the defendant had been rigorously defended. The sole allegation advanced by the defendant in opposing the postponement application, is that this application was brought a few days before trial, thereby the plaintiff orchestrated a postponement. With respect, this allegation pales into insignificance, when compared with the compelling nature of the merits of this application.

[44] As far back as 7 February 2018, in terms of Annexure “**FA3**”⁴⁷ as well as 7 December 2017 (pre-trial conference)⁴⁸ the issue of a contribution towards the plaintiff’s legal costs for trial had been raised. In the latter instance, it was raised in the following manner, viz, what amount is defendant prepared to contribute towards the plaintiff’s legal costs for trial to which the defendant responded as follows:

“The defendant undertook to revert by no later than ___ in regard to the aforesaid enquiries.”

[45] Notwithstanding the tender that was made by the defendant, he demurred when called upon to do so. To make matters worse, to date, the defendant has not contributed even a single cent notwithstanding such a call being made as far back as 2018 – *when he was able to do*.

[46] What adds weight to the scale in favour of the plaintiff is the fact that it is not disputed by the defendant that the plaintiff is entitled to such contribution.

⁴⁷ CaseLines, 010-21

⁴⁸ CaseLines, 015-13

COSTS

[47] As it was put by the Constitutional Court in **Public Protector v South African Reserve Bank**:

“...The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. As explained by this Court in Eskom, the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left “out of pocket” in respect of expenses incurred by them in the litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.

The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.

More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.”⁴⁹

[48] I have already found the defendant’s conduct in conducting the entire

⁴⁹ **Public Protector v South African Reserve Bank** [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) paras 221-223.

litigation to be reprehensible. Therefore, it will be unfair to expect the plaintiff to bear any costs occasioned by such conduct.

CONCLUSION

[49] In all the circumstances, and in the light of the reasons aforestated, I consider it appropriate to make an order in the following terms:

1. Condoning the plaintiff's non-compliance with the Rules of this Honourable Court insofar as same may be necessary and directing that this application is urgent;
2. Declaring that the defendant is in contempt of the order handed down in this Honourable Court by my learned Acting Judge Thupaatlase on 9 November 2023;
3. Directing that the defendant be found guilty of contempt and that the defendant be imprisoned for a period of 30 (thirty) calendar days, on conditions that the facilities to cater for his condition, being a quadriplegic, are available in Gauteng.
4. Directing that the period of imprisonment be suspended for a period of 120 (one hundred and twenty days), subject to compliance by the defendant with the order of 9 November 2023.
5. Postponing the trial *sine die*.
6. Granting the plaintiff leave to apply for a striking out of the defendant's plea and counterclaim on the papers duly supplemented, in the event of the defendant failing to comply with the orders referred to in 2, 3 and 4 above.

7. Granting the parties leave to approach the Deputy Judge President for a preferential date, upon the defendant's purging his contempt.
8. Directing that the costs of this application and the wasted costs occasioned by a postponement to be paid by the defendant on a scale as between attorney and client.

M J GUMBI

*Acting Judge of the High Court of South Africa
Gauteng Local Division Johannesburg*

Delivered: 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 on 23 November 2023.

HEARD ON:	20 November 2023
DATE OF JUDGMENT:	23 November 2023
FOR PLAINTIFF:	Adv M Nowitz
INSTRUCTED BY:	Hirschowitz Flionis Attorneys
FOR DEFENDANT:	Adv G Olwagen-Meyer
INSTRUCTED BY:	Cummings Attorneys