

SOUTH AFRICA / JUDGMENT

H.A.E v H.S.E (3350/2022) [2024] ZAFSHC 114 (25 April 2024)

[2024] ZAFSHC 114

COURT

Free State High Court, Bloemfontein

BEFORE

PJJ Zietsmann

CASE / FILE NUMBER

3350/2022

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: 3350/2022

In the contempt application between: H[...] A[...] E[...] Applicant and H[...] S[...] E[...] Respondent

CORAM:

PJJ ZIETSMAN AJ

HEARD ON:

26 OCTOBER 2023

DELIVERED ON: 25 APRIL 2024

Introduction

[1] This matter came before me on the extended return day of contempt of court proceedings.

- [2] Mrs E[...] is the applicant in the contempt application which she brought against her former husband, Mr E[...]. The basis of the contempt is Mr E[...]’ wilful and mala fide refusal to honour his maintenance obligations and to pay a cost order from previous litigation between the parties.
- [3] Mrs E[...] made the contempt allegations in her answering affidavit filed in opposition to an application brought by Mr E[...] to amend the provisions of the deed of settlement concluded by the parties in their divorce proceedings.
- [4] Mr E[...] seeks an order that the deed of settlement be amended so that the primary residence of the minor daughters born of the marriage relationship between the parties be awarded to him and that contact rights be awarded to Mrs E[...].
- [5] In order to avoid confusion I shall refer to the application to amend the deed of settlement as “the main application” and to the counter application for contempt of court as “the contempt application”.
- [6] Although Mrs E[...] is the respondent in the main application she is the applicant in the contempt application and I shall thus refer to her as “the applicant” and to Mr E[...] as “the respondent”.
- [7] In addition to the aforementioned litigation Mr E[...] also instituted proceedings in the Brandfort Magistrate Court where he seeks a reduction of his maintenance obligations to Mrs E[...].
- [8] At the time when the contempt application served before me neither the main application nor the maintenance court application had been heard.

The litigious background and the contempt proceedings

- [9] The parties were married and from their marriage relationship two minor daughters were born.
- [10] The marriage was dissolved on 2 May 2017 and the divorce order also incorporated the deed of settlement concluded between the parties. In terms thereof the parties agreed that the primary residence of the minor children be awarded to the applicant, subject to the respondent’s right of contact with the children.
- [11] The respondent also agreed to pay maintenance of R4000-00 per month per child to the applicant and he further agreed to pay the reasonable medical, dental and ophthalmological as well as school fees and reasonable extramural activities of the minor children.
- [12] The parties further agreed that the maintenance shall increase annually in accordance with the consumer price index (CPI), on the 1st of May of each year following the date of divorce.

- [13] During July 2020 the respondent instituted the main application wherein he primarily seeks an amendment of the deed of settlement so that the primary residence of the minor children be awarded to him and that certain contact rights be awarded to the applicant.
- [14] The applicant incorporated the counter contempt application as part of her answering affidavit to the main proceedings.
- [15] The respondent's replying affidavit in the main application also served as his answering affidavit to the contempt allegations and in reply thereto the applicant filed a replying affidavit to the counter application.
- [16] The contempt application is premised on the allegations that the respondent is in arrears with maintenance payments to the tune of R 268 635,35 and that he refuses to pay a cost order in favour of the applicant in the amount of R 16 945,85.
- [17] The respondent admits that he is in arrears with his maintenance obligations but he denies that his actions are both wilful and mala fide.
- [18] The defence against the respondent's failure to pay maintenance is one of poverty.
- [19] The respondent alleges that due to his dire financial position he is only able to afford maintenance of R 3 000,00 per month in respect of both minor children and during January 2021 he instituted proceedings in the maintenance court for a reduction of his maintenance obligations.
- [20] The respondent's approach in the answering affidavit to the contempt allegations (the replying affidavit to the main application) was that:

the determination of [his] ability to afford payment of the maintenance order and/or the extent thereof is substantially determinative of the issues before the maintenance Court.

and his failure to comply with the maintenance order:

was neither wilful nor mala fide but due to the deterioration of [his] financial affairs. Much of this deterioration had to do with the divorce itself (e.g. payment of onerous interim maintenance and the costs of litigation) but also with extraneous matters such as drought on the farm. [The respondent] have also for a long time incurred expenses in order to excise contact with [his] children.... [The respondent's] current income is only R6 000.00 per month.

- [21] The respondent explained that he earns R6 000.00 per month of which R3000.00 goes towards the maintenance of both the minor children. In addition, it costs him approximately R4 000.00 per fortnight in travelling and accommodation costs to exercise his contact rights with his children.
- [22] According to the respondent his monthly shortfall of approximately R5 000.00 is made good with loans from his mother.

[23] The main application and the contempt application came before Daniso J on 20 and 28 April 2023. At that point in time the parties agreed that the main application be stayed pending an investigation by the family advocate into the children's' circumstances but the contempt application was argued and Daniso J held[1] that:

[20] Except to fleetingly attribute his failure to adhere to the court orders the [respondent] has provided no evidence in relation to his alleged material change in his financial circumstances. He told the court that he will address that issue at the maintenance court therefore, at a prima facie level the [applicant's] contention that the [respondent's] failure to comply with the court orders is not due to lack of means has not been gainsaid. It is also important to note that it took the [respondent] approximately over three years since the divorce to seek the variation of the order. Another six years lapsed from the date he launched the variation application to

the date on which these proceedings were heard. The arrears are substantial and the delay is extreme, this points to maliciousness, a total disregard of his parental responsibilities and an affront to an order of court aimed at protecting the minor children's best interests.

[24] ... the [respondent] has failed to discharge his burden of disproving that he has been wilful and mala fide in this failure to comply with the court orders, contempt of court has been established beyond a reasonable doubt.'

[24] Daniso J issued a rule nisi calling upon the respondent to give reasons why an order in the following terms should not be made final:

2.1. Declaring that the Applicant is in contempt of the court orders issued on 02 May 2017 and 13 October 2021;

2.2. Ordering the Applicant to pay a fine, the amount of which amount is to be determined by this Court; and

2.3 Sentencing the Applicant to direct imprisonment for a period of 6 months, aforementioned period to be suspended for a period of three years, subject to the conditions that the Applicant pay a fine, the amount of which is to be determined by this Court, the Applicant purge his contempt within thirty (30) days from the date of this order and subject to the condition that the Applicant not be found guilty of contempt of Court for a period of 3 years from the date that this order is granted.

3 The applicant shall pay the costs of the counter-application on attorney and client scale.

[25] As a result of the rule nisi the respondent filed a further supplementary answering affidavit and the applicant filed a further replying affidavit. The matter served before me on the extended return day.

The law

[26] In *Fakie N.O. v CCII Systems (Pty) Ltd*[2] (Fakie) Cameron JA (as he was then) explained that once an applicant in contempt proceedings has proved the order; service or notice; and non-compliance the respondent bears an evidential burden in relation to wilfulness and mala fides. He held further that:

Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

[27] And in *Pheko v Ekurhuleni City*[3] (Pheko II) the Constitutional Court, with reference to *Facie*, held that:

...a respondent in contempt proceedings, Fakie said, is not an 'accused person' as envisioned by s 35 of the Constitution, and the protections afforded to a contemnor should not supersede the capacity of a non-state litigant who may not have the administrative might to establish motive. Therefore 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 reasonable doubt as to their existence.

(footnotes omitted)

[28] Since the parties elected to bring the application by way of motion proceedings the normal principles applicable to the adjudication of applications applies. This was confirmed in *Fakie*[4] as follows:

[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers

The main reasons advanced by the respondent to displace the evidential burden

[29] In the respondent's supplementary answering affidavit he raised three defences to displace the evidential burden in relation to wilfulness and mala fides. They are: (a) that as a matter of law and policy it is objectionable for a party who initiated proceedings for a reduction of maintenance in a maintenance court to, while those proceedings are pending, be subjected to High Court contempt proceedings relating to a failure to pay maintenance; (b) contempt

proceedings relating purely to an unpaid cost order is neither appropriate nor legally sustainable; and (c) that the respondent has not deliberately and mala fide breached his maintenance obligations and there is at least doubt as to whether the respondent's non-compliance with the orders is wilful and mala fide.

- [30] The third contention, namely that the respondent is not in wilful and mala fide breach of his maintenance obligations is primarily a plea of poverty and needs further elaboration.
- [31] The respondent explained that his personal finances are tied up to the business of the Saberias Trust (the Trust). The respondent is the only beneficiary of the Trust. He is also a trustee of the Trust together with his mother, his sister and an independent trustee, Mr Lombard.
- [32] The Trust is the owner of livestock and three farm properties. In addition, the Trust holds all the members interest of a close corporation known as Vrugtefontein Boerdery.
- [33] Initially the respondent honoured his maintenance obligations but since December 2019 he, started paying a reduced amount of R 4000,00 per month, and from April 2020 he reduced the amount further to R 3000,00 per month (R1500.00 per month per child).
- [34] The reason, according to the respondent, for his inability to honour the terms of the maintenance order is the financial deterioration of the Trust.
- [35] He explained that the Trust's financial position deteriorated, and that the Trust is in serious cash flow problems, as a result of the following:
- [35.1] During 2016 the Trust concluded two sheep lease agreements with a close corporation known as Bloekompark. Bloekompark leased 398 ewes and 7 rams from the Trust to be grazed on property not belonging to the Trust and a further 1300 ewes and 24 rams which would graze on the Trust's property.
- [35.2] By February 2019 Bloekompark failed to honour the sheep lease agreements which resulted in an agreed reduced lease payment and by 30 June 2020 Bloekompark simply did not pay the lease of R 30 475 due to the Trust. As a result the Trust suffered a loss of income of R 201 825,00 and in addition Bloekompark disappeared with approximately 400 of the Trust's sheep to the value of R 800 000,00; and
- [35.3] The area where the Trust's farms are located suffered a drought which started in 2016 and reached its height around mid 2019. The loss of rental income as well as the drought forced the Trust to sell breeding stock.
- [36] As a result, during February 2019 the Trust reduced the respondent's salary from R 20 000,00 per month to R 14 000,00 per month and a further reduction followed during December 2019 to R 6000,00 per month.

- [37] According to the respondent, “due to several factors, including the drought and the costs of the divorce, [his] finances were depleted” and he was dependant on loans to be able to meet his maintenance obligations.
- [38] He further declared that he has no income apart from the salary that he receives from the Trust and that the other credit entries in his personal accounts are loans and/or financial assistance from friends and relatives.
- [39] However, the respondent only disclosed the identity of two sources who made loans and/or provided financial assistance to him. They are his mother, who loaned a total amount of R 201 192,00 to the respondent between March 2020 and August 2023 and a certain Mr Louw who loaned R12 000,00 to the respondent during April 2023.
- [40] The respondent says that the loan from his mother was used for personal expenses, the vast majority which was for fuel to exercise contact rights with his children. The respondent’s mother also financed his post-divorce litigation.
- [41] To conclude, the respondent declared that he does not own any assets that can be sold to pay additional maintenance and the only assets in his name are a number of firearms.

Has the respondent displaced the evidential burden ?

- [42] As to the first contention above, the respondent did not, neither in his heads of argument nor in argument before me, direct the court’s attention to the legal basis on which his first submission is premised.
- [43] However, in argument before me it was contended that the maintenance court is “best suited” to investigate the financial affairs of the respondent and that the contempt application should, as a matter of policy, stand over until after the maintenance court proceedings.
- [44] I cannot endorse the respondent’s submission. The primary nature and purpose of contempt proceedings is to vindicate judicial

authority[5] whereas the purpose of maintenance court proceedings is, inter alia, to recognise the right of every child to a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development and to take all appropriate measures in order to secure the recovery of maintenance for a child from the parents or other persons having the financial responsibility for the child[6].

- [45] The object and purpose of the two proceedings are thus so far removed from one another that it militates against the establishment of a policy such as that contended for by the respondent.
- [46] As to the second contention: At the outset of the arguments before me, counsel for the applicant correctly conceded that the respondent’s failure to pay the cost order is not receptive for civil contempt proceedings.

- [47] The remaining issue is whether the respondent was in wilful and mala fide breach of his maintenance obligations.
- [48] The point of departure in respect of the third contention is to recognise that the respondent has been in constant and continuous breach of his maintenance obligations since December 2019.
- [49] The golden thread through the respondent's case is that his finances are tied to the Trust. He only receives a salary from the Trust which, as a result of the deterioration of the Trust's financial position, was reduced and is not sufficient to honour his maintenance obligations. He also has no other assets which can be sold, save for a number of firearms, to honour his obligations.
- [50] The respondent did not take the court into his confidence to disclose either the number of firearms or the value thereof.
- [51] Furthermore, the respondent appended the financial statements of the Trust for the financial years ended February 2019, 2020 and 2021 as well as the financial statements of Vrugtefontein Boerdery ('the CC') for the financial year ended 28 February 2019 to the supplementary answering affidavit and the applicant appended the financial statements of the CC for the financial years ended February 2020 and 2021 to the supplementary replying affidavit.
- [52] The financial statements of the Trusts shows that, as at 28 February 2019 the respondent loaned R 1 854 066,00 to the Trust. The loan is clearly not at arm's length because it is interest free and repayable on demand.
- [53] By 29 February 2020 the respondent's loan to the Trust reduced to R 1 654 074,00 and the Trust's cashflow statement reflects that the loans from members – i.e. the respondent – decreased with R 199 992,00.
- [54] The inference, in the absence of an explanation from the respondent, is inescapable that during the financial year 1 March 2019 to 29 February 2020, i.e. the period during which the respondent voluntarily decided not to honour his maintenance obligations, the Trust paid R 199 992,00 to the respondent to reduce its loan account to the respondent.
- [55] In addition, the respondent's loan to the Trust is an asset in his estate and, according to the terms of the loan[7], as disclosed in the financial statements, the respondent is at liberty to call on the loan at any time.
- [56] The respondent did not even deal with this loan in his supplementary answering affidavit let alone proffered an explanation why he cannot call on the loan to honour his maintenance obligations.

- [57] The financial statements of the CC tells a similar tale. On 28 February 2019 the CC loaned an amount of R 384 590,00 to the respondent. That amount was reduced during the period 1 March 2019 to 29 February 2020 to R 107 322. The cashflow statement of the CC shows that the loan to the respondent decreased with R 277 268,00.
- [58] Again, the inference, in the absence of an explanation from the respondent, is inescapable that during the financial year 1 March 2019 to 29 February 2020 the respondent had the ability to pay R 277 268,00 to the CC instead of honouring his maintenance obligations.
- [59] The following year[8], the CC's loan to the respondent increased from R 107 322,00 to R 272 425,00 and the cashflow statement recorded that a loan of R 165 103,00 was advanced to the respondent.
- [60] In addition, note 18.2 of the CC's financial statements for the year ended 29 February 2020 shows that the CC paid a salary of R 90 001,00 to the respondent. This is in direct contrast with the respondent's version that he only received a salary from the Trust.
- [61] In *Wightman t/a JW Construction v Headfour (Pty)Ltd and Another*[9] Heher JA, with reference to the *Plascon-Evans* test, held that:
- [13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other

party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.

- [62] The information pertaining to the transactions recorded in the financial statements of the Trust and the CC, as discussed above, lies purely within the knowledge of the respondent but he failed to take the court into his confidence to explain any of the said transactions.
- [63] In addition, the information contained in the financial statements of the Trust and the CC, stands in direct contrast with the respondent's pleaded poverty case.
- [64] The respondent's poverty defence is clearly untenable and is rejected on the papers. It follows that the respondent has failed to discharge the evidential burden and that he is in wilful and mala fide breach of the orders. Paragraph 2.1 of the extended rule nisi is thus confirmed.

Appropriate Remedy

- [65] Paragraphs 2.2 and 2.3 of the rule nisi invited to respondent to give reasons why a fine, to be determined by the court, and direct imprisonment for a period of 6 months, suspended for a period of 3 years subject thereto that he purges his contempt within thirty (30) days from the date of the order and subject to the condition that he is not found guilty of contempt of Court for a period of 3 years from the date of the order.
- [66] The respondent did not specifically provide reasons in his supplementary answering affidavit, if he is found to be in contempt, why paragraph 2.2 and 2.3 of the rule nisi should not be confirmed.
- [67] It is trite that a court enjoys wide remedial discretion in contempt proceedings and that committal is ordered for coercive purposes to seek compliance and made conditional upon non-compliance with a mandamus or interdict[10].
- [68] The fact that the respondent has been in continuous contempt of his maintenance obligations since December 2019 speaks volumes of the respondent's disregard for the integrity and authority of the Court. I am thus of the view that a fine of R 50 000,00, to be paid to the registrar of this court within 90 days of this order, will be sufficient in the circumstances to preserve the integrity of the Court.
- [69] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*[11] the Constitutional Court held that:
- [54] Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamuses, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest. In the pertinent words of Cameron JA (as he then was) for the majority in *Fakie*:

'(W)hile the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.'

[70] I am likewise satisfied that the extent of the respondent's past non-compliance with the orders justifies committal, fully suspended on the proviso that he purges his contempt and complies with the provisions of the order made herein.

[71] Accordingly the following order is made:

1. It is declared that the respondent in the counter contempt application – Mr HS E[...] - is in contempt of the court orders issued on 02 May 2017 and 13 October 2021;
2. The respondent is ordered to pay a fine of R 50 000,00 to the registrar of this court within ninety (90) days of the date of this order.
3. The respondent is sentenced to direct imprisonment for a period of 6 months, wholly suspended for a period of three years, subject thereto that (a) the respondent complies with paragraph 2 of this order; and (b) the respondent purges his contempt within sixty (60) days from the date of this order through payment of his outstanding maintenance obligations of R 268 635,35 to the applicant in the contempt application – Mrs E[...].
4. The respondent is ordered to pay the costs of the counter-application on the scale as between attorney and client.

PJJ ZIETSMAN AJ

Counsel for the applicant in the counter contempt application: Adv R van der Merwe Instructed by: Phatshoane Henney Attorneys BLOEMFONTEIN Counsel for the respondent in the counter contempt application: Adv HJ van der Merwe Instructed by: Symington De Kok Attorneys BLOEMFONTEIN

[1] H.S.E v H.A.E (3350/2022) [2023] ZAFSHC 322 (15 August 2023) para 24, Daniso J's judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The deemed date and time for hand-down for handing down the judgment was 15 August 2023 at 09h30.

[2]

[2006] ZASCA 52; 2006

(4) SA 326 (SCA) at para 41 and 42.

[3] 2015

(5) SA 600 (CC) at [36]

[4] Footnote 2 above, at par [50]

- [5] Fakie at para [38] to [40] and Pheko II at para [28].
- [6] Preamble to the Maintenance Act, 1998
- [7] In terms of Note 3 of the financial statements the loan from the respondent is interest free and has no fixed repayment terms.
- [8] The financial period ended 28 February 2021.
- [9]
- [2008] ZASCA 6; 2008
- (3) SA 371 (SCA) at par [13]
- [10] Ciliba v Ciliba 2022 JDR 1630 (FB) at para [41] and [42]
- [11] 2018
- (1) SA 1 (CC) at para [54]
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