

SOUTH AFRICA / JUDGMENT

J.S.H v M.S.H and Others (1308/2024)

[2024] ZAWCHC 42 (16 February 2024)

[2024] ZAWCHC 42

COURT

Western Cape High Court, Cape Town

BEFORE

Adhikari

CASE / FILE NUMBER

1308/2024

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FLYNOTES: FAMILY – Maintenance – School fees – Private or public school – Whether respondent in contempt – Applicant desiring children to attend private school when respondent offering to pay for government school – Rule 43 order not stating that respondent required to pay the school fees of the school chosen by applicant – Parties to immediately approach registrar of judge who assumed role of case management judge – In interests of children and proper administration of justice that the divorce is finalised as soon as possible – Uniform Rule 43.

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 1308/2024

In the matter between:

J[...] S[...] H[...] Applicant versus M[...] S[...] H[...] First Respondent E[...] H[...] Second Respondent R[...] H[...] Third Respondent

Coram: Adhikari AJ

Heard: 26 January 2024

Delivered: 26 January 2024

REASONS FOR THE ORDER MADE ON 26 JANUARY 2024

DELIVERED ON 16 FEBRUARY 2024

Delivered: These reasons for the order made on 26 January 2024 were handed down electronically by circulation to the parties' legal representatives by email. The date for the provision of reasons is deemed to be on 16 February 2024.

ADHIKARI, AJ

- [1] These are the reasons for the order granted on 26 January 2024, pursuant to an application for reasons in terms of Rule 49(1)(c) delivered by the applicant ('Ms H[...]') on 30 January 2024. The provision of these reasons was unfortunately delayed because Ms H[...] attorney was apparently unable to locate the court file for some two weeks. The file was returned to my chambers only on 12 February 2024.
- [2] Acrimonious and protracted divorce proceedings are pending between Ms H[...] and her husband, the first respondent ('Mr H[...]'). [1] There are two minor children born of the marriage both of whom reside with Ms H[...]. Ms H[...] instituted proceedings in 2019 in terms of Rule 43 for interim relief pendente lite ('the Rule 43 proceedings'). This Court per Le Grange ADJP granted an order in the Rule 43 proceedings on 3 April 2019 which directed which Mr H[...], inter alia, to pay maintenance to Ms H[...] and the minor children pendente lite ('the Rule 43 Order').
- [3] The divorce proceedings have not been finalised despite the passage of some 5 years. The parties have been embroiled in ongoing litigation relating to Mr H[...] alleged non-compliance with the Rule 43 Order.
- [4] On 11 June 2021 Ms H[...] instituted urgent contempt proceedings seeking, inter alia, compliance with paragraphs 3.1; 3.2; 5 and 6[2] of the Rule 43 Order. These provisions all relate to the payment of maintenance pendente lite to Ms H[...] and the minor children ('the maintenance contempt application'). A copy of the maintenance contempt application was not placed before me in these proceedings, nor was the relief that was sought in Part B of that application dealt with in the founding affidavit in this application. I was able to glean from the allegations in the founding affidavit, as well as from a copy of the judgment that was granted by Maher AJ in the maintenance contempt application, that in Part A of the notice of motion in the maintenance contempt application Ms H[...] sought an order directing Mr H[...] to immediately comply with paragraphs 3.1; 3.2; 5 and 6 of the Rule 43 Order. It is however, unclear what relief she sought in Part B save that relief was sought in the form of a rule nisi.
- [5] On 15 June 2021 this Court granted an order by agreement between the parties in the maintenance contempt application that provided, with respect to Part A, that Mr H[...] would immediately comply with the provisions of the Rule 43 Order. The order, in addition, postponed the hearing of Part B of the maintenance contempt application to 19 August 2021 and set a timetable regulating the further conduct of Part B. On 19 August 2021 this Court granted a further order by agreement in respect of Part B of the maintenance contempt application, in which it was confirmed that Mr H[...] would comply with the provisions of the Rule 43 Order, failing which Ms H[...] was granted leave to re-enrol Part B on 72-hours' notice.

[6] Ms H[...] re-enrolled the maintenance contempt application in November 2022.[3] It appears from the judgment of Maher AJ that Ms H[...] sought to hold Mr H[...] in contempt of paragraphs 3.1; 3.2; 4.4;[4] 5 and 6 of the Rule 43 Order as this is the relief that was eventually granted by Maher AJ. It is unfortunate

that Ms H[...] failed to deal in her founding affidavit in this application, with the nature of the relief sought in the re-enrolled the maintenance

contempt application, given that she contends in these proceedings that the “[Mr H[...]” has signally failed to comply with numerous Orders of Court” and that “there has still been no compliance by [Mr H[...]” with the Rule 43 Order”.

[7] It is unclear when the re-enrolled maintenance contempt application was heard, however, judgment was handed down in that matter on 18 July 2023. Mr H[...] applied for leave to appeal against the judgment of Maher AJ. The application for leave to appeal was heard on 18 August 2023. On 14 September 2023 Maher AJ dismissed the application for leave to appeal.

[8] On 10 October 2023 Ms H[...] instructed her attorneys to issue a writ for Mr H[...]’ committal to prison “as a result of [his] continued non-compliance”. Ms H[...]’ founding affidavit in these proceedings is silent as to the nature of Mr H[...]’ “continued non-compliance” which resulted in her instructing her attorneys to issue the writ. On 11 October 2023 the proceeds of an Old Mutual

retirement annuity held by Mr H[...] was paid over to Ms H[...]. On 12 October 2023 Mr H[...] was arrested by the Sheriff and incarcerated at Pollsmoor Prison. Later that day the writ was stayed, pursuant to urgent proceedings in this Court before Erasmus J, who in addition, took on the role of the case management judge in the divorce proceedings in that he was of the view that the divorce proceedings ought to be finalised expeditiously.

[9] On 13 December 2023 the Supreme Court of Appeal granted Mr H[...] leave to appeal to the full bench of this Division against the contempt order granted by Maher AJ.

The proceedings before this Court

[10] Ms H[...] approached this Court on an urgent basis for relief in two parts.

[11] In Part A of the notice of motion she sought orders directing that:

[11.1] Mr H[...] pay arrear school fees in respect of the minor children within 48 hours;

[11.2] Mr H[...] comply with paragraph 3.4 of the Rule 43 Order;[5]

[11.3] In the event that Mr H[...] failed to pay the arrear school fees and to comply with paragraph 3.4 of the Rule 43 Order within 48 hours, that the second and third respondents (collectively ‘the paternal grandparents’)[6] pay the arrear school fees within 48 hours and that the paternal grandparents pay the minor children’s comprehensive educational costs as provided for in paragraph 3.4 of the Rule 43 Order; and

[11.4] In the event that Mr H[...] and/or the paternal grandparents failed to pay the arrear school fees and to comply with paragraph 3.4 of the Rule 43 Order:

[11.4.1] a warrant of arrest be issued for Mr H[...]’ immediate committal to prison; and

[11.4.2] that Mr H[...] be sentenced to a period of 6 months imprisonment, or such alternative period as the Court may determine.

[12] In Part B of the notice of motion Ms H[...] sought orders directing that:

[12.1] A rule nisi be issued calling on Mr H[...] and the paternal grandparents to show cause why the following orders should not be granted:

[12.1.1] An order finding Mr H[...] in contempt for failing to comply with paragraph 3.4 of the Rule 43 Order;

[12.1.2] An order directing that Mr H[...] be sentenced to a period of 12 months’ imprisonment, suspended for 2 years on condition that:

12.1.2.1. Mr H[...] or the paternal grandparents pay the arrear school fees within 48 hours of the order being granted; and

12.1.2.2. Mr H[...] complies with the Rule 43 Order.

[12.1.3] A warrant of arrest be authorised and issued for Mr H[...]’ immediate committal to prison for failing to adhere to the conditions of the order granted;

[12.1.4] An order directing that Mr H[...] pay a fine due to his contempt of the Rule 43 Order;

[12.1.5] An order directing that service of the order granted by the Court may be served by email or any other means on Mr H[...] and the paternal grandparents;

[12.1.6] An order directing that the order granted by the Court not be suspended pending an appeal; and

[12.1.7] An order that Mr H[...] pay the costs of the application on an attorney and client scale.

[13] Ms H[...] sought relief in respect of both Part A and Part B on an urgent basis.

[14] In Part A, Ms H[...] in effect sought a final order holding Mr H[...] in contempt of the Rule 43 Order.

This is clear from the fact that she sought an order directing that Mr H[...], failing which the paternal grandparents, pay the arrear school fees within 48 hours and that in the event of non-payment by any of the parties, Mr H[...] be sentenced to a period of imprisonment. Consequently, in respect of the relief sought in Part A, Ms H[...] bore the onus of meeting the requirements for contempt of court.

[15] The requirements for contempt of court are trite.[7] They are: the existence of a court order; the contemnor must have knowledge of the court order; there must be non-compliance with the court order; and the non-compliance must have been wilful or male fides. Once the first three elements have been shown, wilfulness and male fides will be presumed and the evidentiary burden switches to the contemnor. Where a committal is ordered, the standard of proof in civil contempt matters is the criminal standard,[8] meaning that wilfulness and male fides must shown beyond reasonable doubt.[9] The contemnor has an evidential burden to create a reasonable doubt as to whether his conduct was wilful and male fide. There is a different standard of proof where no criminal sanction is sought - then, the standard of proof is that of a balance

of probabilities.[10] The hybrid nature of contempt proceedings which results in committal, combines civil and criminal elements. Alleged contemnors are entitled to the substantive and procedural protections which apply to any individual facing the loss of his freedom.

[16] Mr H[...] did not dispute that he was aware of the existence of the Rule 43 Order. He did, however, dispute that he had failed to comply with the order, and that his conduct was wilful or mala fide. In essence, Mr H[...] contended that paragraph 3.4 of the Rule 43 Order does not require him to pay the school fees for a specific school, but only that he must pay for the children's comprehensive education costs. In addition, he contended that while he cannot afford the school fees for the school that the children were attending in 2023, he is prepared to, and able to pay the school fees for a less expensive school. Mr H[...] stated in his answering affidavit that he can afford to and is willing to pay the school fees for W[...] G[...] H[...] S[...] ('WGHS') where the annual school fees are R43 525.

[17] The minor children attended R[...] H[...], Constantia ('R[...]') until the end of 2023. Due to the impasse between the parties, the children have not been enrolled in any school for the 2024 academic year. It was not

in dispute between the parties that the children's annual school fees at R[...] exceed R270 000 per year. It was

further not in dispute that Mr H[...] had arranged for the children to attend WGHS and that the children had been accepted into WGHS, but that Ms H[...] refused to consent to the children moving to any school other than R[...]. Ms H[...]

contended that moving the children to another school would not be in their best interests and that the children did not want to move to another school. It bears emphasis that no evidence was placed before me as to why moving the children to a less expensive school such as WGHS, or indeed to any school other than R[...], would not be in their best interests.

[18] At the hearing I expressed concern about the fact that the children were not enrolled in any school, given that the academic year had started on 17 January 2024. Mr H[...]' attorney reiterated that his client had made arrangements with WGHS to accept the children for the 2024 academic year and that his client had tendered to pay the school fees for WGHS. Ms H[...]' attorney reiterated that her client refused to consent to the children attending WGHS. In the founding affidavit Ms H[...] stated that the older child had been enrolled at W[...] G[...] P[...] S[...]

in 2015 but had to return to R[...] later that year because she could not “adjust to the curriculum structure at W[...] G[...] P[...] s[...] and risked having to repeat the grade”. No evidence was placed before me to substantiate the contention that some eight years later, the eldest child would still face the same difficulties if she were to attend WGHS nor was there any evidence before me that the younger child would experience the same or similar difficulties if she was to attend WGHS.

[19] Ms H[...]' attorney in argument stated that her client was of the view that the children could not be expected to attend WGHS because it is a “government school” and that the children were accustomed to the “private school” environment of R[...]. Notwithstanding the stance of Ms H[...] and in light of my concern that the children were not attending any school at all, I stood the matter down to give the parties the opportunity to try reach an agreement on enrolling the children at WGHS. The parties were unfortunately unable to reach agreement.

[20] The order sought by Ms H[...] in Part A, would potentially result, inter alia, in Mr H[...] losing his liberty. Consequently, before granting such relief it was incumbent on me to determine whether Mr H[...] had failed to comply with the Rule 43 order, and if so, to determine whether his conduct was male fide and wilful beyond a reasonable doubt. This in turn, required me to determine whether his failure to meet his financial obligations in respect of the payment of school fees was intentional, or as a result of the deterioration of his financial circumstances.

[21] Ms H[...] contended that Mr H[...] had failed to pay the R[...] school fees for November and December 2023 and for January 2024, in the sum of R79 764.32.

[22] Ms H[...] stated in the founding affidavit that she had instructed her attorneys to issue a writ for the attachment of Mr H[...] Old Mutual retirement annuity and that on 13 October 2023 she received a payment of R277 653.62 from Old Mutual pursuant to the warrant of execution. She further stated that she had used part of this sum to settle the children's outstanding school fees at R[...] and that on 16 October 2023 R[...] had confirmed that the arrear school fees for the 2023 academic year had been settled as a consequence of the payment.

- [23] Ms H[...] stated in the founding affidavit that she used the remainder of the sum received from Mr H[...]’ retirement annuity to settle her outstanding legal fees. She did not disclose how much she paid in respect of legal fees, however, given that the arrear school fees at the time amounted to R79 764.32, it is reasonable to assume that the balance, being a sum of approximately R197 899 was paid in respect her legal fees.
- [24] In Part A of this application Ms H[...] sought an order directing that Mr H[...] pay the sum of R40 414.60, which she characterised as “arrear school fees owing to R[...]”. It appeared from the founding affidavit, that the sum of R40 414.60 was in fact the amount that R[...] required for the children to commence schooling for the 2024 school year. The school fees for 2023 were fully paid, and the reason that Ms H[...] sought payment of the sum of R40 414.60 was because insisted that the children attend R[...] and refused to consent to their enrolment at WGHS or any other school. Consequently, it was not accurate to characterise this amount as “arrear school fees”.
- [25] Further, the Rule 43 Order only required that Mr H[...] pay an initial contribution to Ms H[...]’ legal costs in the amount of R25 000 payable in 3 monthly instalments commencing on 1 May 2019, and there is no allegation that this amount was not paid. It is therefore unclear on what basis Ms H[...] was entitled to use the sum received from Mr H[...]’ retirement annuity to settle her legal fees, as opposed to paying for the children’s 2024 school fees.
- [26] The Rule 43 Order does not state that Mr H[...] is required to pay the R[...] school fees, but rather that he must pay “the children’s comprehensive educational costs”. Mr H[...] arranged for the children to attend WGHS and tendered to pay the school fees for WGHS. In addition, Mr H[...] set out his current financial position in detail in the answering affidavit. He stated that he was previously able to meet his obligations in terms of the Rule 43 Order because he took out a loan in the amount of R600 000, secured by a bond over his property, and that he used the loan to pay his arrear and ongoing maintenance obligations, and further that these funds have now been depleted. Ms H[...] sought to dispute these allegations, contending that Mr H[...] had failed to annex proof of how these funds were spent, or that the funds had been used to pay his maintenance obligations. That was, however, beside the point. Ms H[...] could and did not dispute that he no longer has these funds available to pay for the R[...] school fees.
- [27] Mr H[...] explained in his answering affidavit that he earns a nett month salary of R40 779.69 and annexed his salary advice. He provided details of his monthly expenses which amount to R41 438.61, before paying the children’s school fees and the maintenance payment due to Ms H[...] and the children in terms of the Rule 43 Order. He explained that pays the school fees and the maintenance payments from loans taken out with various financial institutions and annexed recent bank statements from the financial institutions at which he holds accounts, including FNB, Discovery Bank, Wesbank/Direct Axis,

Old Mutual, and Absa.

- [28] In response, Ms H[...] denied these allegations contending that the bank statements annexed to the answering affidavit “do not reflect an inability to afford the educational costs of the minor children” and that Mr H[...] had failed to disclose “all financial statements for the financial institutions listed”.
- [29] Ms H[...] did not, however, engage meaningfully with the content of the bank statements in her replying affidavit. She merely stated that there was no evidence as to how Mr H[...] had spent a loan that he received from Wesbank and pointed to one payment of R10 000 made into one bank account, contending that there was no evidence as to where that payment came from. These allegations, however, did not take the matter any further. Ms H[...] made no attempt to show that Mr H[...] earns an income in excess of that which he had disclosed, and she made no attempt to dispute the nature and extent of his disclosed monthly expenses, or the nature and extent of his indebtedness.
- [30] Having regard to all the evidence, there was no basis on which to find that Mr H[...]’ failure to pay the sum of R40 414.60 constituted contempt of paragraph 3.4 of the Rule 43 Order, or that his conduct was male fide and wilful beyond a reasonable doubt.
- [31] As regards the relief sought against the paternal grandparents, they are not parties to the Rule 43 Order. While it is so that where a grandchild is in need of support, the grandparent will have a legal duty to maintain the child if both parents are unable to support the child and the grandparent is able to provide support, the proper forum for that debate, is a maintenance inquiry, not contempt proceedings. There was no basis on which to hold the paternal grandparents liable, in contempt proceedings, for Mr H[...]’ obligations in terms of the Rule 43 Order, even if Ms H[...] had been able to demonstrate that Mr H[...] had failed to comply with that order.
- [32] For these reasons I dismissed the relief sought in Part A of the notice of motion. In that the relief sought in Part B of the notice of motion was premised on a finding that Mr H[...] had failed to comply with paragraph 3.4 of the Rule 43 Order, in light of the findings set out above, I dismissed the relief sought in Part B as well.
- [33] Finally, the conduct of Ms H[...] leaves much to be desired. It bears emphasis that Ms H[...] failed to refer in her affidavits to the fact that the divorce proceedings are subject to case management before Erasmus J. There was no explanation proffered for this failure, or for why these proceedings were brought in the urgent court without any reference to Erasmus J as the case management judge. These unexplained failures are concerning.
- [34] Ms H[...]’ refusal to consent to the enrolment of the children into any school other than R[...] has resulted in the children not attending school at all. Her conduct in this regard is unreasonable and manifestly not in the interests of the minor children. She mischaracterised the sum of R40 414.60 as “arrear school fees” in circumstances where the only reason that this amount was sought was due to her unreasonable stance that the children could only attend R[...] and no other school. Ms H[...] sought to hold Mr H[...] in contempt and sought his immediate imprisonment for a supposed failure to pay the

children's school fees in circumstances where he had arranged for their enrolment at WGHS and had tendered to pay the school fees for that school. There was no legal basis for the relief that she sought.

[35] Further, she sought to hold the paternal grandparents liable in circumstances where there was no basis for any such relief. The founding papers were not served on the third respondent, the maternal grandmother. The papers were sent to the maternal grandmother via WhatsApp. Mr H[...] filed an affidavit in which he stated that his mother, the third respondent, is bed ridden, frail and in ill-health and that the content of the application had greatly upset her and resulted in a deterioration of her symptoms. He further stated that she is not in a position to instruct attorneys or to depose to an affidavit herself. In support of these contentions he annexed a letter from her physician confirming the third respondent's health conditions. He further appealed to the Court to have regard to the fact that the legal proceedings had had a negative impact on the third respondent's

well-being and health.

[36] In response, Ms H[...] stated:

"... the relief sought against the Second and Third Respondents do (sic) not include any request for their committal.

I assume Dr. Rosenthal received and perused a copy of the Notice of Motion as he indicated in his correspondence dated 22 January 2024.

Thus, I do not know why the Third Respondent or the aforesaid Doctor (sic) would be of the opinion otherwise and make appeal (sic) to this Honourable Court in circumstances where no committal consequence (sic) is requested against the Third Respondent.

Furthermore, the correspondence from the Doctor (sic) does not stipulate if he physically saw and examined or assessed the Third Respondent on a certain date nor provide dates regarding the various diagnoses."

[37] The tenor of Ms H[...]’ response is callous and entirely inappropriate.

[38] The only reason that I did not award costs on a punitive scale against Ms H[...] is because she is unemployed, and her sole source of income is the maintenance received pendente lite from Mr H[...] in terms of the Rule 43 Order. Further, Ms H[...] has in the past used the maintenance received to defray her legal costs. Consequently, if I had awarded costs against her, I have no doubt that Ms H[...] would ultimately have sought to recover her costs from Mr H[...] in further proceedings in terms of the Rule 43 Order. For this reason I directed that each party pay their own costs in this matter.

[39] It is clear that the litigation in respect of interim maintenance will continue unabated until the divorce is settled or finally determined by a court. No doubt Erasmus J reached the same conclusion which is why he took on the role of case management judge in respect of the divorce. It further appears that Ms H[...]’ legal representatives are either unwilling

or incapable of bringing any sort of sense to bear on the process. It is in the interests of the minor children and in the interests of the proper administration of justice that the divorce is finalised as soon as possible. It is for this reason that I directed that the parties immediately approach the Registrar of Erasmus J to manage the further conduct of the divorce action.

In the result I made the following order:

1. The application is dismissed with costs to stand over.
2. The parties must immediately approach the Registrar of Erasmus J to manage the further conduct of the divorce action .

M. ADHIKARI

Acting Judge of the High Court

APPEARANCES: Applicant’s Attorney: Nicole Lawrence Inc. Ms N Lawrence Respondents’ Attorney: G van Zyl Attorneys Mr D van Zyl

- [1] In the remainder of this judgment I refer to Ms H[...] and Mr H[...] collectively as ‘the parties’.
- [2] Paragraph 3.1 provides that Mr H[...] is to contribute an amount of R6 000 per month per child toward the maintenance of the children. Paragraph 3.2, in relevant part, provides that payment of the aforesaid amounts is to made on or before the first day of the month succeeding the granting of the order. Paragraph 5 provides that Mr H[...] is to pay an amount of R5 000.00 per month to Ms H[...] in respect of maintenance pendente lite. Paragraph 6, in relevant part, provides that that payment of the aforesaid amounts is to made on or before the first day of the month succeeding the granting of the order.
- [2] Paragraph 3.1 provides that Mr H[...] is to contribute an amount of R6 000 per month per child toward the maintenance of the children. Paragraph 3.2, in relevant part, provides that payment of the aforesaid amounts is to made on or before the first day of the month succeeding the granting of the order.

Paragraph 5 provides that Mr H[...] is to pay an amount of R5 000.00 per month to Ms H[...] in respect of maintenance pendente lite. Paragraph 6, in relevant part, provides that that payment of the aforesaid amounts is to made on or before the first day of the month succeeding the granting of the order.

- [3] In the founding affidavit in these proceedings, Ms H[...] states that she re-enrolled the maintenance contempt application on 22 November 2022 but in the judgment of Maher AJ he states that the application was re-enrolled on 17 November 2022.
- [4] Paragraph 4.4 of the Rule 43 Order provides that Mr H[...] is to pay the electricity account at the property in Stonehurst Mountain Estate where Ms H[...] and the minor children reside.
- [5] Paragraph 3.4 of the Rule 43 Order provides that the first respondent is to contribute to the maintenance of the minor children pendente lite by paying the children's comprehensive educational costs.
- [6] The second and third respondents are the first respondent's parents and the paternal grandparents of the minor children.
- [7] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006
- (4) SA 326 (SCA); *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2015
- (5) SA 600 (CC).
- [8] *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2018
- (1) SA 1 (CC) at para [61].
- [9] *Matjhabeng* at para [62].
- [10] *Fakie* at para [17]; *Matjhabeng* at para [64] – [67].

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