

SOUTH AFRICA / JUDGMENT

JB v HMB (31011/2021) [2024] ZAGPPHC 936 (25 September 2024)

[2024] ZAGPPHC 936

COURT

North Gauteng High Court, Pretoria

BEFORE

Minnaar

CASE / FILE NUMBER

31011/2021

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IN THE HIGH COURT

OF SOUTH AFRICA

(GAUTENG DIVISION:

PRETORIA)

Date: 25 September 2024

Case number:

31011/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE: 25 SEPTEMBER 2024

SIGNATURE

In

the matter between: J
B
APPLICANT
And
H M
B
RESPONDENT

JUDGMENT

MINNAAR AJ,

- [1] The parties were married to each other on 9 January 1991, in community of property, and the marriage still subsists. On 23 June 2021, the applicant instituted divorce proceedings and the respondent is defending the action. On 20 January 2022, this court granted relief in Rule 43 proceedings (“the Rule 43 order”).
- [2] The applicant seeks an order that the respondent be found to be in contempt of the Rule 43 order and the respondent be sentenced to imprisonment for a period to be determined by the court, with or without an option of a fine, suspended on condition that the respondent complies with the order.
- [3] The legal principles concerning contempt proceedings are:
- The existence of the order.
 - The order must be duly served or brought to the notice of the alleged contemnor.
 - There must be non-compliance with the order; and
 - The non-compliance must be wilful and mala fide.[1]
- [4] It is for the applicant to shed the onus on the requisites of contempt, beyond reasonable doubt. Once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden concerning wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, the contempt will have been established beyond a reasonable doubt.[2]
- [5] It is the applicant’s case that the respondent is in contempt of the following prayers of the Rule 43 order:

“4. The respondent shall pay an amount of R10 500.00 (Ten Thousand Five Hundred Rand) per month towards the maintenance of the applicant. Payable to the applicant into her nominated bank account, free from deduction and set off, on or before the first day of each month with commencement from 1 February 2022.

6. The respondent shall pay an amount of R4 000.00 (Four Thousand Rand) per month towards the maintenance of the minor child. Payable to the applicant into her nominated bank account, free from deduction and set off, on or before the first day of each month with commencement from 1 February 2022.
7. The respondent shall pay the minor child's monthly school fees directly to the school. Payable to the school into its nominated bank account, free from deduction and set off, on or before the first day of each month with commencement from 1 February 2022.
8. Respondent shall pay an amount of R1 000.00 (One Thousand Rand) per month towards the medical needs of the child. Payable to the applicant into her nominated bank account, free from deduction and set off, on or before the first day of each month with commencement from 1 February 2022."
- [6] The existence of the Rule 43 order and the respondent's knowledge of the Rule 43 order is common cause between the parties. The court need not deal with these two requirements in any further detail.
- [7] In dispute is the respondent's non-compliance with the terms of the Rule 43 order and the question of whether the respondent's non-compliance is wilful and mala fide.
- [8] In terms of the founding affidavit, it is the applicant's case that the respondent failed to make the following payments to her:
 - a. R115 500.00 in respect of maintenance of the applicant (prayer 4).
 - b. R44 000.00 in respect of maintenance of the minor child (prayer 6).
 - c. Monthly school fees (prayer 7).
 - d. R11 000.00 in respect of the minor child's medical needs (prayer 8).
- [9] The minor child was born on 8 April 2004. He became a major on 8 April 2022. The applicant's counsel submitted that the child no longer attends school. It was submitted that the respondent remains liable for historically unpaid school fees. In terms of annexure "E" to the founding affidavit, this represents an amount of R27 280.00.
- [10] It is the applicant's case that, despite various requests and demands, the respondent has failed to make payment of the outstanding amounts.
- [11] In essence, it is the respondent's case that the parties entered into settlement negotiations and a formal settlement agreement was prepared and signed by the respondent. This settlement was however never signed by the applicant. In September 2022, and this is common cause between the parties, the respondent made a payment in the amount of R144 000.00 towards the applicant. It is the case of the respondent that he was under the impression that this settlement agreement would settle the aspect of maintenance in toto and upon payment of the amount of R144 000.00 he would have settled all outstanding arrears and will no longer be liable for any further payments.

[12] This explanation by the respondent might have assisted the respondent in shedding his evidential burden concerning wilfulness and mala fides. If there was no wilfulness to disobey the Rule 43 order and no mala fides could be attributed to the respondent, then it could have been found that he was not in contempt of the Rule 43 order. But this was in September 2022. Subsequent thereto, this illusion of the respondent's good intentions and understanding of the Rule 43 order shattered.

[13] On 30 August 2023, almost a year after the respondent's good intentions, the respondent addressed an email to the applicant's attorney. This was in response to an email requesting compliance with the Rule 43 order. A copy of the email is attached to the applicant's founding affidavit as annexure "G". In this email, the respondent states, and I quote:

"Good afternoon Sir, Based on our Telephonic Discussion regarding the outstanding Maintenance, I am aware that the last payment done was September 2022, from that time things were bad on my side but I am now busy with temporary work at the Western Cape. I am committing myself that I will Settle the outstanding by no Later than 30st of September 2023 though I have been paying School fund and Allowens money that was paid direct to my Son,s bank account. I will make sure that I compile all proof of Payments and work out the difference and Settle it before 30st September. Regarding the Settlement Draft I will go through it to see the way I know, I will then Sign and mail it back to you.

Hope you find this in order.

Best Regards

H[...] B[...]" [sic]" (my emphasis)

[14] In the respondent's own words: Mea culpa: I am in arrears with my obligations and therefore, without any doubt, in contempt of the Rule 43 order.

[15] This correspondence from the respondent is an unequivocal admittance that he is in arrears with his obligations in respect of the maintenance and it wipes out any doubt there can be as to how the respondent interpreted the purpose of the settlement negotiations and his payment of R144 000.00 in September 2022. The respondent, in his own words, is a contemptuous litigant.

[16] Of concern is that the 'defence' as to the in toto settlement of the maintenance aspect is not mentioned at all in this correspondence: this 'defence' only surfaced when the answering affidavit was deposed.

[17] The respondent's further defence that the minor child has since become a major and that he is self-sustained has no merits and is rejected by this court. It is a trite legal principle that a minor child is entitled to be maintained until he or she is

self-sustained.[3]

- [18] Equally so, the respondent's insistence that the applicant no longer needs to be maintained is rejected by this court. The Rule 43 order is clear in this regard and the respondent cannot simply elect not to obey same because he feels that the applicant no longer needs to be maintained. The respondent is bound by the Rule 43 order. If he so wishes, he should challenge it in terms of available legal remedies.
- [19] If there indeed was a change of circumstances in the applicant's need to be maintained, or in the respondent's ability to maintain the applicant and/or the child's maintenance needs, the respondent could have brought an application in terms of Rule 43(6). Until another court has pronounced on the terms thereof, the Rule 43 order must be obeyed and it should never be treated with impunity. Treating an order of court with impunity would have dire consequences to legal certainty, the future of the Judiciary and the rule of law.[4]
- [20] In conclusion, this court finds that the respondent wilfully and mala fide failed to comply with the Rule 43 order and he has failed to discharge the burden that was placed on him. The result is that the respondent is guilty of contempt of the Rule 43 order.
- [21] Being guilty of contempt of an order of court must be followed by an appropriate sanction. On the sanction to be imposed for the contempt of the court order, the applicant sought an order that the respondent be committed to imprisonment for a period to be determined by this court, with or without an option of a fine. Such imprisonment is to be suspended on condition that the respondent complies with the court order.
- [22] It would serve no purpose to sentence the respondent to direct imprisonment as that would curtail his ability to earn an income to honour the court order. It is anticipated that a suspended sentence would urge the respondent to pay the arrear maintenance and to comply with the court order.
- [23] To impose a fine on top of a committal to imprisonment would serve no purpose as it might negatively impact the respondent's ability to comply with the Rule 43 order.
- [24] On the approach as to costs, it remains at the discretion of the court and as a general rule, the successful party should have his or her costs.[5] In August 2023, the respondent, in no uncertain terms, admitted that he was not adhering to the Rule 43 order. In his answering affidavit, he elected to advance a defence that he settled the aspect of maintenance already in September 2022. This change in tact is indicative of a litigant who alters his stance as and when the shoe pinches. To play cat and mouse with the terms of an order of this court will not be tolerated. Although same was not prayed for, punitive costs will be awarded to dissuade the respondent from this kind of behaviour and to impress upon him the seriousness of his conduct.

[25] On the provisions of prayer 7 of the Rule 43 order: there is no evidence before the court that the respondent is still liable for the maintenance in terms of prayer 7 of the order. The child is no longer attending school. The respondent however remains liable for the school fees he has not paid in the past.

[26] Consequently, I make the following order:

1. The respondent is found to be in contempt of court by his failure to comply with his obligations as stipulated in prayers 4, 6, 7 and 8 of the Rule 43 order granted on 20 January 2022.

2. The respondent is sentenced to undergo 60 (sixty) days in imprisonment. This sentence is suspended on the following conditions:

2.1 The respondent is to make payment of the arrear amounts concerning prayers 4, 6, 7 and 8 of the Rule 43 order granted on 20 January 2022 by no later than 31 January 2025, such payment to be made into the applicant's banking account.

2.2 The respondent is to proceed with the payment of the amounts stipulated in prayers 4, 6 and 8 of the Rule 43 order granted on 20 January 2022, such payment to commence on or before 1 October 2024 and thereafter on or before the first day of each consecutive month and to be made into the applicant's banking account.

3. The respondent is to pay the costs of this application, on the scale as between attorney and client.

Minnaar AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Heard on: 13 September 2024 For the applicant: Adv X van Niekerk Instructed by: Martin Vermaak Attorneys Inc For the respondent: Adv. S J Nkuna-Maleka Instructed by: Adv S J Nkuna-Maleka (advocate with trust account) Date of Judgment: 25 September 2024

[1] Fakie NO v CCII Systems (Pty) Ltd 2006

(4) SA 326 (SCA)

[2] Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006

(4) SA 326 (SCA) at par 42

[3] Centre for Child Law and Others v Media 24 Ltd and Others 2020

(4) SA 319 (CC) para 102. Also see Z v Z 2022 (5) SA 451 (SCA) at par 11 to 16 where section 6 of the Maintenance Act 99 of 1999 is discussed

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- [4] Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others 2021
- (5) SA 327 (CC) at par 59 and 60
- [5] Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO and Others
- [1996] ZACC 27; 1996 (2) SA 621 (CC) at paragraph 3
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