

SOUTH AFRICA / JUDGMENT

J.M.M v S.T.N.M (5647/2019) [2024] ZAGPPHC 1383 (18 December 2024)

[2024] ZAGPPHC 1383**COURT**

North Gauteng High Court, Pretoria

BEFORE

Marx du Plessis

CASE / FILE NUMBER

5647/2019

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Source record**FLYNOTES:****FAMILY**

– Children – Contact –

Divorce

settlement agreement providing for contact by applicant –

Seeking contempt order against respondent –

Report by Family

Advocate – Breakdown in applicant's relationship with
children due to applicant's behaviour –

Respondent's

conduct not showing wilfulness or mala fides for contempt –

Applicant to undergo parental guidance

course – Bonding

therapist appointed – Applicant's contact rights to be
phased in with contact supervisor.

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

REPORTABLE:

YES/NO

OF INTEREST TO OTHER

JUDGES: YES/NO

REVISED: YES/NO

Date: 18 December 2024

Case number: 5647/2019

In

the matter between: J[...]
M[...] M[...]
APPLICANT
and
S[...]
T[...]
N[...] M[...]
RESPONDENT

JUDGMENT

MARX DU PLESSIS, AJ

Introduction

1. This judgment concerns an application for contempt ('the contempt application'). The application came before me in the Family Court on 3 July 2024 and I proceeded to grant an order in the following terms on 4 July 2024:
 - i. The Applicant's contempt application is dismissed.
 - ii. The Applicant is to undergo a parental guidance course with a certificate of completion, at his own costs, and the certificate of completion is to be provided to the bonding therapist appointed in paragraph 3 hereinunder. The bonding therapist will, in conjunction with the expert appointed by the Applicant for purposes of parental guidance, determine whether bonding therapy can commence prior to the Applicant's completion of the parental guidance course.
 - iii.

Jana van Jaarsveld from Temenos Trauma Recovery alternatively her nominee ('the bonding therapist') is appointed to conduct bonding therapy between the Applicant and the minor children.
 - iv.

The bonding therapy sessions between the Applicant and the minor children shall take place at dates and times suitable to the minor children and the Respondent, with due regard to the minor children's scholastic, extra-curricular and sport commitments.
 - v. The costs associated with the bonding therapy sessions between the Applicant and the minor children, referred to in paragraph iv above, are to be paid by the Applicant.
 - vi. The duly appointed bonding therapist shall be entitled to facilitate the implementation of the Applicant's contact rights which contact rights cannot commence until at least three (3) bonding therapy sessions have taken place.

- vii. Upon compliance with paragraph ii of this Order and after at least three (3) bonding therapy sessions have taken place, the Applicant's contact with the minor children will commence and will be exercised under the supervision of MEDIATIONWORX alternatively his/her nominee ('the contact supervisor') on every alternative Saturday and Sunday from 09h00 to 15h00.
- viii. The contact supervisor, appointed in terms of paragraph vii hereinabove, shall submit a written feedback report on the Applicant's contact, to the bonding therapist, after each contact weekend. The fees of the contact supervisor are to be paid by the Applicant and the Respondent in equal shares.
- ix. The bonding therapist, after consideration has been given to the contact supervisor's feedback reports as well as the minor children's views and wishes, will be entitled to facilitate the extension and phasing in of the Applicant's contact rights, provided that the Applicant has maintained successful and consistent contact with the minor children for at least a period of 1 (one) year prior to any variation of the contact stipulated in paragraph vii of this order.
- x. The Applicant shall be entitled to exercise unfettered telephonic contact with the minor children every Monday and Friday from 18h00 to 19h00 subject to the minor children's views, wishes, scholastic commitments and routine. Any difficulty experienced by the Applicant and/or the minor children in the course of exercising telephonic contact with one another is to be reported to the bonding therapist who will, in her/his discretion, address such difficulties during the bonding therapy sessions between the Applicant and the minor children.
- xi. The Applicant shall pay the costs of the application, including the cost of Counsel on Scale C.
2. Pursuant to the above order being granted on 4 July 2024, the applicant sought reasons therefor. A formal request for reasons as envisaged by Rule 49(1)(c) of the Uniform Rules of Court was not delivered. Instead, the applicant uploaded correspondence onto Case Lines. This correspondence containing the applicant's request for reasons was only brought to my attention on 2 October 2024.
3. The reasons for the order dated 4 July 2024 are set out in what follows.

Background facts

4. The background facts relevant to the contempt application appear from the affidavits delivered by the parties. Only the key aspects pertinent to this contempt application are repeated herein.
5. The parties were previously married and of their marriage, two children, a boy called MM, and a girl called NM, were born (collectively referred to as 'the children'). At the time of this judgment MM is 15 years of age and NM is 13 years of age.

6. The parties' marriage broke down irretrievably and was dissolved by a decree of divorce on 18 November 2019. The decree of divorce incorporated a settlement agreement concluded between the parties during August 2019 ('the settlement agreement').

The facts leading the contempt application

7. In terms of the settlement agreement, both the applicant and respondent retained full parental rights and responsibilities in respect of the children.
8. The parties agreed that the children's primary care and place of residence would vest with the respondent, subject to the applicant's right to exercise regular weekend and holiday contact with the children. It is important to bear in mind that the right to contact is one that also inherently vests in the children.
9. The applicant alleges that he initially exercised contact with the children until the national COVID-19 lockdown in March 2020, during and after which the respondent 'actively denied' him access to the children.
10. According to the applicant, the contempt application was triggered by the respondent's refusal to allow the children to attend his wedding on 21-22 May 2022 and to visit him during the June 2022 school holidays.
11. The applicant provides no detail in respect of his efforts to maintain or resume contact with the children between March 2020 and July 2022, when the contempt application was launched.
12. The respondent admits that the applicant has not exercised regular contact with the children as agreed in the settlement agreement, but attributes this to the applicant's behaviour. Specifically, the respondent asserts that the applicant's interactions with the children have been harmful to them as the interactions involve the applicant inappropriately engaging the children in disputes between the parties and the applicant making disparaging remarks about her and her mother in the children's presence.
13. The respondent states that the applicant's conduct has caused trauma to the children, resulting in their unwillingness to maintain contact with the applicant. The respondent argues that under these circumstances she did not deem it in the children's best interests to enforce the provisions of the settlement agreement.
14. The contempt application was previously postponed to allow the Office of the Family Advocate to investigate the allegations made by both parties and to provide a report on what would serve the children's best interests.
15. Following the investigation by the office of the Family Advocate, and the submission of supplementary affidavits, the contempt application was re- enrolled for hearing before me.

16. I must highlight that the best interests of the children are not only paramount in all matters pertaining to them but also plays a crucial role in assessing whether the respondent acted in bad faith when she did not comply with the contact provisions provided for in the settlement agreement.
17. The Family Advocate's report is revealing and provides the following key insights:
 - 17.1 The relationship between the applicant and the children is fractured. The Family Advocate in fact describes the relationship between the applicant and the children as follows:
 - 17.1.1 'the relationship between the Applicant and the parties' daughter is reported to have completely broken down,..'
 - 17.1.2 'His relationship with the boy is deemed to be strained, but cordial.'
 - 17.2 The breakdown in the applicant's relationship with the children is of the applicant's own doing and is attributed to the applicant's behaviour.
 - 17.3 Professional intervention is deemed essential before resuming contact, as it may prevent further harm to the relationships.
 - 17.4 The applicant must engage in psychotherapy to address his issues which negatively impact his relationship with the children.
 - 17.5 The applicant does not seem to comprehend the consequences of his actions and behaviour and the significantly detrimental effect this has on his relationship with the children.
 - 17.6 The acrimony between the parties, stemming from their differing parenting styles and personalities, has impaired their ability to co-parent effectively and to act objectively in the children's best interests.
18. Despite the recommendations of the Family Advocate, and the views expressed by the children, the applicant has maintained his resolve to pursue the contempt application, arguing that his contact rights must be enforced.

Principles applicable to contempt of court applications

19. Our law on contempt of court is well established. Contempt of court is defined as "the deliberate, intentional (i.e., wilful), disobedience of an order granted by a court of competent Jurisdiction".^[1]
20. Contempt proceedings serve three important purposes namely,^[1] protecting the rights of everyone to fair trials, ^[2] maintaining public confidence in the judicial arm of government, and
 - ^[3] upholding the integrity of court orders.^[2]
21. The Supreme Court of Appeal in *Fakie N.O. v CCII Systems (Pty) Ltd*^[3] held:

" The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

These requirements - that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute, or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

22. Additionally, the SCA went on to summarise the rationale and requirements for civil contempt as being:[4]

"(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an accused person but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to 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, contempt will have been established beyond reasonable doubt."

23. In summary, an applicant in a contempt application must establish [1] the court order; [2] service or notice of the order; [3] non-compliance with the terms of the order; and [4] wilfulness and mala fides.[5] But, once an applicant has

24. In *Pheko and Others v Ekurhuleni Metropolitan Municipality*, [6] Nkabinde J restated that:

"Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders... Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in

accordance with the previous order."

25. In *Matjhabeng local Municipality v Eskom Holdings limited and Others; Mkhonto and Others v Compensation Solutions (Pty) limited*[7] the principles applicable to the onus of proof in contempt proceedings were clarified as follows:

' ... I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof - beyond reasonable doubt - applies always. A fitting example of this is *Fakie*. On the other hand, there are civil contempt remedies - for example, declaratory relief, mandamus, or a structural interdict - that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is *Burchell*. Here, and I stress, the civil standard of proof - a balance of probabilities - applies.'^[8]

26. Because the relief sought in this contempt application is the imposition of a fine, alternatively committal to imprisonment, the criminal standard of proof of beyond a reasonable doubt applies.^[9] The onus is therefore not the ordinary civil onus, (i.e., on a balance of probabilities), but instead one of beyond reasonable doubt.
27. As such, if, on a conspectus of all the evidence, there is a reasonable possibility that non-compliance with the court order in issue was not wilful and *ma/a fide*, contempt is not established.^[10]

Application of the legal principles to the facts

28. In these proceedings, it is common cause that a court order, which incorporates a settlement agreement, exists, that the respondent has knowledge thereof and that there has not been compliance with the provisions of the court order.
29. The question before me is whether the respondent's conduct, her failure to comply with the contact provisions of the settlement agreement, is wilful and *mala fide*.
30. The respondent has from the outset explained that her non-compliance with the contact provisions in the settlement agreement was driven and motivated by the children's refusal to maintain contact with the applicant due to his conduct. The Family Advocate's investigation corroborates this explanation, as do the annexures to the affidavits filed of record.
31. As I have already indicated, our courts have emphasised that "contempt of court does not merely consist of disobedience to a court order but involves contumacious disrespect for judicial authority."^[11]

32. Upon a thorough analysis of the facts, it cannot be concluded that the respondent wilfully and in bad faith failed to comply with the provisions of the deed of settlement. The respondent has produced evidence that raises reasonable doubt as to whether her non-compliance with the settlement agreement was wilful or in bad faith.
33. While I am fully aware that a court order remains binding and must be complied with until varied or set aside by a competent court, I cannot overlook the fact that the respondent acted in what she believed to be in the children's best interests. The respondent sought to protect the children from the applicant's conduct, conduct which the children complained off and which they indicated traumatised them.
34. This explanation for the respondent's failure to comply with the provisions of the settlement agreement, as supported by the evidence and the report of the Family Advocate, is sufficient to establish that the respondent did not intend to undermine the course of justice and that she did not wilfully and in bad faith fail to comply with the provisions of the deed of settlement.
35. I find that the respondent has provided a credible and exculpatory explanation for her non-compliance with the provisions of the settlement agreement. Her conduct does not exhibit the wilfulness or ma/a tides necessary to establish contempt. Consequently, the application must fail.
36. In his supplementary affidavit, the applicant underscores the significance of children maintaining a meaningful and loving relationship with both parents, as well as the importance of his own contact with the children. While I agree that this is essential, such contact must be reintroduced gradually and in a manner that fosters a healthy, nurturing, and trusting relationship between the applicant and the children.
37. To facilitate the restoration of the relationship between the applicant and the children, I issued an order aligned with the recommendations of the Family Advocate and as set out in paragraph 1 hereof. This approach aims to provide the applicant with the necessary support and guidance to rebuild his relationship with the children effectively.
38. The bonding therapy will provide the children with an opportunity to comprehend the applicant's desire for contact and his role in their lives. It will also aid the applicant and the children in addressing the challenges in their relationship, creating a foundation for healing and reconciliation.
39. Ultimately, the restoration of the bond between the applicant and the children now lies within the applicant's hands.
40. I must mention that the applicant's insistence on pursuing an order for the respondent's committal to imprisonment, despite the Family Advocate's observations as addressed herein, raises concerns.

41. I say this considering the children's views and wishes as documented in the Family Advocates' report, and the already strained relationship between the applicant and the children due to the applicant's conduct, particularly his conduct aimed at the respondent.
42. I cannot help but wonder whether the applicant considered the profound impact such a sanction for imprisonment or a fine would have on the children and the applicant's already strained relationship with the children.
43. While I accept that the applicant's actions are driven by a genuine desire to facilitate contact with the children, I strongly encourage the applicant to ensure that his future actions are aligned with the best interests of the children.
44. For these reasons I granted the order as set out in paragraph 1 hereof.

Z MARX DU PLESSIS

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 3 July 2024 Date of order: 4 July 2024 Date of reasons: 18 December 2024

APPEARANCES On behalf of the applicant: Adv NL Dandazi On behalf of the respondent: Adv A Koekemoer

- [1] Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2) 2015
- (5) SA 600 (CC) (Pheko II) at 617A- B; Minister of Home Affairs v Scalabrini Centre 2013
- (6) SA 421 (SCA) at 443H-I; NW Civil Contractors CC v Anton Ramaano Inc 2020 (3) SA 241 (SCA) at para [6]
- [2] Milton, South African Criminal Law and Procedure (Vol II: Common Law Crimes) (3 ed), Juta and Co: 1996 at 165
- [3]
- [2006] ZASCA 52; 2006
- (4) SA 326 (SCA) at para 9
- [4] Fakie N.O. supra at para 42
- [5] Tasima (Pty) Ltd v Department of Transport 20161 All SA 465 (SCA) proved [1], [2] and [3] the respondent bears an evidentiary burden in relation to [4].
- [6] Pheko v Ekurhuleni Metropolitan Municipality supra at para 28
- [7] Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty} Limited 2018 (1) SA 1 (CC)
- [8] Matjhabeng Local Municipality supra at para 63

- [9] Matjhabeng Local Municipality supra at para 63 and 73
- [10] See Fakie NO v CCII Systems (Pty) Ltd supra at para 14; Matjhabeng Local Municipality supra at para 67 and 85-88
- [11] Pheko and Others v Ekurhuleni Metropolitan Municipality supra
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