

SOUTH AFRICA / JUDGMENT

E.N.M v L.T.M and Another (DIV88/11; UM107/18) [2023] ZANWHC 34 (30 March 2023) [2023] ZANWHC 34

COURT

North West High Court, Mafikeng

BEFORE

Morgan AJ

CASE / FILE NUMBER

DIV88/11; UM107/18

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FLYNOTES:

JAILED FOR FAILING TO PAY MAINTENANCE
FAMILY
– Maintenance – Contempt – Divorce settlement
agreement made order of court – Wilfully disobeyed
order –
Non-compliance also mala fide – Best interests of children
severely undermined – Clear that would
not comply with
coercive order – Only appropriate sanction was direct and
unsuspended imprisonment – Guilty of
contempt and ordered to
undergo three months' imprisonment.
IN
THE HIGH COURT OF SOUTH AFRICA
NORTHWEST
DIVISION, MAHIKENG
CASE
NO: DIV88/11& UM107/18

Reportable:

YES / NO
Circulate

to Judges:	YES / NO Circulate
to Magistrates:	YES / NO Circulate to Regional Magistrates: YES / NO In
the application between:	E[....] N[....] M[....]1 (n[....] D[....]) APPLICANT and L[....] T[....] M[....]2 FIRST RESPONDENT MOSEGEDI & ASSOCIATES (PTY) LTD SECOND RESPONDENT Neutral
Citation:	E[....] N[....] M[....]1 (n[....] D[....])v L[....] T[....] M[....]2 and another (DIV88/11& UM107/18) [2023] ZANWHC (30 March 2023)
Heard:	18 August 2022
Delivered:	30 March 2023
Summary:	Contempt of court order(s) - coercive order to enforce compliance with court orders not possible – respect for court orders and vindication of the authority of the courts, the rule of law and dignity of the innocent party(ies)- consequences of respondents’ contempt indirectly severely affects the rights of vulnerable groups (minor children) and single mother in ensuring basic fundamental rights of minor children are protected and best interests of the minor children are advanced- courts are custodians and upper guardians for vulnerable persons. The judgment summary was handed down virtually and the full judgment circulated electronically to the parties’ representatives via email. The date and time of hand-down are deemed to be 10:00am on 30 March 2023. ORDER I. It is declared that L[....] T[....] M[....]2 (first respondent) with Identity Number [....], is guilty of the crime of contempt of court for failure to comply with the orders made by this Court per Landman

J dated

22 December 2014, and Matlapeng AJ dated 27 July 2018.

II.

The first respondent is sentenced to undergo three (3) months' imprisonment.

III.

The first respondent is directed to submit himself to the Station Commander of the South African Police Service, at Mafikeng Police Station, within 24 hours from the date of this order, for the Station Commander or other officer in charge of that police station to ensure that he is immediately delivered to Rooigrond Correctional Centre or any other prison with jurisdiction, to commence serving the sentence imposed in paragraph II.

IV.

In the event that the first respondent does not submit himself to the South African Police Service as required by paragraph III, the North West Provincial Commissioner of the South African Police Service and the Station Commander of SAPS, Mafikeng Police Station must, within three (3) calendar days of the expiry of the period stipulated in paragraph III, take all steps that are necessary and permissible in law to ensure that the first respondent is delivered to a correctional centre to commence serving the sentence imposed in paragraph II.

V.

By virtue of the above orders, the first and second respondents are not absolved from complying with the orders made by this Court per Landman J dated 22 December 2014, and Matlapeng AJ dated 27 July 2018.

VI.

The first respondent is ordered to pay the costs of the applicant, including the costs of two counsel, on an attorney and client scale.

JUDGMENT

MORGAN AJ:

INTRODUCTION

- [1] This matter concerns the question of whether the first and second respondents are individually guilty of contempt of court for failure to comply with this Court's orders of 22 December 2014 and 27 July 2018 granted by my brothers Landman J and Matlapeng AJ respectively.

BACKGROUND**FACTS**

- [2] Pursuant to the divorce order granted by my brother Landman J, the parties in this matter became frequent or resident litigants in this Court and other courts in other provinces, where a litany of court applications and litigation ensued between the parties on issues relating to non-compliance with the divorce order granted by Landman J. All the applications instituted were in pursuit to have the first respondent comply or perform in terms of the order granted by Landman J and subsequent orders granted by this Court.
- [3] What is common amongst all the applications brought by the applicant in the different courts, is that she sought to compel the first respondent and later the second respondent to comply with this Court's order per Landman J. I elaborate more fully below on the proceedings that are relevant or linked to the present application and omit those proceedings and matters not relevant to the present matter.
- [4] In this application, the applicant seeks an order in the following terms:
1. Declaring that:
 - a. The first respondent has not complied with the order of court, dated 22 December 2014, under case number DIV 88/2011, which order was an order for a final decree of divorce incorporating a deed of settlement entered into by and between the first respondent and the applicant.
 - b. The second respondent has not complied with the order of the court, dated 27 July 2018, case number UM 107/18, which was an order that the second respondent pay seventy-five percent (75%) of all amounts due to the first respondent up until the entire debt owed to the applicant is paid up and settled in full.
 2. Declaring that first and second respondents are in wilful default, and/or non-compliant with and/or have totally disregarded the orders as set in Prayer 1.

3. Declaring that the first and second respondents are in contempt of court.
4. Directing the first and second respondents to comply with the orders as granted, and as set out in Prayer 1 within 30 (thirty) days of the granting of this court order.
5. The first and [second] respondents to bear the costs of this application, on a scale on the determined by this Court, the one paying the other to be absolved.
- [5] The applicant and the first respondent were married in community of property from 1 December 2002 until 22 December 2014, when the final decree of divorce was granted.
- [6] Notably, the settlement agreement was drafted and presented to the applicant by the first respondent. It was accepted by the applicant and later incorporated into the divorce order granted by Landman J.
- [7] The first respondent is an accountant and businessman and the sole director and shareholder in the second respondent, an accounting firm.
- [8] The first respondent initiated the divorce proceedings. As already stated above, he drafted the deed of settlement and presented it to the applicant (the defendant in the divorce proceedings) who on her version, merely acceded to it in order to maintain peace, avoid an acrimonious divorce and have the divorce finalised speedily.
- [9] The applicant and the first respondent have three minor children born from their marriage.
- [10] I set out the relevant portions of the settlement agreement, which were made an order of Court:

“Maintenance:

1. The first respondent shall pay maintenance of the minor children in accordance with the Maintenance Court issued out of the Randburg Magistrate’s Court under case number: 14/3/2-149/12, dated 23 August 2013.

Immovable assets:

In relation to the property located at [...] P[...] S[...], R[...] P[...] M[...]

2. The first respondent offers the applicant full ownership of the property situated at [...] P[...] S[...], R[...] P[...] M[...]. The first respondent offers to settle the loan balance owing to SA Home Loans in full within a period of 24 months from date of signature and sign all necessary documents to effect transfer of the property to the applicant’s name.
3. Where the applicant elects to either alienates or sells the property before the expiry of the 24 months period mentioned above, all proceeds of the sale will accrue to the applicant.

4. The first respondent offers to make an advance payment of an equivalent to twelve (12) months loan repayment in respect of the property referred to above into the SA Home Loans account by 31 January 2015 to mitigate risk of SA Home Loans collecting any overdue accounts from the applicant.
5. The first respondent offers to refund the applicant's any monies that SA Home Loans may have collected from the applicant in respect of this property in the last twelve (12) months (period of 5 August 2013 to 6 August 2014) by 31 December 2014.

In relation to the property located at [...] F[...], The Orchards, Pretoria

6. The first respondent offers the applicant full ownership of the property situated at [...] F[...], The Orchards, Pretoria. The first respondent offers to settle the loan balance owing to Standard Bank in full within a period of 24 months from date of signature and sign all necessary documents to effect transfer of the property to the applicant's name.
7. Where the applicant elects to either alienates or sells the property before the expiry of the 24 months period mentioned above, all proceeds of the sale will accrue to the applicant.
8. The first respondent offers to make an advance payment of an equivalent to twelve (12) months loan repayment in respect of the property referred to above into the Standard Bank Homeloans account by 31 January 2015 to mitigate risk of Standard Bank collecting any overdue accounts from the applicant.
9. The first respondent offers to refund the applicant's any monies that Standard Bank may have collected from the applicant in respect of this property in the last twelve (12) months (period of 5 August 2013 to 6 August 2014) by 31 December 2014.

Movable assets:

10. The first respondent offers to pay the applicant R60 000 (sixty thousand Rands) and, in return, he would retain ownership of a motor vehicle, a Colt Rodeo.
11. The first respondent offers to pay the applicant R50 000 (fifty thousand Rands) by 31 December 2014, and in return, he would retain ownership of a motor vehicle, a Smart vehicle.

Liabilities owed by the joint estate

12. The first respondent offers to settle the amount owed by the joint estate to the Mafikeng Local Municipality.

Family home in Gauteng

13. The first respondent offers to purchase the family home for the applicant and the children for the value of R3 000 000 (three million Rands), the applicant accepts an amount of R3 000 000 (three million Rands) payable within the period of 180 days from date of signature.

Payment in lieu of a sport utility vehicle

14. The first respondent offers to purchase a Sport Utility Vehicle for the applicant, the applicant accepts an amount of R1 800 000 (one million eight hundred thousand Rands) payable within the period of 120 days from the date of signature.

Payment in lieu of renovations of [....] P[....] S[....], R[....] P[....] M[....]

15. The applicant accepts an amount of R1 000 000 (one million Rands) payable within the period of 90 days from the date of signature.
- [11] It is common cause that the first and later the second respondents pursuant to the order of Matlapeng AJ, failed to comply with the provisions of the settlement agreement which was made an order of court.
- [12] Amongst other hardships suffered by the applicant to make ends meet to support the minor children, she had to sell the one immovable property in order to pay off the mortgage bond, the municipal rates and related expenses.
- [13] Consequently, there is a current pending action for the foreclosure of the mortgage bond under Standard Bank on the remaining property offered to the applicant, which would result in the applicant and the children losing this property if not settled.
- [14] All the amounts arising from the court order (settlement agreement) were computed and totalled to R7 386 324.89 (seven million three hundred and eighty-six thousand three hundred and twenty-four Rands and eighty-nine cents).
- [15] On 22 June 2018, the applicant caused a warrant of execution to be issued, under case number DIV 88/2011, in which the Sheriff of the Court was authorised to raise R7 386 324.89 against the first respondent's assets.
- [16] The Sheriff attached the sum of R9 657 617.69 (nine million six hundred and fifty-seven thousand six hundred and seventeen Rands and sixty-nine cents). The first respondent launched an urgent application in an attempt to set aside the attachment of these funds, under case number UM 107/18, which was unsuccessful and later followed with the same urgent application in the Gauteng Division of the High Court of South Africa before van der Schyff J, who granted the order by agreement and qualified it with a caveat.
- [17] This Court, per Matlapeng AJ, granted a garnishee order against the first respondent's dividends in the second respondent and held that the second respondent is liable to pay the applicant 75% of all amounts due to the first respondent, until the entire debt is settled.
- [18] As alluded above, none of the court orders issued by this Court were complied with. This, the first respondent also conceded to during argument.

CONTEMPT OF COURT

[19] Contempt of court refers to the deliberate, wilful, disobedience of an order granted by a court of competent jurisdiction. Recently, Khampepe ADCJ held that all members of South African society have a duty 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.’ This was acknowledged in *Victoria Park Ratepayers’ Association*, where it was held that ‘contempt jurisdiction, whatever the situation may have been before 27 April 1994, now also involves the vindication of the Constitution.’

[20] Our country is founded on the rule of law and the supremacy of the Constitution, amongst other foundational values. Thus, a case concerning contempt of court proceedings and a blatant disregard of a court order, is a challenge to these values and the authority of the judiciary. Nkabinde J in *Pheko II* recognised this and stated:

‘[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.’

[21] It cannot be gainsaid that the aim 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. There are several dire consequences to the effectiveness and legitimacy of our legal system and the judiciary when a case concerns contempt of court.

[22] Contempt of court proceedings exist to protect the rule of law and the authority of the judiciary. The authority of courts and obedience of their orders, the very foundation of a constitutional order founded on the rule of law, depends on public trust and respect for the courts.

[23] The test for contempt of court is well-established. An applicant who avers contempt of court must demonstrate and established that: (i) an order was granted against the alleged contemnor; (ii) the alleged contemnor was served with the order or had knowledge of it; and (iii) the alleged contemnor failed to comply with the order. This test was reaffirmed in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State vs Zuma and Others*.

Wilfulness and mala fides are presumed once these elements are satisfied. After this has been established, the respondent then bears an evidentiary burden to establish a reasonable doubt. If the respondent fails to discharge this burden, contempt will have been established.

[24] This was confirmed in *Pheko II*, where the Constitutional Court held:

‘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.’

[25] Undoubtedly, it is in the public interest to maintain the integrity of the judiciary. The judiciary is a crucial constitutional strut, which supports and reinforces the rule of law. Courts function to achieve justice through their court orders. They do not command the army, the police, and the public purse. They must rely on moral authority and trust, founded on the legitimacy of their court orders.

[26] In *S v Mamobolo*, the Constitutional Court held:

‘In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers, it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the State.’

[27] It has also been underscored that the legal consequence that flows from non-compliance with a court order is contempt. The crux of contempt lies in violating the dignity, repute, or authority of the court. No one is above the law. The law, including court orders, should be obeyed. The well-founded obligation to obey and comply with court orders is at the very heart of our constitutional dispensation.

[28] In closing, the words of Khampepe ADCJ must be heeded to:

‘An act of defiance in respect of a direct judicial order has the potential to precipitate a constitutional crisis: when a public office-bearer or government official, or indeed any citizen of this Republic, announces that he or she will not play by the rules of the Constitution, then surely our Constitution, and the infrastructure built around it, has failed us all.’

IS THE FIRST RESPONDENT GUILTY OF CONTEMPT OF COURT?

- [29] It has been proven beyond reasonable doubt that an order for maintenance was granted as incorporated into the settlement agreement that was made an order of court; that the first respondent was aware of the maintenance order and the obligations it imposed on him. The first respondent has intentionally, deliberately, and wilfully disobeyed the order.
- [30] The first respondent is a recalcitrant respondent who indicated that he will not comply with this Court's orders. He declared unequivocally during the hearing that he would not comply with the court order, styling performing in terms of his undertakings per the settlement agreement as "giving into the applicant's luxurious demands" he would not provide for. This contention to me is somewhat mindboggling as he drafted and presented the offers in the settlement agreement to the applicant. Furthermore, it is difficult for me to believe that the first respondent promised what he could not provide. The undertakings which translated to a court order were made long before the covid pandemic was foreseen and known of. I found the first respondents' contention that the covid pandemic prevented him from complying with Landman J's order farfetched and an unjustified excuse. This, one can even see through his conduct in other fora, where he still challenges this obligation.
- [31] Furthermore, when the first respondent drafted the settlement agreement, he understood his obligations. In fact, he drafted the settlement agreement, which was then made a court order. There is no evidence before this Court that he suffered any prejudice when he signed that settlement agreement. He has also not raised any defence and has not claimed that he is experiencing any financial hardship because of the maintenance order. It is clear that his non-compliance was wilful, intentional, deliberate and was also mala fides. There is nothing in his actions that illustrates that the actions were bona fide.
- [32] The first respondent's conduct is contemptuous, and offends the Constitution and the rule of law, which undergirds it. I am of the view that the first respondent is guilty of contempt of court because he has indicated that he will not be obey the court orders that are already in place. It is my view that the first respondent has failed to satisfactorily discharge the evidentiary burden that rests on him, to raise reasonable doubt, against the legal presumption that his contempt his both wilful and mala fides.

APPROPRIATE SANCTION

- [33] Before I consider the appropriate sanction, it is important to mention that on 21 October 2022, I issued directives to the parties to file written submissions and make representations on the appropriate sanction I were to impose if I were to find the first respondent guilty of contempt. Each party was given ample time to file their submissions and neither responded to my invitation. I procced to consider the appropriate sanction without representations, presuming that the parties elected not to make representations.
- [34] I now turn to consider the appropriate sanction.
- [35] Section 31 of the Child Maintenance Act provides:

‘31 Offences relating to maintenance orders.

- (1) Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.
- (2) If the defence is raised in any prosecution for an offence under this section that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she shall not merely on the grounds of such defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct.
- (3) If the name of a person stated in a maintenance order as the person against whom the maintenance order has been made corresponds substantially to the name of the particular person prosecuted for an offence under this section, any copy of the maintenance order certified as a true copy by a person who purports to be the registrar or clerk of the court or other officer having the custody of the records of the court in the Republic where the maintenance order was made, shall on its production be prima facie proof of the fact that the maintenance order was made against the person so prosecuted.
- (4) If a person has been convicted of an offence under this section, the maintenance officer may, notwithstanding anything to the contrary contained in any law, furnish that person's personal particulars to any business which has as its object the granting of credit or is involved in the credit rating of persons.’

[36] A failure to pay child maintenance is a criminal offence.

[37] The respondent has indicated, quite brazenly, that he would not abide by the court order. I have no reason to second guess his own words. His conduct corroborates his words that he had no intention of complying with the previous court orders. There is no reason to doubt his utterances. He has offered no contrition or apology.

[38] His conduct indicates that a coercive order will not be appropriate in this case. Pheko II tells us that ‘coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order.’ It is obvious that a coercive order would have no effect in this case. It would be inapposite as he has stated that he would not comply with the court order. A coercive order, giving him an opportunity to remedy his previous non-compliance, would be futile and a threat of imprisonment will not have any effect in vindicating the authority, integrity, and honour of the court.

[39] Furthermore, a coercive order merely indirectly and/or incidentally vindicates the integrity of the court. Such an order in this case would simply give the first respondent a further opportunity to disregard this Court’s order. Importantly, if a coercive order is granted, which states that he only be punished once he fails to further disobey a court order, that would

have little to no effect on vindicating the initial disobedience of the previous court order. In other words, the first respondent would only be punished for failing to perform and obey the coercive order and not the initial court order. This, in my view, would have the untenable effect of rendering the court's previous orders nugatory and of no effect, until a coercive order is granted.

- [40] It must be borne in mind that 'the principal purpose of contempt of court proceedings when an order has been disobeyed, has been the imposition of a penalty in order to vindicate the Court's honour consequent upon the disregard of its order . . . and to compel the performance thereof'. In my view, a coercive order would fall short of vindicating the court's authority.
- [41] The only sanction that would be appropriate is direct, unsuspended imprisonment.
- [42] Outside of the undermining the authority of a court, the first respondent's actions have an obvious adverse impact on the rights of the children. His continued disregard of a court order, which compels him to support his children, clearly indicates that he is not acting in the best interests of the children, as demanded by the Constitution under section 28(2). The best interests of the children, include the interest of the children to be provided with the necessary support or maintenance. In *Fletcher*, it was held that 'the best interest standard must undoubtedly be the main consideration in matters involving the children'. Furthermore, in *McCall*, the court noted that 'the ability to provide for the basic physical needs of the child, the so-called "creature comforts", such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security' relating to a child, constitute considerations of the best interests of the child.
- [43] Section 7(1)(c) of the Children's Act notes the capacity of the parents to provide for the child's needs. Section 9 of the Children's Act provides that in all matters concerning the care, protection, and well-being of a child, the standard of the child's best interest is of paramount importance and must be applied. In *Christian Education South Africa v Minister of Education*, the Constitutional Court held:
- 'It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. This Court has recently reaffirmed the significance of this right which every child has.'
- [44] In my view, the best interests of the children in this case are severely undermined. It is a constitutional imperative that the interests of children remain paramount. That is the "central and constant consideration". Courts are thus mandated by the Constitution, which is the highest law in the land, to always give effect to what would be best for the child. Children remain vulnerable groups of society. Unfortunately, the persistence of the first respondent's non-compliance with the court order further exacerbates the vulnerability of the children. Therefore, it is imperative that this Court to not only make an order that is appropriate enough to vindicate the court's integrity and honour, but also to protect the best interest of the children.

- [45] One may potentially argue that sending the children's father to prison would not be in the best interest of the children as the father would not be able to support the children. Unfortunately, the first respondent has indicated that he will not support his children and has not done so. In evidence the first respondent produced an excel spread sheet depicting amounts which he alleges he has paid over in child support over the years. This spreadsheet is absent of bank statements corroborating the disputed allegation that he has failed to pay child maintenance and is in my view unsatisfactory evidence to support his version. This excel spreadsheet to me is just numbers without any evidence. Thus, this argument is a non-starter in this context.
- [46] There have been several attempts by the first respondent to subvert the court orders. For instance, there is a preceding decision made by Matlapeng AJ, which granted the applicant an order permitting her to attach seventy-five percent (75%) of the first respondent's dividends in the second respondent, in order to ensure that the maintenance order is adhered to. This was frustrated by the first respondent by placing the second respondent under voluntary business rescue.
- [47] It must be noted that the first respondent did not comply with two court orders. This Court cannot ignore the blatant disregard of its orders, as the first respondent has done throughout. To do so would lead to a miscarriage of justice.
- [48] After the delivery of the previous order for maintenance, the first respondent voluntarily placed the second respondent, where he is the sole director, under business rescue. Chapter 6 of the Companies Act governs business rescue proceedings. This part of the Act allows financially distressed companies to file for business rescue and with the assistance of a business rescue practitioner, bring the business back to a more profitable and stable entity. The aim of business rescue is to provide a fresh option and assist companies to remain solvent and safeguard the interests of creditors and employees.
- [49] Business rescue, according to section 128 of the Companies Act, are proceedings aimed to facilitate the rehabilitation of a company that is financially distressed by providing for, inter alia:
- a) the temporary supervision of the company, and the management of its affairs, business and property, by a business rescue practitioner;
 - b) a temporary moratorium (stay) on the rights of claimants against the company or in respect of property in its possession; and
 - c) the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business, property, debt, affairs, other liabilities, and equity.
- [50] From the definition, it can be deduced that for a company to qualify for business rescue it should be "financially distressed". A company can be regarded as financially distressed if it appears that the company will reasonably be unlikely to pay all its debts as they become due and payable within the immediately ensuing six months (commercial insolvency), or that it

reasonably appears that the company will become insolvent in the immediately ensuing six months (factual insolvency). Thus, the trigger for business rescue is that the company must be financially distressed and there must be reasonable prospects of rescuing it.

- [51] Of note, business rescue can be commenced in two ways. These proceedings can be commenced either through a resolution by the board of directors of the company or through a court order. If the business rescue proceedings are commenced through a resolution by the board of directors of the company, the procedure stipulated in section 129 of the Companies Act must be followed and complied with.
- [52] Legislatively, business rescue proceedings are intended to end within three (3) months after the commencement of those proceedings. However, they may persist for longer where there is a court order granted after an application by a business rescue practitioner for an extension beyond the statutory prescribed three months, where the practitioner has prepared a report on the progress of the business rescue proceedings, and updated it at the end of each subsequent month until the end of those proceeding.
- [53] In this case, the first respondent has placed the second respondent under business rescue voluntarily as the sole director. He clearly did this as an attempt to prevent the applicant from attaching the assets of the company in satisfaction of the maintenance order and order granted by Matlapeng AJ. The second respondent has purportedly been under business rescue since Matlapeng AJ's order was granted and it has been eight (8) years since. It appears that the first respondent has not approached a court to extend the proceedings for longer than three (3) months, despite the legislative requirement to do so. He has merely benefited from placing the second respondent on a moratorium and preventing legal proceedings against it. This is yet another example of the first respondent's attempts to avoid his responsibilities. Perforce, this reinforces my belief that only direct imprisonment will suffice.
- [54] It may even be argued that the first respondent's placement of the company under business rescue as a means to avoid the attachment of its assets, and keeping it under business rescue for 8 (eight) years, was in violation of his (director's) fiduciary duties towards the second respondent (the company). But that is not before me, and I will not engage it further than that.
- [55] A divorce and the arrangements made thereafter to distribute assets and child visitations tend to be difficult and fraught with difficulties. There is sometimes acrimony and animosity between the parties. Regardless of how they personally feel about each other, they should respect court orders and where they are not pleased with a court order, they should appeal the decision. But what they cannot do is to ignore a court order or comply with the orders selectively or blatantly evade compliance with a court order or directive. The latter scenarios are plainly unacceptable in our society, which is based on the supremacy of the Constitution and rule of law. Court orders are not suggestions but have a binding effect. They should always be followed and adhered to.

- [56] Furthermore, the parents should always act in the best interests of their children. Here, the opposite has happened. The first respondent has acted in a manner that undermined the interests of the children. He exacerbated an already strenuous process by engaging in protracted litigation and failing to honour court orders.
- [57] More suspicious and worrisome is the modus the first respondent adopted during April 2021 in pulling more wool over the applicant's eyes, after she had successfully managed to have the second respondent's bank account frozen through a writ of execution obtained from this Court.
- [58] To have her agree to an order by "agreement" to unfreeze the second respondent's bank account in the urgent application, the respondents brought an urgent application before my brother van der Schyff J, in the Gauteng Division, following another adverse order of the maintenance court in the Magistrates Court which held the first respondent in contempt for failure to pay the children's maintenance.
- [59] First, the respondents approached another Court in a different jurisdiction / Division (Gauteng) on an urgent basis to unfreeze the bank account, which was attached in terms of a court order and writ issued in this Division (North West). This to me seems like forum shopping at its best, as the first respondent may have been under the impression that if he were to approach the North West Division pursuant to two orders that did not favour him, a similar (adverse) outcome would follow. This thinking is wrong.
- [60] It also bears mentioning that pursuant to all the orders issued in this Division, the first respondent did nothing to challenge them legally, but simply chose to ignore them. If he was aggrieved by this Court's orders or believed that they were wrong, he could have lodged an appeal against them respectively, but he did not.
- [61] Through his readiness and eagerness to litigate in the various proceedings in different courts and Divisions in an attempt to evade compliance, the first respondent has clearly demonstrated his financial wherewithal to comply with the court orders, if he desire to. Instead, copious amounts of money were spent on legal representatives' fees and litigation whilst in my view, it could have been better utilised to ensure compliance with this Court's orders and decreasing his total liability to the applicant as well as fulfilling his parental responsibility towards the children. The punitive costs order he has been mulcted with and collected in this Division would not have resulted if he showed some will or effort to comply with this Court's

orders.

- [62] It bears mentioning that the nature and status of an order granted by agreement is the same as that of an order granted after the presiding officer has heard the parties' submissions and has reached a decision on the disputes before him or her. Simply, because in both instances the presiding officer would have considered the court processes (documents) before him or her and applied his or her mind prior to making the order. After the order is made it is no

longer an agreement between the parties but an order of court, which must be complied with. Failure to comply with the order would attract the sanctions (coercive or committal) laid down in terms of the law.

- [63] A person who seeks to enforce compliance would have to do so through the various procedures or mechanisms stipulated in the Rules of Court. Parties cannot agree to vary or amend the contents of an order obtained by agreement informally inter partes or absent of a subsequent court order obtained from the same court or higher Court.
- [64] Noteworthy, none of the orders granted in this Division were appealed, instead the first respondent chose to ignore them and make more empty promises.
- [65] The first respondent's empty promises even led to the financial expulsion of one of the minors from their primary school because of the parents' failure to pay school fees. The tuition termination letter from the minor's school was included as evidence in the applicant's founding affidavit. Such a consequence (expulsion) is unfortunate for the minor and beyond his control. It is sad to even imagine that it was not caused by his own fault (behaviour or academic failure) but by the parents' feud. It is indeed true and unfortunate that the minors became unwilling casualties as the African proverb correctly puts it "when elephants fight, the grass gets trampled".
- [66] Efficient legal solutions and legal certainty and finality is of great import in matters affecting children and vulnerable persons or groups, whether directly or indirectly. This principle is recognised universally. It is never in the best interests of a child when the parents are engaged in a protracted court battle. Court battles relating to children are often than not very selfish in nature and it is easy to overlook the psychological and mental harm done to the child in the process.
- [67] Notwithstanding that the settlement agreement relates to a contract which is sui generis. If it were in the normal contract law setting, given that the first respondent drafted and presented the offer which was accepted by the applicant and became the settlement agreement, the pacta sunt servanda principle (sanctity of contracts) remains applicable and the contra proferentem rule would on its own application not favour the first respondent. Further, in that context should the first respondent have been of the view that any clause or term(s) or condition(s) of the contract are unfair or unlawful, the only way he would escape non-performance would not be by choosing to ignore and proverbially "bury his head in the sand like an ostrich", but rather bring an application to have the alleged unfair provision or clause, term(s) or condition(s) declared unfair and unenforceable.
- [68] In other words, absent of a variation or amendment in terms of the agreement concluded inter partes or court order declaring the contractual clause or provision, term or condition unfair or unlawful and unenforceable as per the principles laid down by our superior Courts, the first respondent would in law be obliged to perform in terms of the agreement. On the facts of this case, he failed to perform and thus is in breach of the agreement.

- [69] In conclusion, the applicant has been going from pillar to post trying her level best to have the first respondent comply with this Court's orders. From as early as when the first court order was granted, using informal non-litigious means, she inquired with the first respondent numerous times via SMS communication, on different dates, of his intention to comply with the court order, only to receive no clear or definitive answer from the first respondent.
- [70] Second, she called a family meeting between senior members of both their families to intervene and mediate to ensure he complies with the court order as her and the children's lives were being drastically affected due her limited and diminishing finances and unstable abode. In this meeting the first respondent promised to comply, but the promise was empty and never realized post the family meeting.
- [71] Third, the applicant approached this Court on motion to compel his compliance with the court order granted by Landman J and further obtained a writ of execution against the property of the respondents. She obtained a favorable order and also had the second respondent's bank account successfully attached only to be lured into agreeing to an order by agreement in an urgent application brought in the Gauteng Division to unfreeze the second respondent's bank account. In the order granted, more rosy promises were made by the first respondent to the applicant which were not done other, than a payment of R300,000 (three hundred thousand Rands) to her in partial settlement of the outstanding debt was deposited into the applicant's bank account by the second respondent's business rescue practitioner.
- [72] This payment in my view could not be close to the damage and loss the applicant and the children suffered at that stage. In the process, she lost immovable property awarded to her (one was sold to pay outstanding expenses related to the property and sustain her and the minor children's livelihoods; and the other subject to a foreclosure) as the bond the first respondent was ordered to settle the outstanding debt. Worse still, the children were without medical aids and a child was expelled from school due to non-payment of school fees.
- [73] Fourth, destitute and desperate for justice the applicant approached and obtained favorable orders from the Maintenance Court against the first respondent. Still the first respondent did not budge. Instead, more empty promises which translated into court orders were made "by agreement" to ward the applicant off. Such conduct in my view is deliberate and mischievous. As much as I would like to believe it was not aimed at the children, unfortunately they became victims and beneficiaries of all the ill treatment and adverse consequences of the first respondent's contempt, which may have been directed at the applicant. Unfortunately, the applicant's psychological state as the primary guardian of the children will in turn indirectly affect the minor children's state of mind and wellbeing adversely if it is affected negatively. I cannot imagine how the minor children feel to see one of their parents, especially the primary care giver crying over a situation beyond their control.

[74] In summary, the facts and circumstances of this matter and concession made during argument by the first respondent clearly demonstrate the first respondent's disregard of this Court's orders and secondly, that his disregard was deliberate and at times accentuated by mala fides. It is on that premise that I make the following order:

Morgan AJ

PARTIES REPRESENTATIVES

For the Applicant: Adv PA Mabilo Instructed by Tyron I Pather Inc C/O Motshabi & Associates Inc. For the First Respondent: Adv DJ Coetzee Instructed by: Van der Linde Attorneys C/O Smit Stanton Inc For the Second Respondent: No appearance in these proceedings

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