

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

REPUBLIC OF SOUTH AFRICA



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

Case Number: 18882/2022

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between:

W[...] M[...] (BORN M[...])

Applicant

And

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

First Respondent

PHILLIP JORDAAN N.O

Second Respondent

REGISTRAR OF DEEDS

Third

Respondent

Delivered: This judgement 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 21 November 2023.

JUDGMENT

MANAMELA AJ

INTRODUCTION:

- [1.] This is an opposed application for contempt of court. The applicant seeks this order based on the disobedience of a decree of divorce order incorporating an order for spousal maintenance which was preceded by an interim order in terms of Rule 43 of the Uniform Rules of Court.
- [2.] The Applicant, W[...] M[...] (born M[...]) was married in community of property to the first Respondent, K[...] M[...]. A decree of divorce incorporating a settlement agreement was granted on 14 May 2018, and the Rule 43 order was granted on 27 January 2015.
- [3.] The Second Respondent, PHILLIP JORDAAN *N.O.*, is cited in his official capacity as the appointed receiver and liquidator of the joint estate of the Applicant and the First Respondent.
- [4.] The Third Respondent is the Registrar of Deeds, Pretoria.
- [5.] The relief sought by the Applicant in terms of the Notice of Motion, are set-out as follows:
- a. That the First Respondent be declared to be in contempt of the above Honourable Court by virtue of his failure to comply with his maintenance obligations, arising from the decree of divorce issued, dissolving the marriage of the Applicant and

of the First Respondent on 14 May 2018 under case number :74234/2014. Additionally a Rule 43 order was issued by the above Honourable Court in such proceedings between the Applicant and the First Respondent on 27 January 2015 under case number : 7424/2014.

- b. That the First Respondent be sentenced to imprisonment for a period of six months or such period as the Honourable Court may deem just, or in such other manner as the Honourable Court may deem just, for the reasons of the contempt of the First Respondent as aforesaid.
- c. That the entire sentence imposed upon the First Respondent in terms of prayer b *supra*, be suspended upon such terms and conditions as the Honourable Court deems just, including:
- d. That the First Respondent forthwith pay all arrears owed to the Applicant as a result of the First Respondent maintenance obligations arising from the two aforesaid orders.
- e. Continues to meet his obligations arising from the aforesaid decree of divorce punctually.
- f. That it be declared, pursuant to the provisions of Rule 46, that the Applicant as judgment creditor, shall be entitled to have a writ of execution issued against the immovable property of the First Respondent, being Flat [...], [...], [...] street, Sunnyside, Pretoria, also known as [...] Place, [...].

- g. That it be declared, pursuant to the provisions of Rule 46A, that the Applicant as judgment creditor, shall be entitled to have a writ of execution issued against the immovable property of the First Respondent being [...] Street, House [...], Zone [...], Mahwelereng-A, 2267, O, Limpopo Province.
- h. The costs of suit to be paid by the First Respondent and in the event of the First Respondent opposing the Application, on a scale as between Attorney and Client.
- i. That no costs be paid by the Second and Third Respondents, save in the event of the opposition hereto, in which event such Respondent who opposes, be ordered to pay the costs hereof jointly and severally, together with any other opposing Respondent.

BACKGROUND

[6.] In 2015, an interim order was granted, whereby the First Respondent was ordered to pay maintenance to the Applicant for the sum of R15 000.00 per month, on or before the first day of every month, In addition to the maintenance amount granted the First Respondent was ordered to pay a contribution towards the Applicant's legal costs in the amount of R5000.00 payable in monthly instalments of R500.00. At the commencement of this application the arrear amount due by the first respondent was:

(a) R770 000.00 being due and payable as at 5 April 2019;¹

(b) R5 000.00 towards the contribution of legal fees;

¹ See writ of Execution at CL A33 to A38

(c) Interest for the value of R345 000.00 as accrued from the date of the Writ of Execution (issued on 08 April 2019) to date, which is due, payable and owing.

- [7.] The First Respondent is the registered owner of the following immovable properties, Erf [...] Street, Mahwelereng, Limpopo Province, where the First Respondent currently resides (“the [...] property”) and immovable property [...], Ga-Kgosana, Mokopane, (“the tribal land property”).
- [8.] At the time the application was launched, the Applicant was under the impression that the First Respondent was still the registered owner of Flat Number: [...], Sunnyside, Pretoria (“the [...] Property”) as purchased by the First Respondent from the joint estate. The notice of motion was not amended to exclude the [...] property.
- [9.] From the First Respondent’s answering affidavit it is evident that the [...] property was sold for R385 000.00 on 7 November 2020 and subsequently registered in the name of K P C Credit CC (Reg No. 198500152323) on 22 April 2021.
- [10.] The applicant seeks to have the [...] property declared executable in terms of Rule 46A of the Uniform Rules of Court as the [...] property serves as the First Respondent’s place of residence. The applicant argues that the [...] property is currently valued at R350 000.00
- [11.] The First Respondent opposes the application on the grounds that he was ill-advised by his former legal representatives during divorce proceedings as he was never in a financial position to comply with the maintenance order granted, and that the Applicant was also

aware of his distressed financial position at the time, albeit she did not enforce the order soon thereafter.

[12.] The Applicant on the other hand, argues that the First Respondent's opposition is without merit, and that the failure to comply with the orders was wilful and *mala fide*.

[13.] The following issues are common cause between the parties, that –

13.1. The First Respondent was aware of the orders granted in terms of Rule 43 as well as the divorce order incorporating a settlement agreement confirming the interim order as final.

13.2. No payments were made by the First Respondent in respect of the maintenance order.

13.3. The amount in arrears has not been placed in dispute.

13.4. In so far execution of immovable properties is concerned, the First Respondent is the lawful owner of the [...] Property and the tribal land property and that there are no amounts owed in respect of the immovable properties to any financial institution.

[14.] The Applicant's contention is that the First Respondent had funds available which he could utilize towards the payment of spousal maintenance, and the First Respondent avers that he is currently experiencing a shortfall in his monthly expenses.

ISSUES OF DETERMINATION

- [15.] Whether the First Respondent is in contempt of the court order granted on 14 May 2018;
- [16.] Whether the First Respondent's failure to comply with the existing court order is wilful and *mala fide*; and
- [17.] Whether the immovable property known as [...] Street, Mahwelereng, Limpopo Province should be declared executable in order to satisfy the debt owed to the Applicant.

LEGAL FRAMEWORK

- [18.] The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order².
- [19.] The Applicant bears the onus to prove (i) that a court order was granted; (ii) that the court order was served on the Respondent or that the Respondent had knowledge of the court order; and (iii) that the court order was not complied with by the Respondent. Once all these requirements are proven a presumption arises that the respondent's non-compliance is wilful and *mala fide*.
- [20.] In *Fakie NO v CCII Systems (Pty) Ltd*³ the SCA held that the test to determine if the disobedience of a civil order constitutes contempt occurs when the breach was committed "*deliberately and mala fide*"⁴. "... A deliberate disregard is not enough,..."⁵. The Court held that:

² Pheko v Ekurhuleni City 2015 (5) SA 600 (CC) at para 28.

³ 2006 (4) SA 326 (SCA)

⁴ *Ibid* at para 9

⁵ *Ibid*.

'... this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites..., unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide the requisites of contempt would have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but, but only need evidence that establishes a reasonable doubt.⁶

[21.] In *Pheko and Others v Ekurhuleni Metropolitan Municipality*⁷, the Constitutional Court explained that:

“The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour...”

[22.] In the matter of *Victoria Park Ratepayers Association v Greyvenouw CC and others*⁸ the Court stated that:

“Contempt of court is not merely a means by which a frustrated successful litigant is able to force his or her opponents to obey a court order. Whenever a litigant fails or refuses to obey a court

⁶ *Ibid* at para 41

⁷ 2015 (5) SA 600 (CC) at para 30

⁸ [2003] ZAECHC 19 at para 23.

order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as the guardian of the public interest.”

ANALYSIS

[23.] Section 165(5) of the Constitution provides that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. There is no doubt that court orders, once issued, are binding and must therefore be complied with.

[24.] In this case the Applicant in her founding documents had proven that there is a court order in existence that was issued on the 14 May 2018 and there is a settlement agreement which was entered into by both parties on the 14 May 2018, which has not been complied with. The Respondent agrees with the Applicant in respect of the existence or knowledge of the court order and settlement agreement.

[25.] The Respondent argues that he was never in a position to pay the required amount ordered by the court during divorce proceedings at the time of divorce.

[26.] Evidently the Respondent did not seek any variation of the maintenance order, and believed that the applicant was aware of his financial position hence she failed to enforce her claim before and soon after the divorce was granted. The Respondent did not have a clear appreciation of the gravity of his non-compliance with the court order.

[27.] It is apparent that both the Applicant and the First Respondent were represented during divorce proceedings. The First Respondent does not deny that he failed to make the payments of maintenance as per the court order.

[28.] It is therefore evident that all the requirements for contempt of court are met. Now, the first respondent bears the onus to prove that the non-compliance is neither *mala fides* or wilful⁹.

[29.] In *J K v G O K*¹⁰, the court held that –

“The meaning of the terms mala [f]ides and wilfulness need to be determined. It was held in *Fakie* that a deliberate (wilful) disregard is not enough, 'since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in a way claimed to constitute contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).”

[30.] I find the respondent's explanation, that he was ill-advised by his legal representative when he was never in a financial position to afford to comply with the order, to be reasonable and *bona fide*. The Respondent was a pensioner. At the time when the interim order in terms of Rule 43 was granted, both the Applicant and the Respondent had pension pay outs. As a result, a large sum of money reflected in the First Respondent's bank account. The First Respondent was receiving a pension amount of R14, 002.84 and *ad hoc* rental income of around R2000.00. There is no explanation

⁹ *Ndabeni v Municipal Manager: OR Tambo District Municipality and Another* [2021] ZASCA 08

¹⁰ [2022] ZAGPPHC 402 at para 15

proffered that suggests that due to the First Respondent's poor financial position, he was not in the position to meet the requested maintenance figures granted. The First Respondent was simply advised to sign a settlement agreement on the date of trial, confirming the interim maintenance order. The First Respondent argues that his whole estate is worth less than the amount claimed.

[31.] In this application the First Respondent provided his bank statement which shows that most of the funds moved to his personal account were from his invested pension funds. The facts that he paid R10 000.00 for lobola in respect of his second wife, is of no relevance to prove his current financial means to comply with maintenance order, it is after all a once off payment. The argument submitted by the Applicant that the first respondent is receiving income from tenders through his close corporation is not substantiated. The first respondent's financial position seems to be far less than what the application is projecting.

Report by the Liquidator of the Joint estate

[32.] The First Respondent argues that he was never personally served with the writ of execution for the amount of R770 000.00, which was served on the liquidator, the Second Respondent, who received the writ of execution around 18 April 2019, and he was neither notified of the writ of execution. This amount was only mentioned in the final report issued by the liquidator in September 2022, where the liquidator stated that:

“Therefore Mrs M[...] is to receive payment of R357 698.59 and Mr M[...] is to pay Ms M[...] an amount of R31 246.00 plus writ of R770 000.00 = R801 246.00”

[33.] The explanation provided by the liquidator, is that he only received a copy of the Rule 43 order, after he issued the provisional liquidation report in 2019. He did not receive any submissions from the First Respondent even after the final liquidation report was issued, until around February 2023, when the first respondent's attorneys of record dealt with this matter. According to the liquidator the First Respondent missed an opportunity to deal with the report when he had a chance. Therefore, it was within the liquidator's powers to make an allocation in the final liquidation and distribution account against the First Respondent's movables upon receipt of a the writ of execution for the Applicant's claim of R770 000.00.

Executability of the immovable property

[34.] The Applicant seeks an order for a writ of execution against the immovable properties owned by the First Respondent. The First Respondent has opposed such relief on the basis that the property is his primary residence. It is common cause that the one property, in Sunnyside is excluded from the proceedings, as it has been sold.

[35.] In deciding whether or not to declare the primary residence of a judgment debtor, who is a natural person is specially executable the court must consider all the relevant circumstances as contemplated in Rule 46A. This includes the requirement that a court shall not authorise execution against immovable property which is the primary residence of a judgement debtor unless the court having considered all relevant factors, consider that execution against such property is warranted¹¹. A Court may order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt¹²

¹¹ Rule 46A(2)(b).

¹² Rule 46A(8)(d).

[36.] In *Jaftha v Schoeman: Van Rooyen v Stoltz*¹³ the Constitutional Court gave the following examples of relevant circumstances:

- (a) Whether the rules of court have been complied with;
- (b) Whether there are other reasonable ways in which the judgment debt can be paid;
- (c) Whether there is any disproportionality between executor and other possible means to exact payment of the judgment debt;
- (d) The circumstances in which the judgement debt was incurred;
- (e) Attempts made by the judgment debtor to pay off the debt;
- (f) The financial position of the parties;
- (g) The amount of the judgment debt;
- (h) Whether the judgment debtor is employed or has a source of income to pay off the debt;
- (i) Any other factors relevant to the particular case.

[37.] The requirement relating to executability under Rule 46A(5) are that every application shall be supported by the following documents, (a) the market value of the immovable property, (b) the local authority valuation of the immovable property, (c) the amount owing on mortgage bonds registered over the immovable property, (d) the amount owing to the local authority as rates and other dues, (e) the amount owing to a body corporate as levies; and (f) any other fact which may be necessary to enable the court to give effect to sub-rule (8).

[38.] In *Gundwana v Steko Development*¹⁴ the Constitutional Court observed that, at [53], that is a very well-established principle that a

¹³ 2005 (2) SA 140 (CC) at para 60.

¹⁴ 2011 (3) SA 608 (CC) at para 53.

judgment creditor is entitled to execute the assets of a judgment debtor in satisfaction of a judgment sounding in money, however,

“due regards should be taken of the fact that this may have on judgement debtors who are poor and at risk of losing their homes. If the judgement debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially considered before granting execution orders”.

[39.] The first respondent evidently demonstrates that, if he were to lose his primary residence based in Mahwelereng, he will have no alternative accommodation as the tribal land property is not habitable.

[40.] Out of all these requirements, the Applicant failed to provide sufficient evidence to comply with the provisions set out Rule 46A(5). I am therefore not convinced that such execution is warranted and just in the circumstances. I find that the first respondent's non-compliance was not wilful and *mala fide*, and he has placed sufficient evidence to cast a reasonable doubt against a claim for contempt of court.

COSTS

[41.] The First Respondent is not in wilful contempt of the court orders. The Applicant failed to enforce the orders for over 5 years since they were granted and the First Respondent barely has the financial means to comply with the orders. It would even be worse if he loses his primary residence. The cost order sought by the applicant is unjustified.

It is ordered that -

(1) The application is dismissed with costs.

P N MANAMELA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 22 August 2023

Judgment delivered: 21 November 2023

APPEARANCES:

Counsels for the Applicant: Adv. ZM du Plessis

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Counsel for the first Respondent: Adv. N van Niekerk

Attorneys for the Respondent: JJ Viljoen Attorneys