

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



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

CASE NO: 2021/44071

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

DATE
SIGNATURE

In the application by

K, F A E

and

K, M G

Applicant

Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Contempt of court – standard of proof – beyond reasonable doubt – three requirements namely (1) the existence of a court order, (2) that was served on or made known to the respondent, and (3) and that was then ignored or disobeyed by the respondent - in the absence of evidence raising a reasonable doubt as to whether the respondent acted wilfully and mala fide, all the requisites of the offence will have been established.

Order

[1] In this matter I make the following order:

1. *The late filing of the answering affidavit is condoned;*
2. *The respondent is declared to be in contempt of paragraph 3.3 read with paragraph 3.6 of the order made in terms of rule 43 of the Uniform Rules on 27 January 2022 (“the rule 43 order”);*
3.
 - 3.1. *The respondent is ordered to pay the amount of R472 080.00 to the applicant in respect of arrear maintenance due as at the end of March 2023 in terms of paragraphs 3.3 and 3.6 of the rule 43 order, within sixty days from the date of this order*
 - 3.2. *The respondent make payment of monthly maintenance due from 25 April 2023 onwards in terms of the rule 43 order;*
 - 3.3. *Nothing in this order amends the rule 43 order;*
4. *In the event that the applicant fails to comply with this order the applicant is granted leave to approach the Court on amplified papers and under the same case number for further relief;*

5. *The respondent is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for an order that the respondent be held in contempt of court of an order made by agreement and in terms of rule 43 of the Uniform Rules on 27 January 2022,¹.

[4] The criminal standard of proof, namely proof beyond reasonable doubt, applies.

The applicant must show -

4.1 that the respondent was served with or otherwise informed

4.2 of an existing court order granted against him,

4.3 and has either ignored or disobeyed it.²

[5] To avoid being convicted the respondent must establish a reasonable doubt as to whether his failure to comply was wilful and *mala fide*. In *Fakie NO v CCII Systems (Pty) Ltd*,³ Cameron J said:

¹ Caselines 019-1.

² *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 6 et seq. See also *Uncedo Taxi Service Association v Maninjwa* 1998 (3) SA 417 (ECD) 429 G – I, *Dezius v Dezius* 2006 (6) SA 395 (CPD), *Wilson v Wilson* [2009] ZAFSHC 2 para 10, and *AR v MN* [2020] ZAGPJHC 215.

³ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 23.

“[23] It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.”

[6] In the present matter it is common cause that the respondent was informed of the order that was granted with his consent. The issues in dispute are whether he disobeyed the order and if so, whether he acted wilfully and in bad faith. The onus is on the applicant to show that the respondent disobeyed the order and if that onus is discharged there arises an evidentiary burden on the respondent to show that his failure to comply was not wilful and in bad faith.

[7] Any failure to comply with an order of court undermines the Constitution of South Africa⁴ and can not be taken lightly.⁵

[8] The applicant seeks an order declaring the respondent to be in contempt of paragraphs 3 and 4 of the rule 43 order as well as an order that a retirement annuity of the respondent be attached and that the respondent be ordered to reinstate the medical scheme that was in place at the time of the rule 43 order. The applicant also seeks a punitive cost order against the respondent and a *de bonis propriis* cost order against the respondent's attorneys.

In limine

⁴ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) paras 46 to 67, and the authorities referred to.

⁵ See also *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T), *SH v GF* 2013 (6) SA 621 (SCA), *JC v DC* 2014 (2) SA 138 (WCC), and *Ndabeni v Municipal Manager: OR Tambo District Municipality (Hlazo) and another* [2021] JOL 49383 (SCA)

[9] In the replying affidavit the applicant raises three points *in limine*. The first point is that the answering affidavit was not properly commissioned. On the face of it the answering affidavit (incorrectly and confusingly identified as a replying affidavit) was deposited to in Richards Bay on 24 April 2023⁶ but it appears from the context that the respondent was in Denmark and the commissioner of oaths in South Africa.

[10] In *S v Munn*⁷ the Court held that compliance with the regulations governing the administering of oaths by commissioners of oaths was a matter of fact, not of law. The regulations are directory and not peremptory. I am satisfied when reading the affidavit as well as an affidavit⁸ in a rule 35(3) application deposited to at the same time that there was substantial compliance and that the affidavits were commissioned in South Africa. Authentication in terms of rule 63 of the Uniform Rules is not required. It is however advisable that a commissioner of oath commissioning an affidavit via video link make a statement to that effect when doing so, and that a copy of the video be retained for record purposes.

[11] In the Rule 35(3) application the attorney in Richards Bay deposited to an affidavit⁹ confirming that the affidavit was commissioned using a video link and the inference must be made that the answering affidavit was similarly dealt with by the same commissioner of oaths on the same day. When the commissioner observed the witness deposing to the affidavit she did so in South Africa. It was careless not to file a similar affidavit in the contempt application, but no more than that.

[12] The second point *in limine* is that the answering affidavit was filed out of time. Given that proceedings were stayed pending negotiations there is no substance in this point and no prejudice to the applicant. Condonation is granted.

[13] The third point *in limine* is not really a point *in limine* as it relates to the merits. It is argued that the respondent rely on changed circumstances but that he failed to bring a R43(6) application. I deal with this aspect elsewhere.

⁶ Caselines 036-21.

⁷ *S v Munn* 1973 (3) SA 734 (NC).

⁸ Caselines 038-7.

⁹ Caselines 038-27.

The maintenance payable

[14] Paragraph 3.3 of the order provides for maintenance for the applicant and the minor child of R42 000 per month. A simple calculation shows that the maintenance amount for the 2022 year was R504 000. Payments were due on the 25th day of each month. The founding affidavit¹⁰ was signed (it would seem as the date is not quite legible) on 13 February 2023 which means that the total amount payable by then, was twelve payments of R42 000, plus one payment of R45 360 for January 2023 as the order was subject to a 8% increase in January 2023.¹¹ The total then due was therefore R549 360.

[15] The answering affidavit¹² was deposed to on 24 April 2023. By then the payments for February and March 2023 (R90 720) had become payable and the amount of R549 360 had increased by R90 720 to R640 080.

15.1 On the applicant's version, the respondent had by then paid R168 000 in respect of payments due during January to April 2022.¹³ He made no payments after April 2022. The arrears therefore amounted to R472 080 as at the end of March 2023.

15.2 The respondent averred in his answering affidavit on 24 April 2023¹⁴ that since May 2022 he had paid a further R353 252.42 towards maintenance. These payments are at odds with what is stated in the founding affidavit yet no evidence¹⁵ is presented in the answering affidavit in support of the allegation. It is neither alleged that these were cash payments (unlikely as the respondent was in Denmark and the applicant in South Africa) nor that payments were made by cheque or electronic fund transfer or similar means. Such payments are easy to prove. The onus¹⁶ to prove these payments are on the respondent and he made no attempt to do so.¹⁷

¹⁰ Caselines 034-6.

¹¹ Para 3.6 of the order, Caselines 019-5.

¹² Caselines 036-3.

¹³ Para 6.8.5 of founding affidavit, Caselines 034-16 and 036-6.

¹⁴ Para 19.6.20.5 of answering affidavit, Caselines 036-16.

¹⁵ Compare *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162.

¹⁶ *Pillay v Krishna and Another* 1946 AD 946 at 951 to 954.

15.3 On the respondent's version he has paid a total of R521 252.42 of an indebtedness of R640 080, leaving a shortfall of R118 827.58.

15.4 There is therefore a shortfall on both parties' evidence.

[16] In terms of paragraph 3.3 of the court order payments must be made "*without deduction or set-off.*" The respondent however relies on deduction or set-off. He states that the applicant had transferred R2 855 000 from his account in March 2021 and then transferred R180 000 in January 2022. He states that he authorised the applicant to use this money towards any maintenance shortfall. The status of these funds is in dispute.¹⁸

[17] In the respondent's counterclaim dated 4 February 2022 in the pending divorce action, the averment¹⁹ is made that the applicant stole R2 700 000 from the respondent in March 2021. This amount is claimed in the counterclaim and is referred to in paragraph 31.1²⁰ of the answering affidavit in the Rule 43 application. The claim was therefore known to the court and the parties when the rule 43 order was granted, and can for this reason also not now be off-set against maintenance payments.

[18] On any possible version therefore the respondent has failed to make the required payments of maintenance. His reliance on set-off or deduction is without any foundation.

[19] The respondent also relies on a change of circumstances in that he has terminated his employment and has relocated to Denmark where he earns less than he previously earned in South Africa. He has not made use of the provisions of rule 43(6) to seek an amendment of the order on the basis of a material change in circumstances.

[20] The bald allegation that the respondent is earning less in Denmark than what he previously earned in South Africa is made without any evidence and is therefore without substance. No evidence is presented to compare his earnings and employment circumstances in Denmark to his earnings and circumstances in South Africa. His expenditure in Denmark compared to South Africa is also not dealt with. These bald

¹⁷ In annexure "EK9" to the founding affidavit at Caselines 034-58 reference is made to a schedule of payments that it was not relied upon in argument nor is it possible to interpret it.

¹⁸ Para 4.36 of replying affidavit, Caselines 037-19.

¹⁹ Para 7 of the plea, Caselines 001-37.

²⁰ Para 31.1 of Caselines 010-27.

allegations are therefore not sufficient to create a reasonable doubt as to whether the respondent acted wilfully and *mala fide*. In application proceedings the affidavits serve as pleadings and as evidence, and the failure to present evidence mean that the bald averments remain unsubstantiated.

[21] The respondent also refers to heart attacks that he suffered but these unfortunate events occurred during the period 2018 to 2021, before the rule 43 order was granted.

[22] I find that the respondent is in contempt of paragraphs 3.3 read with paragraph 3.6 of the order. He failed to make payments totalling R472 080 for the period until the end of March 2023. He remains liable for monthly payments of R45 360, payable on the 25th day of each month, for the period since April 2023. This amount will escalate in January 2024 in terms of paragraph 3.6 of the order.

The medical scheme cover

[23] In terms of the order the respondent was required to continue the medical scheme cover then in place or cover in terms of a “*similar medical*” scheme in respect of the minor child²¹ and the applicant.²² The respondent explains that he was a member of this scheme in his capacity as an employee and his entitlement to a subsidy from his employer ceased when he resigned. He then obtained a medical scheme affording similar cover at an affordable premium and enrolled the applicant and the minor child on this scheme. It provides 100% hospital cover, full cover for chronic medication and savings to be accessed when needed. The applicant is in any event liable for the medical expenses of the minor child and the applicant.

[24] I conclude that the respondent did not disobey the order in this regard and willfulness and bad faith do not arise. He is not in contempt of paragraphs 3.2 and 4.1 of the order.

²¹ Para 3.2 of order.

²² Para 4.1 of order.

An appropriate order

[25] Neither party addressed the question whether this court has jurisdiction to impose a sentence of imprisonment under circumstances where the respondent resides, it would seem permanently,²³ in Denmark.²⁴ I do not find it necessary to decide this question as I have formed the view that a sentence of imprisonment is not justified on the facts before me.

[26] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*,²⁵ Nkabinde ADCJ said:

"[54] Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamuses, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest...."

[56] The common law drew a sharp distinction between orders ad solvendam pecuniam, which related to the payment of money, and orders ad factum praestandum, which called upon a person to perform a certain act or refrain from specified action. Indeed, failure to comply with the order to pay money was not regarded as contempt of court, whereas disobedience of the latter order was.

[57] In Mjeni²⁶ Jafta J (as he then was) endorsed the long line of judicial authority that an order must be ad factum praestandum before the court can enforce it by means of committal. The court, correctly in my view, endorsed that

²³ This implies that he is domiciled in Denmark.

²⁴ See *JC v DC* 2014 (2) SA 138 (WCC) para 18 et seq.

²⁵ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) paras 54 to 57.

²⁶ *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) 451D – E.

the objective of declaratory relief for contempt, for instance, is to vindicate the rule of law rather than to 'punish the transgressor'. This does not, however, mean that a civil remedy of committal may not be imposed against a contemnor for contempt of court."²⁷ [Footnotes in judgment omitted]

[27] No case is made out on the papers for a punitive cost order or a cost order *de bonis propriis* as sought by the applicant.

[28] For the reasons set out above I make the order in paragraph 1.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **28 AUGUST 2023**

²⁷ In *SH v GF and Others* 2013 (6) SA 621 (SCA) the Supreme Court of Appeal dismissed an appeal against a suspended sentence of imprisonment arising out of contempt of court based on a failure to pay maintenance.

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DATE OF ARGUMENT:	17 AUGUST 2023
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