

SOUTH AFRICA / JUDGMENT

E.W v V.T.H (7333/2024) [2024]

ZAWCHC 310 (14 October 2024)

[2024] ZAWCHC 310

COURT

Western Cape High Court, Cape Town

BEFORE

Parker, AJ

CASE / FILE NUMBER

7333/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
CASE NO: 7333/2024

In the matter between:

E[...]
W[...]
Applicant
And
V[...] T[...]
H[...]
Respondent
Coram: Parker, AJ
Matter heard on 16
September 2024
Judgment delivered on 14
October 2024, electronically by circulation to
the parties' representatives via email.

JUDGMENT**PARKER, AJ****Introduction**

- [1] This application concerns an order declaring the Respondent to be in contempt of the court arising out of his failure to comply with an order obtained by the parties granted by the Honourable Ms Justice Steyn dated 7 November 2022. The order incorporated the provisions of a consent paper and parenting plan under case number 257/2022.
- [2] The Applicant seeks sentencing the Respondent to a period of imprisonment, alternatively community service, or such sanction as the Court deems appropriate, which sentence is suspended on the condition that the Respondent complies with the terms of the court order.
- [3] The parties were involved in an intimate romantic relationship for a period of about 9 years and three minor children were born from the relationship, namely, I[...] W[...], a girl born on 2 January 2015, T[...] M[...] W[...] and M[...] H[...] W[...], who are twin boys, born on 25 August 2017 (“the children”). In or during April 2022, the marital relationship broke down irretrievably and the Respondent vacated the common matrimonial family home
- [4] The Order dated 7 November 2022, was granted in terms of which the Respondent was directed, “pending the finalization of a trial incorporating a maintenance hearing and/or Part B of the application”. For the sake of brevity I summarise the prayers which led to the non compliance in respect of this application.

4.1 to maintain the minor children by, inter alia, paying cash maintenance in the amount of R60 000.00 per month to the Applicant, the first payment due on 15 November 2022,

4.2 bearing the children’s medical aid and medical expenses,

4.3 bearing some of the children’s educational expenses and

4.4 paying the rental due and the utilities account in respect of the former family home where the Applicant and the children still reside.

The First Contempt

- [5] The Applicant had previously brought contempt proceedings in respect of other relief, regarding the Respondent’s failure to reimburse her for the shortfall in the cash maintenance in respect of the children for November 2022, and certain educational expenses incurred on behalf of the children. Although the Respondent has continued to fail to reimburse Applicant in respect of certain specific medical and educational expenses incurred in respect of the children subsequent to the first contempt application being launched, those claims are not included in the current application. The first

contempt Order was granted by Justice Gamble on 22 August 2024 and held the sanction in abeyance provided the Respondent complies with certain conditions.

The pre break up

- [6] The Applicant claims that the Respondent was responsible for the financial support of the children throughout the duration of the relationship and that both she and the children were entirely reliant on him. The Respondent disputes this assertion, asserting that the Applicant was employed, earned an income, and contributed to the domestic expenses and the maintenance of the children.
- [7] Subsequent to vacating the family home, the Respondent tendered to pay an amount of R22 500.00 per month to the Applicant in respect of the children's maintenance, which tender was not accepted by the Applicant, who contended that the amount tendered was a significant reduction in their standard of living that they were accustomed to previously. The Respondent proceeded to make payment in terms of the tender from May 2022, despite her rejection thereof. This was then resolved in terms of the Steyn J Court Order.

Current contempt of court application

- [8] Contrary to the order referred to in paragraph 4 above, and since 1 March 2024, the Respondent has only been paying a cash maintenance in the amount of R22 500.00 per month, paying only the children's school fees and no other educational expenses, paying only the medical aid premium and no other medical expenses and refusing to pay the rental due in respect of the former family home.
- [9] The Applicant contends that her contempt application is urgent due to the following:
- 9.1 the Respondent's failure to pay rental puts the Applicant and the minor children at risk of being evicted from their home, which is not in the best interests of the parties.
- 9.2 the Respondent's failure to pay the aftercare fees for the children at G[...] (the aftercare programme at G[...] Primary), results in the children are no longer attending aftercare, which is not in their best interests because:
- 9.2.1 the family home in Oubaai is located approximately 20kms from the children's school and the Applicant relies on the services provided by the aftercare to assist in taking care of the children after school and before extra-curricular activities and/or take care of the twins while she accompanies I[...] to her extra-curricular activities and/or vice versa, especially considering the children's demanding schedule.
- 9.2.2 the twins, who struggle with school and were at risk of being held back if they did not receive proper educational support, benefit greatly from the assistance with homework provided at aftercare.

9.2.3 due to the Respondent's non-compliance with the Order – including failing to reimburse the applicant for the children's additional medical expenses, such as play therapy, speech therapy and occupational therapy – and reducing the cash maintenance by almost two-thirds, the children are not receiving the therapeutic and educational support they require. This support must be reinstated as a matter of urgency.

[10] According to the Applicant, he is a wealthy business man in the mining industry with various business interests whilst she is a homemaker. After the breakdown of the relationship (1 May 2022) the Respondent unilaterally reduced the maintenance from R 112 000.00 to R 22 500.00 per month.

Respondent's counter application

[11] The Applicant's urgent application was served on the Respondent on 11 April 2024. On 24 April 2024, the Respondent delivered a counter application for a variation of his maintenance obligations in terms of the Steyn J Order. His affidavit therein spans 250 pages (including annexures), serves both as an answering affidavit to the urgent application and as a founding affidavit to his counter application. The Respondent raised various defences in his opposing affidavit to the contempt. One central defence is the Respondent's reliance on alleged changed financial circumstances that allegedly

came about in February 2024 making it impossible for him to comply with the Order.

[12] The Respondent tried to portray his failure to comply with the Order as the Order has "fallen away" because he purportedly "withdrew the extant part of the matter" pending before the George High Court under case number 257/2022 in which the Order was granted.

[13] In response, the Applicant argues that the Respondent's purported "notice of withdrawal" is irregular as the matter is part-heard and can only be withdrawn with the consent of the Applicant or the leave of the court, neither of which has been sought or obtained by the Respondent.[1] Additionally, even if the Respondent were to validly withdraw the extant part of his application, the Applicant's counter

application is not withdrawn and, accordingly, the Order remains extant.

Discussion

[14] Therefore, it is thus evident that the Order remains extant and that the Respondent's conduct constitutes a failure to comply therewith despite his efforts to persuade the court that the order fell away, or if the order has not fallen away, he "did not comply with it on legal advice to the effect" and his conduct is accordingly not willful and not intended to flout an order. I respectfully submit that this contention is without merit and does not benefit the Respondent.

[15] The following facts and circumstances demonstrate the Respondent's willfulness and mala fides in failing to comply with the Order, which are:

15.1 The history of the litigation shows that the Respondent has been dissatisfied with the Order since it was granted on 7 November 2022. I agree with Applicant, he has made various attempts to shirk his obligations in terms of the Order yet failed to bring an application for variation earlier timeously, although, he initially sought the Court's reasons for the Order and indicated that he considered appealing same whereafter he changed tact and sought to bring an application in the Maintenance Court for a variation of the Order.

15.2 If one has regard to the Respondent's application to the Maintenance Court, dated March 2023 attached to his affidavit as "VH5", it is evident that the Respondent has been seeking to reduce his maintenance obligations to R7 500.00 per month per child, and the limitation of additional payments to school fees and the medical aid premium only, since March 2023, without any mention of alleged changed financial circumstances. In the application to the Maintenance Court. Without delving into the merits of that application, the alleged "good reason" for a variation of the Order relied on by the Respondent, are his objections to the circumstances in which the Order was granted, not any alleged changed financial circumstances. I therefore cannot accept his change in financial circumstances being reliable.

15.3 The terms of the proposed variations in April 2024 and March 2023 also happen to accord with the terms of the Respondent's initial tender, in April/May 2022 when he vacated the former family home, to "pay maintenance in the amount of R7 500.00 per month per child, in addition to paying the children's school fees, aftercare fees and medical aid premium directly to the relevant third parties".

15.4 Despite alleging a change in his financial position in February 2024 (which he allegedly had knowledge of since December 2023), the Respondent did not initially seek a variation of the Order but only did so when the Applicant proceeded with contempt proceedings. The Respondent now contends in his counterapplication that his financial circumstances have changed and that he is seeking a variation in the same terms as sought in the Maintenance Court over a year ago (for different reasons) and in the same terms as his first tender in April 2022.

15.5 I agree with Applicant, the Respondent's reliance on "changed financial circumstances" to justify his non-compliance with the Order, is contrived and merely the latest tactic employed by the Respondent to skirt his maintenance obligations in terms of the Order and pay only what he considers to be reasonable maintenance. This is unacceptable.

[16] The Respondent contends the reason for his financial position having changed markedly resulted from loss in business, when in December 2023, an order with one of the businesses was terminated. He is one of 4 directors of this business. This loss had an effect on the other entities he was engaged in. He annexed an accountant's report reflecting an increase in average shortfall to meet the Steyn Order, and showed that his legal fees increased and therefore could no longer abide by the Order. This, he says (the change in financial circumstances) was communicated via his attorneys on 21 February 2024

to the Applicant to which she refused to accept, and efforts to engage her were fruitless.

- [17] The Respondent seemingly relies on the inherent power of the court to vary simple interlocutory orders at any time prior to final judgment for the variation sought herein. Whilst Courts have the power to alter interlocutory or procedural orders on good cause shown,[2] the general rule that a court may not alter its own judgment does not apply to simple interlocutory orders which are susceptible to variation.[3]
- [18] Such orders are open to reconsideration, variation or rescission on good cause shown[4] and our courts have exercised the power to vary simple interlocutory orders when the facts on which the orders are based have changed. In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[5] the Court held that “At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment”, and in *Sandell and Others v Jacobs and Another*[6] , the Court stated that “an interlocutory order may be so varied or set aside, either by the Judge who originally made the order, or by any other Judge sitting in the same Court and exercising the same jurisdiction.”[7]
- [19] However, while courts have the power to vary these orders, “a Court will not lightly exercise such a power” and an invitation to alter even an interlocutory order should be approached with “considerable diffidence.”[8]
- [20] This is an indication that the power ought to be exercised with caution and only by the Judge who initially issued the order, or by any other Judge sitting in the same Court and exercising the same jurisdiction. The rationale for this limitation is that the Court tasked with deciding whether to vary an interlocutory order must have knowledge of the facts and circumstances under which the order was granted in the first place to be able to determine that good cause exists to vary same.
- [21] The Order in this case was granted by the George High Court under case number 257/2022. Whilst this Court has the necessary jurisdiction to hear the Applicant’s contempt application, I respectfully submit that the same cannot be said of the Respondent’s variation application. This application must be heard by a Judge sitting in the same Court and exercising the same jurisdiction as the Honourable Ms Justice Steyn who was sitting at the George High Court when the Order was granted.
- [22] More importantly, the general rule is that a person in contempt of a court order will not be heard by that court until he has purged the contempt.[9]
- [23] In this regard, *Readam SA (Pty) Ltd v BBS International Link CC and Others*[10] where the Court found that it is inappropriate that a Respondent in contempt proceedings should be granted the opportunity to apply for variation of the order which he has not complied with, which effectively allows him to obtain judicial sanction for his course of conduct. Of course there are instances where variations can be met, however, it is my view not when the contempt needs to be purged.

- [24] I am mindful that in *Zondi v MEC, Traditional and Local Government Affairs*[11] , the Constitutional Court stated that in deciding whether to amend an order, the courts are required to determine what is just and equitable in the circumstances of the particular case and can vary an order where it is in the interests of justice to do so, however this does not apply in this instance.
- [25] The Respondent addressed his concerns on the appropriate sanction. He states imprisonment would have serious consequences for him as he would be unable to work whilst he is to seek to rescue the business in what he describes as a time of great financial peril, when he is meant to minimize losses and try to turn the business around. For him, imprisonment would destroy what is left and make it impossible to pay the Applicant what he has tendered. I accept a committal will be grave as he would also not be able to exercise contact and care to the children which would clearly not be in their best interests.
- [26] To succeed with contempt proceedings and compel performance, the Applicant is required to prove the existence of an order and I rely on *Pheko and Others v Ekurhuleni City*[12]; that the order has been duly served on or brought to the notice of the alleged contemnor; the non-compliance with the order; and the noncompliance was mala fides.
- [27] Where an Applicant has established the first 3 requirements the evidential burden shifts to the Respondent to negate it on a balance of probabilities, the presumption of willfulness or mala fides, if he fails then contempt is established[13].
- [28] I am satisfied that the Applicant has satisfied the requirements of Rule 6(12)(b) that an applicant seeking to be heard as a matter of urgency must explicitly set out in the founding affidavit (a) the circumstances rendering the matter urgent and (b) the reasons why he could not be afforded substantial redress at a hearing in due course.[14]
- [29] The urgency which is also occasioned due to the Respondent's failure to pay the rental, puts the Applicant and the minor children at risk of being evicted from their home, which is not in the best interests of the children.
- [30] The Respondent fails to adequately explain his role, shareholding and involvement in the web of businesses and trusts he speaks about. There are many questions to be answered, he may have other sources of income not accounted for including that of the various trusts of which he is a trustee and beneficiary, which requires further disclosures. For me to apply my mind to a variation requires the interrogation of records. At this stage, I cannot deal with the Respondent's personal balance sheet provided since his alleged wealth may be contained within the corporate and trust structures. Above all he needs to purge his contempt.

Conclusion

- [31] As previously stated, the Respondent must demonstrate a significant change in circumstances rendering him unable to comply with the court order which he has failed to do due to insufficient disclosure of his assets and those of associated trusts and entities, beyond the financial statements of Record Project Engineering and the Rossi Trust. This Court cannot assess the alleged impact of the change in income on the Respondent's ability to pay without adequate disclosure regarding the assets of the Respondent and the trusts under his control
- [32] The Respondent's actions are troubling and warrant attention. His course of conduct is fraught with risk and it is significant that Judge Gamble has already found him to be in contempt opting to reserve judgment on the penalty.
- [33] Considering all the evidence it would not be appropriate to let the Respondent off with minimal consequences. To do so would send a detrimental message to South African citizens, implying that disregard for court orders are tolerated. This would set a harmful precedent undermining the authority of court orders and potentially discouraging vulnerable groups including women and children from asserting their rights to maintenance, health and education.
- [34] Confidence in the legal system hinges on the meaningful exercise of the constitutional right to access courts, which necessitates, that litigants have faith in the judiciary's capacity to safeguard their rights particularly when seeking enforcement against recalcitrant individuals, whose non compliance jeopardises children's access to essential maintenance, health and educational provisions.
- [35] I have taken into account the Respondent's plea regarding his business and family obligations and have factored that into the sanction's structure. Considering the financial struggles women often face, permitting the ignoring of the court orders would be a dereliction of my Constitutional and my judicial duties, potentially rendering such orders ineffective. However, as I am constrained to safeguard the rights and well-being of the children involved, the Respondent cannot escape the consequences he brought upon himself.
- [36] I accordingly order as follows:
- a) The Respondent is declared to be in contempt of the court order granted by the Honourable Ms Justice Steyn of the above Honourable Court on 7th November 2022 under case number 257/2022.
 - b) The sanction imposed upon the Respondent shall be as follows:

- i) The Respondent shall be committed to imprisonment for a period of 30 (thirty) days, to be served as periodic imprisonment at weekends between 17h00 on Friday and 06h00 on Monday, such sentence of committal be suspended on condition that the Respondent complies with the court order by paying the full arrear rental, maintenance, health

and educational needs within 60 days and continues to comply with the court order until the final determination of Part B of the

application, alternatively until it is varied.

- ii) The Respondent to rectify his contempt, before he can be heard by this Honourable Court in his counter application for a variation,

- c) The Respondent shall pay the applicant's costs incurred on an attorney and client scale A.

R K PARKER

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for Applicant : Adv. A Thiart Instructing Attorney : Maurice Philips Wisenberg – Ms K

Counsel for Respondent : Adv. D Van Reenen Instructing Attorney : BDP Attorneys – Mr G De Beer

- [1] To the extent that the Respondent contends this is not trite, see the recent unreported judgment of Investec Bank Limited v Abada

- [2023] ZAGPPHC 181; 30528/2021 (23 March 2023) where the applicant launched an application for the home to be declared specially

executable, which proceedings were flawed and resulted in an interim order by Holland-Muter AJ referring certain issues to oral

evidence. The Court stated as follows at paras 6-7: “The applicant, realizing the flaw in the first application, decided to withdraw the application.As a result of the stage of the proceedings (it had been set down) it could only be withdrawn with either the consent of the respondent or the leave of the court. The applicant therefore tendered costs to the respondent and requested that the matter be withdrawn. The respondent in this moment was faced with an election: to object or to consent to the withdrawal. ...If the respondent objected, the applicant would have had to convince the court it was in the interest of justice to permit the applicant to withdraw the application – despite the interim order having been granted.”

- [2] Sandell and Others v Jacobs and Another 1970 (4) SA 630 (SWA); Technical Systems (Pty) Ltd and Another v RTS Industries and Others 2024 JDR 0046 (WCC).

- [3] Duncan NO v Minister of Law and Order 1985 (4) SA 1 (T) at 2 E-F.

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- [4] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 550; Duncan NO at 3; and Zondi v MEC, Traditional and Local Government Affairs and Others 2006 (3) SA 1 (CC).
- [5] 1977 (3) SA 534 (A)
- [6] 1970 (4) SA 630 (SWA)
- [7] At 634D.
- [8] Technical Systems (Pty) Ltd and Another v RTS Industries and Others 2024 JDR 0046 (WCC) para [55]; Sandall supra at 634D-F.
- [9] As formulated in Hadkinson v Hadkinson
- [1952] 2 All ER 571 (CA) and adopted and applied in Kotze v Kotze 1953 (2) SA 184 (C).
- [10] 2017 (5) SA 184 (GJ) at 197H – 198F.
- [11] 2006 (3) SA 1 (CC).
- [12] 2015 (5) SA 600 (CC), para [36].
- [13] Judicial Commission v Zuma supra para [47].
- [14] Salt and Another v Smith 1991 (2) SA 186 (NmHC) at 187A – B.
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