



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

CASE NO: 2022-058855

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
[Date] 30 March 2023

.....

In the matter between:

S

Applicant

and

H

First Respondent

**THE STATION COMMANDER:
SOUTH AFRICAN POLICE (SOPHIATOWN)**

Second Respondent

NATIONAL COMMISSIONER OF POLICE

Third Respondent

**DETECTIVE SERGEANT TAKALANI KGOLE:
SOUTH AFRICAN POLICE (SOPHIATOWN)**

Fourth Respondent

**WARRANT OFFICER NYAMBE:
SOUTH AFRICAN POLICE (SOPHIATOWN)**

Fifth Respondent

JUDGMENT

MITCHELL AJ

[1] The applicant wife and the first respondent husband are married to one another. Three children, who are all minors, were born of their marriage. They have been involved in ongoing acrimonious divorce and ancillary litigation since 2020. This application is the next chapter in a series of legal proceedings in their drawn out divorce.

[2] Where reference is made in this judgment to “the respondent”, this is a reference to the first respondent and where reference is made to “the parties” this is a reference to the applicant and the first respondent collectively.

The relief sought and issues to be determined

[3] During December 2022 the applicant brought an application under the above case number for wide-ranging and varied relief. The relief was sought in two parts, in summary, as follows:

- 3.1 in part A, the applicant sought as a matter of urgency a declaratory order declaring that the respondent was in contempt of two court orders and imposing a period of imprisonment upon him. In addition, she sought interdictory relief against the second, fourth and fifth respondents;
- 3.2 in part B, the applicant sought an order declaring that the respondent was a vexatious litigant and suspending wholly

the respondent's contact rights with the parties' minor children pending the determination of a Rule 43(6) application to be launched by her.

[4] The application for relief in terms of part A of the applicant's notice of motion came before Dlamini J on this court's urgent roll on 20 December 2022. Dlamini J did not decide the merits of the application. He granted an order, *inter alia*, directing the applicant to ensure that the application, including the relief sought in both part A and part B of the notice of motion, be enrolled for hearing in the Family Court on 24 January 2023.

[5] The application came before me on this court's ordinary Family Court roll in terms of Dlamini J's order, not as an urgent application. As a result of the application being enrolled on expedited time periods in terms of Dlamini J's order, strict compliance with this Court's Practice Directives for the enrolment of opposed motions was not possible.

[6] The order of Dlamini J was granted in terms of a draft order which was prepared and uploaded onto CaseLines by the applicant's attorneys. In supplementary heads of argument, the respondent's counsel submitted that the applicant had abandoned her relief claimed in part A of her notice of motion for declaratory relief declaring that the respondent was in contempt of orders of this court.

[7] Mr Dollie who appeared for the applicant, disputed that the applicant had abandoned her relief in part A against the respondent. It is clear from the wording of the order granted by Dlamini J that the applicant persisted with the relief in part A of the notice of motion. There is no other evidence before me that she abandoned this relief and the record of proceedings before Dlamini J on 20 December 2022 were not placed before me. Accordingly, in the absence of any evidence that

the order of Dlamini J was made in error or wrongly granted the order stands.

[8] On 18 January 2023, almost a month after the order of Dlamini J and a few days before the application was heard, the applicant delivered her replying affidavit. Simultaneously, she delivered a notice of withdrawal withdrawing the relief claimed in part A of her notice of motion against the second, third, fourth and fifth respondents.

[9] In her replying affidavit, the applicant said that she would seek a postponement of the relief sought by her in part B of her notice of motion. During argument, Mr Dollie sought leave to withdraw the relief claimed in part B of her notice of motion. With the consent of the respondent, leave was granted to the applicant to withdraw the relief that she had claimed in part B of her notice of motion insofar as same was necessary.

The only issue that remained in respect of part B was the issue of costs.

[10] Consequent upon the applicant withdrawing the relief claimed against the second to fifth respondents in part A of her notice of motion and her withdrawal of the relief claimed by her in part B of her notice of motion, the nature and extent of the relief claimed by the applicant before me was considerably narrowed. The issues that I was called upon to determine were (i) whether the respondent was in contempt of the orders of this court, which I refer to below, and (ii) the issue of costs.

[11] The relevant portion of the applicant's notice of motion in respect of the declaratory order that she sought declaring the respondent to be in contempt of court, reads as follows:

"PART A:

2. *The first respondent be declared to be in contempt of:*
 - 2.1 *the Victor J Order under case number 44450/2020 ('the Victor J order');*
 - 2.2 *the Vally J Order under case number 51556/2022 ('the Vally J order');*
- 3 *The third respondent is to arrest and detain the first respondent, who shall thereafter be incarcerated by the Department of Correctional Services for a period of 60 days as from the date of this order, 30 days of which are to be suspended upon the first respondent's compliance with paragraph 14, and 16 of the Victor J order as read together with the Vally J order, by making payment to the applicant in the aggregate sum of R1 157 000.00 (One Million One Hundred and Fifty-Seven Thousand Rand) within 2 (two) days of the date of this Order;*

..."

The application before Victor J

[12] The application before Victor J was an application in terms of the provisions of Uniform Rule of Court 43. In terms of the order of Victor J, the respondent was ordered *pendente lite* to pay a monthly cash amount of maintenance in respect of the applicant and the minor children, and in addition to pay certain expenses referred to as "*direct expenses*" for the benefit of the applicant and the minor children. The relevant portion of the order reads as follows:

"...

Interim Maintenance

14. *The respondent shall pay interim maintenance at the rate of R104 000,00 per month payable on the last day of each month with effect from 1 September 2022 meaning payment of the said amount commences on 30 September 2022 and the last day of the month thereafter into an account nominated by the applicant.*

Direct expenses

15. *The respondent must pay the following direct expenses for the children:*

- (a) Utilities of the home occupied by the children currently at 16 Joseph Avenue, Northcliffe which shall include rates, water, lights and gas;*
- (b) a motor vehicle which is safe and in reasonable condition to transport the children, including its maintenance and services;*
- (c) R5 000.00 per month towards the children's holidays with the applicant whether local or international;*
- (d) School fees, school uniforms and books;*
- (e) School outings and camps;*
- (f) Tuition fees for extra lessons;*
- (g) Sports clothing equipment;*

- (h) *Continue to keep only the children on his medical aid and pay those premiums;*
- (i) *all reasonable medical excess expenses of the children not covered by the medical aid;*
- (j) *all necessary therapies for the children."*

The respondent's breaches of the order of Victor J

[13] In her founding affidavit, the applicant said that it was "*common cause*" that the respondent had failed to comply with "*the maintenance orders*" and further said that, "*I also mention that the first respondent has not complied with his maintenance obligations as ordered by Victor J for the months September to November 2022. He currently stands in maintenance arrears of R327 000.00*".

[14] Mr Dollie informed me from the Bar that the amount of R327 000.00 referred to in the applicant's founding affidavit consisted of the amounts referred to in paragraphs 14 and 15 (c) of the Victor J order for the three month period September - November 2022, i.e. his alleged failure to make payment to the applicant of interim maintenance at the rate of R104 000.00 per month + R5 000.00 per month towards the children's holidays [R104 000.00 + R5 000.00 = R109 000.00 x 3 = R327 000.00].

[15] Paragraph 3 of the applicant's notice of motion refers to an aggregate sum of R1 157 000.00 claimed by the respondent in terms of the order of Victor J. This amount minus the legal costs contribution of R830 000.00 (which Mr Dollie informed me no longer forms part of the applicant's complaint) equals the amount

of R327 000.00 referred to in the applicant's founding affidavit. In her replying affidavit the applicant said the following:-

"...

12. *The contempt relief was premised upon the Respondent's failure to make the monthly maintenance payments as also his failure to make payment of the legal costs contribution.*
13. *The legal costs contribution has now been resolved in that the sheriff, pursuant to the respondent's averments made in the answering affidavit, released payment to my attorneys. Accordingly, the only issue which is now of concern is that which relates to the monthly maintenance amounts."*

[16] On 23 February 2022, the applicant delivered a revised draft order by uploading same to CaseLines. In the revised draft order she claimed payment of the sum of R436 000.00. Mr Dollie informed me from the Bar that the additional amount of R109 000.00 represented the sum of R104 000.00 + R5 000.00 in respect of paragraph 15 (c) of the order of Victor J for the month of December 2022 which amount the respondent had allegedly failed to pay after the application was brought.

[17] In her replying affidavit, the applicant said that the respondent had not paid maintenance for the months of December 2022 and January 2023 in accordance with the order of Victor J. These amounts arose after the application was launched and after the respondent had delivered his answering affidavit. The applicant is, however, confined to the relief claimed in her notice of motion and to the case made out by her in the founding affidavit. I accordingly for the purposes of this judgment have disregarded

any alleged breaches of the order of Victor J that occurred after the application was launched.

Proceedings following the Victor J order

[18] On 30 September 2022, the respondent (as applicant) launched a two part application. In the first part he sought interim relief to suspend payment of the money orders contained in the order of Victor J in terms of Uniform Rule of Court 45A. In the second part of the application he sought final relief to set aside the order of Victor J, alternatively to declare the order of Victor J to be void *ab initio* (“the suspension application”).

[19] On 4 October 2022, the first part of the suspension application came before Makume J. The applicant (the respondent in the suspension application) furnished an undertaking that she would not execute upon the Victor J order until 25 October 2022. The undertaking is reflected in the order granted by Makume J on 4 October 2022, which order was granted by agreement between the parties. The relevant portions of the order of Makume J read as follows:

“1. The respondent undertakes not to execute the warrant/s of execution obtained by the (sic) her pursuant to the order made by Victor J on 12 September 2022 under the above case number, until 25 October 2022. It is recorded that the respondent does not waive or abandon any of her rights to contend that the applicant did not make out a case for the

relief sought in Parts A and/or B of the application or that the application is not urgent.

2. The applicant shall not persist with seeking any relief as set out in Part A of the application.

...

5. *The applicant shall ensure that the application is enrolled for hearing in the Urgent Family Court for 25 October 2022.*"

[20] Part B of the suspension application to set aside the order of Victor J, alternatively for declaratory relief declaring that the order was void *ab initio* was enrolled for hearing in the urgent Family Court on 25 October 2022. The application came before Wright J who struck the application from the roll for lack of urgency. This was an event, i.e. the striking of the application from the roll, which neither the applicant nor the respondent appeared to have contemplated when the Order, granted by agreement, was made by Makume J.

[21] Following the expiry of the applicant's undertaking not to execute upon the Victor J order, the respondent launched a further Rule 45A application ("the second Rule 45A application") on 30 October 2022 to suspend payment of the money orders contained in paragraphs 14 and 16 of the order of Victor J pending finalisation of part B of the suspension application. The respondent states that subsequent to the institution of the second Rule 45A application the applicant urged him not to enrol the application on an urgent basis and furnished an undertaking to him that, "*the sheriff would not be instructed to remove, only to attach*". The applicant failed to deal with this undertaking either in her founding affidavit or in her reply.

The application before Vally J

[22] On 25 November 2022, the respondent (as applicant) brought an urgent application in which he sought an order *inter alia* to enforce his contact rights to the children. The application was enrolled before Vally J on 7 December 2022. The respondent contended before Vally J that the Victor J order was valid. The applicant alleged in her founding

affidavit in the present application that this was a “*volte-face*” by the respondent who, until then, had contended that the Victor J order was invalid. She alleged in her founding affidavit that “*The contempt relief reared its head on 7 December 2022 when the first respondent conceded the validity of the Victor J order. Prior thereto, although he was in breach, he contended for its invalidity thus scuppering my ability to institute contempt proceedings sooner. Had I done so sooner, I would have been met with a defence of invalidity*”.

[23] Mr Dollie argued that the respondent had, on the one hand, selectively sought to uphold the Victor J order as valid in relation to his contact rights whereas on the other hand, he had sought to contend that it was invalid and unenforceable and had persisted in part B of his suspension application to set aside the order of Victor J alternatively to declare it void *ab initio*.

[24] The respondent does not dispute before me that the order of Victor J remains valid and enforceable until it is set aside. This is in accordance with the judgment of the Constitutional Court in **Department of Transport and Others v. Tasima (Pty) Ltd** (CCT5/16) [2016] ZA CC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622(CC).

[25] On 7 December 2022, Vally J granted an order, the relevant portions of which read as follows:

“2. *The Parties are to comply with the Victor J order of 14 September 2022 under case no. 44450/20.*

3. *The Applicant is alerted to the fact that should he fail to comply with the order referred to in 2 above, he is at peril of being held in contempt of court.”*

[26] The application before Vally J was one brought by the respondent to enforce his rights of contact as provided in the order of Victor J. There is nothing before me to indicate that Vally J was called upon to make any findings in relation to the maintenance orders of Victor J. Given the nature of the relief sought by the respondent before Vally J and the absence of any reasons for the order granted, it is difficult to understand what was meant by paragraph 3 of the order of Vally J or what was meant by paragraph 2 of his order. What is clear is that Vally J did not make a finding that the respondent before me was in breach of the order of Victor J. Furthermore the Victor J order was valid until set aside and paragraph 2 of the order of Vally J did not change the legal position in regard to that order.

[27] In the context of what I set out below no case is made out by the applicant which persuades me that the respondent was in breach of the order of Vally J.

The dismissal of the suspension application

[28] On 17 December 2022, Madau J handed down his order and judgment in the suspension application and dismissed the suspension application. It is common cause that after the order of Madau J, the sheriff released payment of the sum of R830 000.00 to the applicant's attorneys in satisfaction of the order of Victor J in regard to the order made for a contribution towards the applicant's costs. It was on account of this payment that Mr Dollie informed me from the Bar during argument that the respondent's alleged contempt in respect of the contribution to costs had been "*cured*".

[29] Thereafter the respondent brought an application for leave to appeal the order of Madau J, which application for leave to appeal was still pending at the time that the present application was argued.

The jurisdictional requirements for proving contempt

[30] The onus rests on the applicant to prove the requisites of contempt, namely the existence of the order; service of the order or notice of the order on the respondent; non-compliance with the order on the part of the respondent; and wilfulness and *mala fides* beyond reasonable doubt¹.

[31] Once the applicant has proved the order, service or notice and noncompliance the respondent bears an evidential burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether noncompliance was wilful and *mala fide* contempt will have been established beyond reasonable doubt².

[32] Disobedience of a Court order constitutes contempt if committed deliberately (wilfully) and in bad faith³.

1 ***Fakie N.O. v. CCI Systems (Pty) Ltd***, 2006 (4) SA 326 (SCA), at para [53]

2 ***Fakie***, *supra*, at para [53]

3 ***Fakie***, *supra*, at paras [9]-[10]:-

"[9] The test for when disobedience of a civil order constitutes contempt has come

The applicant's submissions

[33] The applicant submitted that she has discharged the onus of proving the requisites of contempt (an order; service or notice; and noncompliance). Mr Dollie submitted that the narrow issue upon which the court was required to decide is whether the respondent's non-compliance was wilful and *mala fide*.

[34] The applicant submitted that the respondent had failed to discharge the evidentiary burden in relation to wilfulness and *mala fides* as he had failed to set out his financial position in his answering

affidavit. She contended that he was a man of significant financial means and had the wherewithal to satisfy the order of Victor J. She pointed *inter alia* to the fact that he had paid his former attorney R1 million and did not set out how he allegedly obtained a loan to pay the sum of R830 000.00, failed to set out what the terms of the loan were and did not deny travelling to the United Arab Emirates and Knysna or buying a boat in December 2022.

[35] Furthermore the applicant stated that the respondent had not been forthright or honest in regard to his finances and had not annexed a single bank statement, credit card statement, list of assets and liabilities to demonstrate his financial position. For this reason she contended that

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 the 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 definition of the crime, of which non-compliance with civil orders is a broad manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

the respondent had not discharged the evidentiary burden that rested on him to show that there was reasonable doubt that his failure to pay was not wilful and *mala fide*.

The respondent's submissions

[36] The respondent denied that he was in contempt of the order of Victor J. He said that he had placed himself in debt to pay legal costs and the costs contribution as ordered by Victor J and was

placing himself in debt to pay maintenance. He gave bald denials of the allegations against him in regard to his financial means and failed to respond in detail to them. He admitted that he had “*access to luxury as a result of my position*”.

[37] The respondent’s failure to adduce satisfactory evidence in regard to his financial position and his ability to pay is not, however, determinative of the issue as to whether there exists reasonable doubt that he wilfully and *mala fide* breached the order of Victor J.

[38] The respondent raised two further grounds of defence to demonstrate that he was not in wilful and *mala fide* breach of the order of Victor J. Firstly, he relies on the undertaking given by the applicant’s attorney (and not disputed by the applicant) that after he launched the second Rule 45A application the sheriff would not be instructed to remove any attached goods to satisfy the order of Victor J. Secondly, the respondent states that the applicant attached the respondent’s motor vehicle, having a value of not less than R400 000.00 which attachment he contends constituted satisfaction of the order of Victor J.

[39] In relation to the attachment the respondent placed reliance on a letter dated 9 December 2022 addressed by his attorney to the applicant’s attorney. The relevant portion of this letter is quoted by the respondent in his answering affidavit and reads as follows:

“ ...

17. *The sheriff has in respect of the outstanding maintenance if calculated as per the Victor order already attached an asset conservatively valued at R400 000.00 and which it is our understanding you may remove any day.*”

[40] The respondent further said in his answering affidavit that:

“95.16 On 22 November 2022 the Sheriff executed a further writ and attached a vehicle whose value is at a minimum R400 000.00 in respect of the maintenance money order. I annex this notice of attachment hereto marked “MA27”.

...

96. ... The fact that the suspension application has now been dismissed does not alter the fact that the R830 000.00 was paid into the Sheriff’s trust and the Sheriff had attached a motor vehicle to the tune of R400 000.00. I am not in contempt and will take steps to engage with the Sheriff in both instances.”

[41] The notice of attachment in execution in respect of the vehicle was annexed to the respondent’s affidavit. It is dated 24 November 2022 and bears the same case number as the Victor J order. Under the heading ‘INVENTORY’ appear the letters and numbers “1 x BMW ES 750 REG BD62VGGP COLOUR BLACK”.

[42] Also attached to the answering affidavit was a writ of execution issued by the Registrar of this Court on 22 November 2022 bearing the same case number as the Victor J order and that appearing in the sheriff’s notice of attachment in execution.

[43] The writ of execution is addressed to the sheriff and contains the following instructions:

“You are hereby directed to attach and take into execution the movable goods of the aboevmetnioned (sic) execution Debtor at 172A

*FREDERICK DRIVE, NORTHCLIFF, or wherever same may be found and of the same to cause to be realised by public auction the sum of **R218 000.00 (Two Hundred and Eighteen Thousand Rand** together with your costs which the above-named Execution Creditor recovered in terms of a Rule 43 Court Order on **12 September 2022** which amount is in respect of outstanding maintenance for the period September 2022 to October 2022 and which amount became due, owing and payable on 31 October 2022 and and (sic) also other costs and charges of the Execution Creditor in the said cause to be hereafter taxed according to law, besides all your costs thereby incurred.*

Further pay to the abovementioned Execution Creditor's attorney the sum or sums due to them with costs as abovementioned, and for your so doing this shall be your warrant.

And return you this writ with what you have done thereupon."

[44] Absent from the applicant's founding affidavit and replying affidavit is any reference to the attachment executed by the sheriff, Johannesburg North of a motor vehicle, valued by the sheriff in the sum of R400 000.00.

[45] Accordingly, there is no dispute on the affidavits before me that the applicant had caused a writ of execution to be issued in respect of amounts payable for maintenance in terms of the order of Victor J and that the vehicle attached had a value of not less than R400 000.00, being an amount in excess of the sum of R327 000.00 referred to in the applicant's founding affidavit as the amount owing in terms of the maintenance orders made by Victor J. It is also not disputed by the applicant that the applicant had undertaken not to remove the attached vehicle until the determination of the suspension application.

- [46] During argument, Mr Dollie informed me that he could not address me on the issue of the attachment of the motor vehicle as it had not been dealt with (by the applicant) on the papers before me. He nevertheless submitted that maintenance orders are performance orders. He argued that the respondent could not contend that by virtue of the execution process, the court cannot find the respondent to be in contempt of the order of Victor J.
- [47] Advocate Jagga who appeared for the respondent, referred me during argument to the judgment in **TCM v. LRMM (HCCA/09/2921)** in support of his submission that a maintenance order (as defined in section 1 of the Maintenance Act, 99 of 1998 to include a Rule 43 order) shall be enforceable by, amongst others, execution against property as contemplated in section 27 of that Act. He argued that the attachment of the motor vehicle satisfied the outstanding monetary maintenance claims in terms of the order of Victor J.
- [48] There is no evidence before me that the attachment of the motor vehicle resulted in the applicant obtaining satisfaction of the order of Victor J in relation to maintenance for the months of September, October and November 2022. The respondent bore the evidentiary burden to show that it did. Absent evidence that the vehicle was sold by the sheriff by public auction, I cannot find that the attachment satisfied the order of Victor J. In **Mattoida Construction (S.A.) (Pty) Ltd v. Carbonari Construction (Pty) Ltd**, 1973 (3) SA 327 (N), the court held that mere execution falls short of satisfying a judgment debt. In that case, Henning J, as he then was, referred to the judgment in **Maharaj Brothers v. Pieterse Bros. Construction (Pty) Ltd and Another**, 1961 (2) SA 232 (N), where Caney J said, *'It appears to me that in either sense, execution means the obtaining of*

satisfaction of a judgment. A mere attachment of property in execution falls short of this ...”.

- [49] Accordingly, the respondent’s submission that the attachment of the motor vehicle constituted a satisfaction of the order of Victor J and “*puts paid to a complaint of non-compliance with the order*” is in my view incorrect.
- [50] Accepting as I do that the attachment of the motor vehicle did not satisfy the Victor J order as contended for by the respondent, this is not the end of the matter. The issue for determination remains whether the respondent has discharged the evidentiary onus that rests on him to show reasonable doubt that he acted *mala fides*.
- [51] Thus the critical issues that I am called upon to decide are (i) whether the respondent had a *bona fide* and genuine belief that the attachment of the motor vehicle amounted to a discharge of his obligations in terms of the Victor J order, and (ii) the effect of the undertaking given subsequent to the institution of the second Rule 45A application.
- [52] The applicant failed to address either issue in her founding affidavit or her reply. On the other hand the respondent contended that he believed that the attachment of the motor vehicle satisfied the order of Victor J. Furthermore, he stated that the undertaking given by the applicant not to execute on the order of Victor J until 25 October 2022 was to enable the parties “*to obtain a clarifying determination on the validity of the Victor J order*”. I accept that on the evidence before me the purpose of this undertaking was to prevent the applicant from obtaining satisfaction of her monetary claims in terms of the order of Victor J until 25 October 2022 when the suspension application was to be enrolled and presumably heard and determined. The effect of the

undertaking furnished by the applicant thereafter logically means that the applicant would not pursue satisfaction of her monetary claims until the final determination of the suspension application. This is the understanding of the respondent and it appears to me a reasonable conclusion to have drawn. The second undertaking given was merely an extension of the first undertaking given in the order of Makume J. However, the very purpose of the contempt application was to punish the respondent by imposing on him a prison sentence for his failure to pay the money amounts of the Victor J order and to suspend part of that sentence on condition that he paid.

[53] I cannot accept the submission made by Mr Dollie during argument that the applicant's undertaking not to execute must be distinguished from any other right that the applicant had in law which would include an application to bring contempt proceedings. He argued that the undertaking not to execute which is referred to in Makume J's order did not constitute an abandonment by the applicant of her right to bring contempt proceedings. There is no evidence from the applicant of what she intended. Having regard to the respondent's evidence, namely that he believed and understood that the second undertaking furnished by the applicant meant that the applicant would not seek satisfaction of the order of Victor J until the final determination of the suspension application, I am satisfied that the respondent has established reasonable doubt that he did not act *mala fides*.

[54] Accordingly I find that the applicant has failed to discharge beyond all reasonable doubt that the respondent has wilfully and *mala fide* failed to comply with the order of Victor J in respect of maintenance for the months of September, October and

November 2022. I accordingly dismiss part A of the applicant's application.

Reference by the applicant to exterior documents

[55] Rather than setting out her case in her affidavits as she ought to have done, the applicant sought to rely both in her founding affidavit and in her replying affidavit on documents and evidence not contained in the affidavits before me in this application. The respondent referred *inter alia* to the applications before Victor J, Madau J and Vally J.

[56] In her founding affidavit the applicant stated, *inter alia*, the following:

"There are, pending before this Honourable Court, other matters incidental to the proceedings referred to above. I do not detail the full history of the various issues that have arisen (sic) the first respondent and I that is the subject matter of other courts save insofar as is necessary to contextualise the present application.

However, I respectfully submit that it is necessary for this court to have regard to the content of affidavits in the various applications which will contextualise the basis upon which the application is premised. I am advised that my counsel will make reference to same at the hearing of this matter as the entirety of the various matters are already on Caselines"; and

"It is necessary for this court to have regard to the allegations I made concerning the extent of his wealth in the rule 43 papers before Victor J. All of the allegations therein are relevant"; and

"On 25 November 2022 the first respondent, as applicant, launched an urgent application before this honourable court

seeking to enforce his parental rights and responsibilities, and specifically seeking to enforce his contact during the December 2022 holiday. In this application, instituted under case number 51556/2022, the first respondent again contended that the Victor J order was invalid. I delivered an answering affidavit in opposition to the application. The papers in this matter must be considered by this court. The content of the founding, answering and replying affidavits are of relevance. Due to the urgency of this application, I do not quote the relevant paragraphs, but reliance will be placed thereon during argument. It provides context and the factual matrix of the two applications described above and the first respondent is invited to respond to those specific paragraphs, if he believes that anything further need be said, in addition to the averments he made in his answering and replying affidavits by virtue of the fact that he was dominus litis (sic) in those applications.”

[57] In her replying affidavit, the applicant stated that:

“The contempt relief is premised upon the previous orders and the averments made in those applications” and “The court is necessarily required to consider whether these papers are relevant.”

[58] In his answering affidavit, the respondent stated that the Rule 43 papers span in excess of 2000 pages and that some 800 pages constituted the application before Vally J.

[59] The applications that served before Victor J, Madau J and Vally J were not provided to me in this matter and I was not given access to them on CaseLines. It would nevertheless appear that the affidavits to which reference was to be made were voluminous. However, I was not referred to any specific portions of those

affidavits by the applicant and nor were the affidavits at any time placed before me.

[60] It is in any event an abuse by a litigant to refer to voluminous additional affidavits filed in other applications without reference to specific portions in the affidavits before me on which reliance will be placed. To expect a court to consider what appears to be a substantial amount of documents without any indication of the relevance or what portions are to be relied on is an invitation which I do not accept.

[61] On 26 January 2023, the respondent filed a notice of application to strike out portions of the applicant's replying affidavit by uploading same to CaseLines. In light of the order that I make, nothing turns on the striking out of portions of the applicant's replying affidavit.

Costs

[62] In respect of costs the applicant has withdrawn part B of her application. In respect of part A the applicant has been unsuccessful.

The applicant advanced no reasons why, if unsuccessful, costs should not follow the result.

[63] I accordingly grant an order in the following terms:

- 1 Part A of the application is dismissed;
- 2 The applicant is given leave to withdraw part B of her application;

- 3 The applicant is ordered to pay the costs of the respondent in respect of part A and part B of the application.

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by e-mail.

A MITCHELL

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Date of Hearing: 26 January 2023

Judgment Delivered: 30 March 2023

APPEARANCES

On Behalf of the Applicant: Attorney Shaheed Dollie

On Behalf of the Respondent: Adv N Jagga

Instructed By: Dylan Jagga