

SOUTH AFRICA / JUDGMENT

Cilibia v Cilibia (3460/2021) [2022] ZAFSHC 132 (17 May 2022)

[2022] ZAFSHC 132

COURT

Free State High Court, Bloemfontein

BEFORE

Snellenburg, AJ

CASE / FILE NUMBER

3460/2021

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3460/2021

In the matter between

HARRY JONATHAN CILIBA

Applicant

and

MAMATSIE EMILY CILIBA

Respondent

JUDGMENT

BY:

SNELLENBURG, AJ

HEARD:

5 MAY 2022

JUDGEMENT

DELIVERED: 17 MAY 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 17 May 2022 at 16H15.

- [1] "It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs. The corollary duty borne by all members of South African society – lawyers, laypeople and politicians alike – is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function." 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 (5) SA 327 (CC), para 1 per Khampepe ADCJ [SJCI v Zuma].

- [2] This matter concerns the question whether the respondent is guilty of contempt of court for failure to comply with the order made on 26 November 2020 by C Nekosie AJ in civil case cover number: 3932/2020 ["the court order"]. In terms of the court order, amongst other matters, the respondent had to pay maintenance to the applicant, pendente lite, in the amount of R1,000.00 per month. The first payment was due before or on 15 December 2020 and all payments thereafter had to be made before or on the 20th of each month.
- [3] The applicant initiated these summary contempt proceedings against the respondent as result of the respondent's failure to comply with the court order. As discussed below, the non-compliance with the court order is admitted by the respondent, albeit she denies contemptuous intent.
- [4] The application initially served in the unopposed motion court on 31 March 2022 before Daffue J. The application was postponed to the opposed role of 5 May 2022 to afford the respondent, who appeared in person when the matter was called, an opportunity to acquire legal assistance and to file an answering affidavit ["the order"].
- [5] When the matter was called on 5 May 2022 the respondent again appeared in person. The respondent was assisted by the Court interpreter to participate in the language of her choice, Sesotho.
- [6] Before hearing the applicant's counsel, the nature of the proceedings was explained to the respondent, being:

6.1 These are summary contempt proceedings as result of the alleged non-compliance of the court order. The purpose of the application was coercive; the applicant wants compliance with the court order. Contempt of a court order is very serious. The Court will ensure that its dignity is restored and that the administration of justice is not jeopardized. The consequences of a finding of contempt of court is very serious and may result in an order of imprisonment.[1]

6.2 The applicant had the onus to prove (a) that a court order was granted;

- (b) that the court order was served on the respondent or that the respondent had knowledge of the court order; and (c) that the court order was not complied with by the respondent. If the applicant proves these requirements a presumption arises that the respondent's non-compliance is wilful and mala fide.[2] Once the applicant has satisfied the requirements to prove contempt, an evidentiary burden rests on the respondent to show reasonable

doubt. Should the respondent fail to discharge this burden, contempt will have been established.
[3]

6.3 The respondent however has the constitutionally guaranteed right to remain silent. She does not have to testify nor is she under any obligation to supply a version to the Court. Should the respondent exercise this right, the applicant's version will be uncontested, and contempt will be established.

CONDONATION FOR THE RESPONDENT'S NON-COMPLIANCE WITH THE ORDER OF 31 MARCH 2022

- [7] The applicant sought leave to introduce a supplementary affidavit deposed to by Ms. Tanita Suzette Soares De Carvalho, a candidate attorney at the applicant's attorneys, dealing with the respondent's failure to file an answering affidavit in terms of the order of 31 March 2022. Ms. De Carvalho states in paragraph 8 of the supplementary affidavit that the respondent told her during a telephone conversation on 4 May 2022 that she (the respondent) has reasons for not filing her answering affidavit but that she has no intention of sharing same and does not need to tell the attorney what the reasons are, and no one can tell her when to file. In paragraph 9 of the affidavit Ms. De Carvalho states that the respondent had

previously told her that she (the respondent) has no intention of filing her answering affidavit as her husband is ill and that she will do everything in her power to delay the matter until the applicant passes away.

- [8] The respondent had no objection to address the issue of her failure to file an answering affidavit in terms of the order, under oath. The respondent was advised that she was under no obligation to answer any questions regarding this issue that the Court may pose. Because she was not legally represented the Court had an obligation to ensure that her rights were given effect to.[4]

- [9] During her evidence the respondent handed up a document headed 'Notice of Non-compliance' which deals with the reasons for her failure to file an answering affidavit in terms of the order as well as an answering affidavit with annexures in relation to the contempt application. The Court read the content of the 'Notice

of Non-compliance', which was not in the form of an affidavit, into the record whereafter the respondent confirmed the content of the document under oath.

- [10] In summary, the respondent's explanation amounts to this: she informed the Court on 31 March 2022 that she wished to procure legal representation. She approached the UFS Law Clinic to represent her, but since she did not satisfy the means test of the UFS Law Clinic, it was not at liberty to represent her in these proceedings. She thereafter approached an attorney in private practice but could not afford to pay the deposit the attorney required to act on her behalf. The respondent then drafted the answering affidavit herself.
- [11] The respondent denies making the statements alleged by Ms. De Carvalho in paragraphs 8 and 9 of the supplementary affidavit. The respondent however admits having spoken to Ms. De Carvalho on 4 May 2022 and on previous occasions.[5]
- [12] The applicant obviously did not a proper opportunity to consider the 'Notice of Non-Compliance' or the answering affidavit before the same were handed in during the respondent's evidence. The applicant's counsel however informed the Court that the applicant could not afford another delay and would therefore not file further affidavits to deal with the issue of condonation.
- [13] It must also be recorded that the respondent complained that the court order contained an error as it recorded in the preamble: "Having considered the documents before the court and having heard the legal practitioner for the applicant and the respondent,..." whilst she did not have legal representation when the application was heard. Nothing turns on this issue in my view.
- [14] Although the explanation could be rightly criticised for lack of particularity, the respondent does explain her failure.
- [15] It was my considered view that no prejudice existed in granting condonation to the respondent that could not be cured, if need be, by a postponement and appropriate cost order. The respondent is not legally represented, and although that by itself does not justify non-compliance with the requirements for condonation, in light of the nature of these proceedings and the serious consequences that a finding in the applicant's favour may ultimately have for the respondent, the interests of justice demand that the respondent's non-compliance in this instance be condoned, and the respondent's answering affidavit be accepted.
- [16] My finding with regards to condonation in this matter should not be seen as a precedent. Non-compliance with any court order must be deprecated in the strongest possible terms for the reasons discussed below when the law relating to contempt of court is discussed.
- [17] In absence, for understandable reasons, at least at this juncture, of a reply by the applicant I am prepared to accept the respondent's denial only insofar as it relates to the issue of condonation. The exercise of my discretion in the respondent's favour should not be seen as an adverse finding regarding Ms. De Carvalho's credibility.

[18] The applicant intimated that they were ready to proceed with the matter and did not deem it necessary, in light of the content of the answering affidavit, to file a replying affidavit.

[19] In the premises condonation was granted to the respondent and the answering affidavit was accepted.

THE MAIN APPLICATION

The

facts

[20] The applicant's case is admitted by the respondent, save for a denial of contempt, as will be dealt with below. In summary, for the reader's convenience, the applicant's case in summary is as follows:

20.1 The respondent has failed to comply with the court order notwithstanding request and demand.

20.2 The respondent was legally represented during the Rule 43 proceedings, although she was not represented when the court order was made.

20.3 The respondent has knowledge of the court order and is in contempt of court.

20.4 The respondent only paid an amount of R1000.00 on 5 February 2021. This payment was made into the applicant's attorney's bank account.

20.5 The respondent thus failed to pay maintenance in terms of paragraph 1 of the court order for the months of December 2020, January 2021 and March 2021 to April 2022.

20.6 The applicant is quite ill and has not had the benefit of the maintenance which the Court directed the respondent to pay towards him, pendente lite.

20.7 The applicant does not wish to see the respondent imprisoned, but the respondent is wilfully and mala fide refusing to comply with paragraph 1 of the court order. The applicant's sole purpose with this application is to compel performance in terms of the court order.

20.8 The respondent's answering affidavit does not establish reasonable doubt; thus, contempt of court is established.

[21] The respondent admits that she has not complied with the court order. To this end the respondent admits only making the payment of R1000.00 during February 2021 by payment into the applicant's attorney's bank account. It is therefore common cause that the respondent failed to make the maintenance payments in favour of the applicant for December 2020, January 2021, March 2021 to (and including) April 2022.

[22] The respondent's explanation for her failure to make the payments, as appears from the affidavit and evidence on oath which she gave after being reminded of her right to remain silent and to refuse to answer any questions that the Court may pose to clarify aspects of her defence, as enunciated in her answering affidavit, is this:

22.1 The court order did not specify how she had to make payment of the monthly maintenance to the applicant.

22.2 The applicant's attorneys did send her a letter demanding payment of the maintenance into their bank account, but the court order directed her to pay the maintenance to the applicant, not to his attorneys.

22.3 She did make the payment for February 2021 into the applicant's attorney's bank account, but now realises that she made a mistake by making the payment into the applicant's attorneys' bank account.

22.4 She also now realises that the one mistake she did make was to not contact the applicant to find out how and where she should pay the maintenance.

22.5 She is the primary caretaker of the minor referred to in the Rule 43 application, pendente lite, and also have other children to care for and cannot afford to be incarcerated as she is responsible for the care of the aforesaid children. She does not 'want to go to prison'.

Discussion Contempt of Court

[23] In *Pheko II* above[6], with reference to s 165 of the Constitution[7], Nkabinde J held that:

"(t)he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially

determined by the assurance that they will be enforced.

Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest."

[24] At the origin of contempt proceedings is denouncement of the crime of disrespecting the courts, and ultimately the rule of law.[8] These proceedings deal with wilful disobedience of an order made in civil proceedings. Such disobedience is both contemptuous and a criminal offence.[9]

- [25] Civil contempt is a form of contempt outside of the court; it refers to contempt by disobeying a court order.[10] Civil contempt is a crime.[11] Civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal, but committal for civil contempt can also be ordered in civil proceedings for punitive or coercive reasons.[12]
- [26] Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the court order granted in its favour. When contempt occurs, a court may also initiate contempt proceedings mero motu.[13]
- [27] Typically, a coercive contempt order calls for the compliance with the original court order that has been breached, as well as the terms of the subsequent contempt order. A contemnor [the person in breach of complying with the court order] may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable.[14]
- [28] Contempt of court is not an issue between the parties, but rather an issue between the court and the party who has not complied with a mandatory order of court.[15]
- [29] Contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary. *SJCI v Zuma* para 27.
- [30] In *Victoria Park Ratepayers' Association v Greyvenouw CC* 2004 JDR 0498 (SE) at paras 5, 26-27 the apex Court explained 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.”

and,

“it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings 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.” Also see *SJCI v Zuma* paras 32-33.

[31] It is by well settled that a coercive order only incidentally vindicates a court's honour.

[32] Compliance will be compelled only if it will be a fruitful exercise.

“Contempt of court is not merely a means by which a frustrated successful litigant is able to force his or her opponent to obey a court order. Whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such 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 guardian of the public interest.”[16]

If a coercive order will be fruitless, a punitive order aimed at punishing the contemnor by imposing a sentence which is unavoidable will be the only appropriate remedy.[17]

Are summary contempt proceedings justified in this matter?

[33] In *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) the Court held:

“Summary contempt proceedings may be invoked in exceptional circumstances, where there is a 'pressing need for firm or swift measures to preserve the integrity of the judicial process'. This will be the case also where ordinary prosecution at the instance of the prosecuting authority is impossible or highly undesirable. But even then, and to the extent possible, the contemnor must be accorded his or her fair trial rights. Otherwise, as this court cautioned in Mamabolo[18]:

'The alternative is constitutionally unacceptable: It is inherently inappropriate for a court of law, the constitutionally designated

primary protector of personal rights and freedoms, to pursue such a course of conduct.'”[19]

[34] In *SJCI v Zuma* para 179, Khampepe ADCJ referred to the following cautionary remarks by De Villiers CJ in *R v Kaplan* (1893) 10 SC 259 at 263:

“My own personal view has always been that, except where immediate punishment is necessary for the maintenance of the authority of the court, it is a wiser course for the court not to take into its own hands the summary punishment of offenders whose contempt is of such a nature as to render them liable to an indictment. The defeating of the due course of justice appears to me to be a contempt of that nature. There may be cases in which such contempt must be summarily dealt with, but, except in such cases, the practice to submit the question whether the offence has been committed to the decision of a jury, appears to me to be a wholesome one.”

[35] There is indeed a 'pressing need for firm or swift measures to preserve the integrity of the judicial process' in this instance. The court order pertains to maintenance that must be paid to the applicant, pendente lite. It is well established that maintenance orders have a special nature which justifies the operation of contempt proceedings in respect of a failure to pay the maintenance.

[36] The applicant is quite ill and has been deprived of the contribution to his maintenance for a period of 14 months. It is clear from the respondent's evidence that she would have persisted with her refusal to comply with the court order, but for these proceedings.

[37] Summary contempt proceedings are warranted in this instance.

Are the requisites of contempt established?

- [38] I have no doubt that the respondent's failure (more aptly refusal) to comply with the court order is wilful and mala fide. The respondent's explanation for not complying with the court order, namely that the court order did not indicate how the maintenance should be paid, and that she refused to pay the maintenance in favour of the applicant by payment into the applicant's attorney's trust account because court order did not order her to pay the attorneys, but the applicant, is contrived and not truthful. The respondent made one payment for February 2021 into the applicant's attorney's trust account. Her evidence to the extent that she now realises that that was a mistake, is rejected.
- [39] As stated above, the evidence in the supplementary affidavit is also relevant to the respondent's alleged contempt of the court order. In light of the finding in paragraph 38 above, it is not necessary at this time to deal with the evidence contained specifically in paragraph 9 of the supplementary affidavit. As dealt with above, the respondent denied the content of paragraph 9 of the supplementary affidavit. The applicant will be able to deal with the denial, should he so elect, in light of the order I make. I have recorded above, although it is not necessary to deal with the issue at this juncture, that I have no reason to doubt the veracity of the candidate attorney's evidence. I have however, for the present, not taken the evidence into consideration.
- [40] In the premises an order in terms of prayer 1 of the notice of motion stood to be granted.

Appropriate remedy in this matter

- [41] The Court enjoys wide remedial discretion to determine appropriate relief in contempt proceedings. In doing so the Court should be guided by the approach adopted by other courts. It is the accepted practice in contempt matters to seek compliance, using punishment as a means of coercing same. Committal is ordered for coercive purposes and made conditional upon non-compliance with a mandamus or interdict.[20]
- [42] In *Matjhabeng Local Municipality v Eskom Holdings Ltd supra*, para 54 the Court held that 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." [References excluded.]
- [43] In the exercise of my discretion I am of the view that the order I intend to make will ensure compliance with the court order whilst affording the respondent an opportunity to make the necessary arrangements to purge her contempt and pay the arrear maintenance. I informed the parties of the terms of the order and requested the interpreter to explain the intended order to the respondent to ensure that there is no room for any doubt or misunderstanding regarding what the order provides for. The respondent indicated thereafter that she

understood the order and the possible consequences should she again not comply.

[44] The following order was made on 5 May 2022 regarding condonation:

1. Condonation is granted to the respondent for the late filing of the answering affidavit.

[45] In the premises IT IS ORDERED:

1. The respondent is found to be in contempt of the Court Order issued by C Nekosie AJ on 26 November 2020, in case number: 3932/2020 [“the court order”].
2. The respondent shall forthwith comply with the court order, in particular paragraph 1 thereof relating to the maintenance payments by the respondent to the applicant, the next maintenance payment being due before or on 20 May 2022.
3. All maintenance payments are to be made to the applicant by means of payment to the applicant’s attorneys of record, McIntyre & Van der Post Attorneys by payment into the following account:

McIntyre & Van der Post Trust account,

Account Number: [...],

Reference Number: [...],

ABSA Bank,

Branch Code: [...]

4. The relief in prayers 2, 3 and 4 of the notice of motion is postponed to Thursday, 3 November 2022, at 09h30, subject to paragraph 5 below, to afford the respondent an opportunity to pay the outstanding/arrear maintenance for the months of December 2020, January 2021, March 2021 to (and including) April 2022, the said outstanding maintenance which must be paid before or on Thursday, 29 October 2022 at 12h00.

5. Leave is granted to the applicant to anticipate (enrol) this

application, duly supplemented, for determination of prayers 2, 3, and 4 of the notice of motion before 3 November 2022 in the event that the respondent fails to make any maintenance payment in terms of paragraph 1 of the court order from date of this order. In the event of an early enrolment in terms of this paragraph, due prior notice of the supplemented papers and the enrolment must be given to the respondent.

6. Leave is granted to the applicant and the respondent to supplement their papers in the event that the arrear maintenance is not paid in full before or on 29 October 2022 at 12h00.

7. The respondent to pay the applicant’s taxed costs, including
the costs of 31 March 2022.

8. The applicant's attorneys must serve this court order on the respondent per email by means of the email address(es) supplied by the respondent to the applicant's legal representatives during the hearing of the matter.

N. SNELLENBURG AJ

Appearance:

On behalf of the Applicant: Adv.

E Lubbe

On Instructions: McIntyre

& Van der Post Attorneys,

Bloemfontein

On behalf of Respondent: Respondent

appeared in person

[1] In *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) (*Pheko II*) para 28 it was held that “[t]he 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 order.” Also see *SJCI v Zuma* n 6.

[2] The test was summarised in *SJCI v Zuma* fn 9 (Page 336) as follows “once it is proven that an order exists and was served on a litigant who did not comply therewith, contempt will have been established beyond reasonable doubt unless the respondent

establishes a reasonable doubt relating to wilfulness and mala fides.” In *Pheko II* para 36 it was held that- “the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create a reasonable doubt as to their existence.

Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.”

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Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.”

[3] Pheko II para 28; Fakie N.O. v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 22 (Fakie); SJCI v Zuma para 37.

[4] Nedbank Ltd v Gqirana NO and Another and Similar Matters 2019 (6) SA 139 (ECG); Nkuzi Development Association v Government of the Republic of South Africa 2002 (2) SA 733 (LCC) approving the dictum in S v Radebe: S v Mbonani 1988 (1) SA 191 (T) at 196F-J.

[5] The respondent requested in court that in future the attorneys should refrain from speaking to her and should correspond with her by means of email only. The respondent was requested by the Court to supply an active email address(es) to the applicant’s

attorneys, which the respondent undertook to do.

[6] Also see SJCI v Zuma para 26

[7] The Constitution of the Republic of South Africa, 1996

[8] Pheko II para 31 and SJCI v Zuma para 61.

[9] Fakie above, para 6; Pheko II above, para 28

[10] Pheko II para 30.

[11] Ibid; and see n 5 above

[12] Pheko II above, para 30; Fakie above para 71.

[13] Pheko II above, para 30.

[14] Pheko II above para 31; Fakie above, paras 74-75

[15] Federation of Governing Bodies of South African Schools v MEC for Education, Gauteng 2016 (4) SA 546 (CC) at at 673C-D; Fakie above, para 38; and SJCI v Zuma para 61.

[16] Victoria Park Ratepayers’ Association above, para 23.

[17] For instance, SJCI v Zuma where the Court held that a coercive order will be fruitless

[18] S v Mamabolo (E TV and Others Intervening) 2001 (3) SA 409 (CC).

[19] Ibid, paras 57-58.

[20] SJCI v Zuma para 54.

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Prepared on 9 October 2026 · Esheria