

SOUTH AFRICA / JUDGMENT

J.S.H v M.S.H (8470/2021) [2023] ZAWCHC 346 (18 July 2023)

[2023] ZAWCHC 346

COURT

Western Cape High Court, Cape Town

BEFORE

Maher

CASE / FILE NUMBER

8470/2021

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Republic

of South Africa

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO:

8470/2021

In

the matter between: J[...]
S[...] H[...]
Applicant
and
M[...]
S[...]
H[...]
Respondent
This
judgment was
delivered
electronically by
circulation to
the parties'
legal representatives by
email on TUESDAY, 18
JULY 2023.

JUDGMENT

MAHER, AJ

INTRODUCTION

- [1] This is the return day of an application calling on the Respondent to show cause, if any, why a final order should not be granted declaring him, inter alia, not to be held to be in contempt of a court order granted on 3 April 2019. The order also includes a provision that the Respondent pay the arrear maintenance within 7 (seven) days of the granting of the order and should he fail to make payment, a warrant of arrest be issued for his committal, and that he be sentenced to imprisonment for a period of 10 (ten) days or for such period or conditions as a court may determine
- [2] Ms Lawrence appeared for the Applicant and Mr Gagiano for the Respondent

BACKGROUND

- [3] The marriage between the parties subsists and they have 2 daughters, who reside with the Applicant in the former common home. The parties are married out of community of property and divorce proceedings are pending under case number 618/2019. As a result of the pending divorce proceedings the Applicant launched an Application in terms of Rule 43 for interim relief. This application was opposed by the Respondent and duly heard on 3 April 2019 before the Honourable Mr. Justice Le Grange who granted an order under case number 618/2019 on 4 April 2019 ("the Rule 43 Order").

- [4] Subparagraph 3.1 of the Rule 43 Order directed the Respondent to pay R6 000,00 (six thousand rand) per month, per child without deduction or set off maintenance for the minor children pendente lite. Paragraph 5 directed the Respondent to pay the Applicant R5000 (five thousand rand) per month towards her maintenance pendente lite.
- [5] The Applicant filed an Urgent Application in two parts on 11 June 2021 calling upon the Respondent, in terms of Part A thereof, to immediately comply with the provisions of the Rule 43 Order, and specifically with paragraphs 3.1, 3.2, 2.6.2, 5 and 6 thereof. Part B of the Contempt Application is in the form of a Rule Nisi as set out in a notice of re-enrolment of the application. The Respondent served a Notice of Intention to Oppose the application on 2 June 2021. The Respondent duly delivered a sworn statement on 14 June 2021 in which, inter alia, he stated that the "purpose of [his] affidavit is not to oppose the applicant's application, but to... bring to the Court's attention what [his] understanding is of the relief being sought by the Applicant [and to] express to what extent [he] may oppose such relief... why a notice of opposition was filed in this matter, but no opposing affidavit; and to advise the court on current and future efforts taken by [him], which may impact in the further conduct of this application."
- [6] On 15 June 2021 Mangcu-Lockwood, J granted an Order in respect of Part A of the contempt application and issued a Rule Nisi with a return date of 19 August 2021 apropos the relief sought for the alleged contempt on the part of the Respondent. The matter then came before Kusevitsky, Jon 19 August 2021 where an order was again taken by agreement between the parties which, inter alia, ordered that the Respondent comply with the Rule 43 Order granted by Le Grange, J on 3 April 2019 and provided that if the Respondent failed to comply with the Order the Applicant could re-enrol the matter on the same papers, duly supplemented, on 72 (seventy-two) hours' notice to the Respondent. The Applicant duly re-enrolled the application on 17 November 2022 once again seeking relief under Part A thereof for an order directing the Respondent to immediately comply with all the Rule 43 Order dated 3 April 2019 and specifically with the provisions of paragraphs 3.1.1.2, 4.4, 3.1.1.3, 5 and 6 thereof. Part B again made provision for the issue of a Rule Nisi calling upon the Respondent to show cause, if any, on the Semi-Urgent Roll, why a final order should not issue that the Respondent be declared to be in contempt of court. An order was also sought directing the Respondent to pay the arrear maintenance within 7(seven) days, failing which that a warrant of arrest be issued for his committal to prison for a period of 10 (ten) days, or such period and conditions as determined by the court. Once again relief was also sought to secure compliance with the Rule 43 Order. The Honourable Court is asked to find the Respondent guilty of contempt, to grant the further relief sought to ensure the Respondent pays the arrear maintenance and complies with the Rule 43 Order going forward, and to deal with the issue of costs.

THE RELIEF SOUGHT

- [7] The relief sought by the Applicant at this juncture relates solely to Part B of the Notice of Motion. The applicant accordingly seeks an order for payment of the arrear maintenance within 7 (seven) days and an order directing the Respondent to comply with the Rule 43 Order.
- [8] The Applicant also seeks a punitive costs order against the Respondent and that a warrant of arrest be issued for the Respondent's committal to imprisonment for a period of 10 (ten) days, or such period or conditions as determined by the court if he fails to pay the arrears within 7 (seven) days, an order that the Respondent henceforth comply with the provisions of the Rule 43 Order and be sentenced to a suspended of imprisonment on conditions determined by the court and, in the event of non-compliance, that an emoluments attachment order may be issued, the imposition of a fine is deemed appropriate by the court in respect of the Respondent's contempt.
- [9] As is obvious from the above this matter has a protracted history and the Respondent has signally failed to comply with numerous orders of court, even orders which were taken by agreement. Notwithstanding the matter coming before courts on numerous occasions there has still been no compliance by the Respondent with the Rule 43 Order.

THE APPLICABLE LEGAL PRINCIPLES

- [10] The central legal issue which falls for determination is whether the Respondent is guilty of contempt of court and specifically whether his failure to comply with the Rule 43 Order was wilful and mala fide.
- [11] The Constitutional Court^[1] held that:
- "As set out by the Supreme Court of Appeal in *Fakie*, and approved by this court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that {a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established."
- [12] It is trite that to intentionally and wilfully not comply with an order of court is a crime, which crime is a violation of the dignity, repute or authority of a court or judicial officer.^[2] Albeit that it is a crime, the Respondent is not an 'accused person' and is entitled to the protections ordinarily afforded a litigant in motion proceedings.
- [13] In casu it is common cause that the Applicant has proven the requisites for contempt as regards the existence of the order, service or notice thereof on the Respondent and non-compliance with the order by the Respondent. These are common- cause facts. It remains for the Applicant to prove beyond reasonable doubt wilfulness and mala fides on the part of the Respondent in disregarding the order.

- [14] As the Applicant has discharged the onus in respect of the aforesaid common-cause facts, it is the Respondent who bears an evidential burden in relation to wilfulness and mala fides. If the Respondent has failed to advance evidence that establishes a reasonable doubt apropos whether or not his non-compliance was wilful and mala fide, his contempt will be established beyond a reasonable doubt.[3]
- [15] The definition of contempt of court in *Fish Distributors (Pty) Ltd v Zive*[4] as 'the deliberate, intentional (i.e. wilful), disobedience of an order granted by a court of competent jurisdiction' has been cited with approval by the Constitutional Court in *Zuma*. [5]

ANALYSIS

- [16] As indicated, the central issue which falls for determination is whether the Respondent is not in wilful default and acting mala fide due to a lack of the financial wherewithal to comply with the obligations to pay maintenance as set out in the Rule 43 Order dated 3 April 2019.
- [17] The facts pertinent to this enquiry are the following.
- [18] The Respondent is employed as a manager at D'Arcy & Harris Enterprises CC. He alleges that he is unable to
- and did not - comply with the maintenance order as he is on a fixed salary which is insufficient to meet his monthly expenses. The Respondent alleges
- that as a result of the insufficiency of his income the only option available to him was to approach financial institutions to obtain a loan. He apparently approached 2 banks, both of which turned down his application. The third bank he approached, namely ABSA, agreed to grant a loan of R600,000 (six hundred thousand rand). The Respondent alleges that the proceeds of this loan were fully depleted and he, far from being in wilful default, has taken all reasonable steps available to him to either comply with the court order or he sought to avoid non-compliance. The steps he has taken in this regard include twice unsuccessfully prosecuting Rule 43(6) applications to vary the Rule 43 Order and to reduce the maintenance payable.
- [19] It follows that the Respondent places a great deal of reliance on the alleged fact that nothing remains of the of R600,000 (six hundred thousand rand) received from ABSA. Notwithstanding this fact, the lack of detail and disclosure by the Respondent in this regard is glaring and the paucity of detail is obvious.
- [20] The Respondent provided no details as to the date upon which he received the R600,000 (six hundred thousand rand) from ABSA. Notwithstanding an assertion that these funds are now been depleted he nonetheless provides neither specific details, nor any documentary or other proof to show how this amount was spent, save for the specific assertions that it was utilised to pay an arrears amount of R262,379.50 (two hundred and sixty-two thousand three hundred and seventy-nine rand and fifty cents) and R6509.58 (six thousand five hundred nine rand and fifty-eight cents) paid in 2021. The Respondent is then content to merely make

a bald assertion that "the balance money (sic) to pay the cash maintenance amount each month and paid my legal fees." The only legal fees which he lists as having been paid is an amount of R8625 (eight thousand six hundred and twenty-five rand) paid in September 2021 in respect of services provided in an unsuccessful attempt to mediate the dispute between the parties.

- [21] It is also noteworthy that the Respondent has an Old Mutual Max Investments retirement policy which had a closing balance as at 16 January 2021 of R375,721.30 (three hundred and seventy-five thousand seven hundred and twenty-one rand and thirty cents). He neither disclosed this investment nor does he disclose whether he approached Old Mutual to ascertain whether or not he could obtain a loan as against the value of the policy. The Respondent also does not indicate why he did not approach Old Mutual to reduce the monthly premium of R2018.07 as at 2022 due on the policy so that he would be in a position to satisfy his maintenance obligations. The Respondent's repeated averments that he has done everything possible to source additional funds and taken all steps possible to ensure that he can and does comply with the Rule 43 Order is clearly not the full truth. The Old Mutual investment which he failed to disclose save to the limited extent of listing it as a monthly expense clearly stipulates that, "a divorce court or maintenance court may require the Retirement Fund, insurer or administrator to pay a portion of the plan assets to a specified third party. This is a special type of disinvestment from the policy." Instead of seeking such an order to enable them to access these funds the Respondent instead threatened to launch a further Rule 43
- (6) application, which in any event failed to do. The Respondent also has approximately 3 months accumulated leave and he does not indicate whether he approached his employer, bearing in mind that it is a family business, in an endeavour to convert the accumulated leave into additional pay.
- [22] The Respondent repeatedly resorted to mere assertion and furnishes no details or satisfactory proof of his financial circumstances. A clear example is to be found in the affidavit jurat 12 August 2021 in which he states, "I have borrowed money from friends, family, businesses and banks in order to try and keep up with my monthly obligations, but it is simply an unsustainable position." Not a tittle of evidence is adduced to indicate how much money was borrowed, who these friends are and when the funds were received. The Respondent also admits that he does have cash on him from time to time as he has "... Borrowed from several sources as detailed herein" but no specific details were forthcoming other than vague references to third parties. It is so interesting that there is reference to the plural 'businesses' and 'banks', again without any details or documentary evidence. A curious anomaly also arises in that in the same affidavit the Respondent stipulates that his monthly salary as a manager of the jewellery kiosk is R16,576.64 (sixteen thousand five hundred and seventy-six rand and sixty-four cents) which is supplemented by a "loan" of R23,700 (twenty-three thousand seven hundred rand) whereas the payslip which is annexed to his affidavit jurat 21 November 2022 makes no reference to any monthly "loan" from his employer and

lists his net pay as R40,340.28 (forty thousand three hundred and forty rand and twenty-eight cents}. It also identifies the amount of R56,880 (fifty-six thousand eight hundred and eighty rand) as his "normal basic pay" and PAYE is deducted accordingly from this amount. I may add that the bond account is also not detailed in any statement made by the Respondent, nor is any documentary evidence attached in respect of this account.

- [23] The Respondent was also content to attach several bank account statements without providing any form of analysis or details in his affidavit. It is not for the court to fossick through bank statements to try and establish what the Respondent's financial circumstances are apropos his income and expenditure on bank accounts. In any event, it is not possible for the court to speculate on the contents of the statements and a clear example is a cash deposit which was made into the Respondent's FNB bank account on 30 June 2022 in the amount of R6200 (six thousand two hundred rand). No explanation is furnished by the Respondent for this cash deposit.
- [24] The Respondent also complains that the Applicant refuses to enrol the children at a less expensive school. They currently attend a private school, Reddam house, and the annual fees are in the region of R67,071.67 (sixty-seven thousand and seventy-one rand and sixty-seven cents) quarterly or as described elsewhere, "more than R270,000 (two hundred seventy thousand rand) per year". However, the Respondent stated that his father had assisted him to pay the school fees. Once again no specific details or evidence have been furnished by the Respondent and reliance is yet again placed on mere assertion. No proof is provided by the Respondent to confirm that the school was not prepared to reduce the fees or in some other manner or form accommodate the Respondent until such time as his financial circumstances improved, nor is there a confirmatory affidavit, explanation or any documentary evidence as to why his father coincidentally ceased to pay for the children's school fees since June 2021. It was incumbent on the Respondent to furnish an explanation for the cessation of the financial assistance, particularly given the apparent coincidence that the Applicant's application is dated 19 May 2021 and was set down initially for hearing on 15 June 2021.
- [25] Notwithstanding that the Respondent was afforded an opportunity he elected not file a supplementary affidavit, nor does the Respondent attach primary documents and instead resorts to the use of partial or limited documentation. The Respondent's alleged income is manifestly irreconcilable with his pre-separation standard of living in a private estate with his children then attending a private school, namely Reddam House. No lease agreement is attached in respect of his current accommodation and his sworn statements are all characterised by repeated assertion and the absence of admissible or conclusive or best evidence, notwithstanding that he bears an evidential burden to adduce such evidence.
- [26] I also find it noteworthy that notwithstanding that the Respondent made 2 unsuccessful attempts to vary the extant Rule 43 order in terms of Rule 43(6) and was unsuccessful in an approach to the Maintenance Court, the Respondent, who clearly has no compunction in initiating proceedings and is well-versed in doing so, last sought a variation in January 2020

and subsequently was content to only threaten to do so notwithstanding repeated protestations of an inability to comply with the financial obligations imposed in the existing order.

[27] It is also pertinent to point out that no less than 2 courts considered all the relevant facts, including the parties' respective financial circumstances and heard argument before granting a Rule 43 order and dismissed the Respondent's Rule 43(6) application. In the application before Sher, J on 8 January 2020 the Respondent, as in this matter, who was required to adduce the relevant evidence, placed reliance on correspondence from an accountant. The court pertinently pointed out that this did not suffice and did not constitute evidence as there was no sworn statement from the accountant and the letter therefore had no evidentiary value. Given this finding by the court, it raises an obvious question as to why, where his wilfulness and ma/a tides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt, he again resorts to relying on a letter without obtaining a sworn statement from the accountant to confirm the correctness of its content. The ineluctable conclusion is that the Respondent did not do so as he could not do so as the decision is otherwise inexplicable.

[28] There is a consistent failure by the Respondent to adduce evidence to establish a reasonable doubt and respond adequately and fully.

[29] The Applicant, by way of example, points out that the business which the Respondent manages includes a family run jewellery store. She stated that during their approximately 11 (eleven) years of marriage prior to the institution of divorce

proceedings and during the 18 (eighteen) year period when she worked at the business, it came to her knowledge that the Respondent had effective control of the income which he received from the various business activities. There is no reason to doubt her assertion in this regard as she doubtless gained this insight over such a protracted period. The Respondent's reply to her specific assertion that the Respondent is in control of the income producing entities and that he is able to determine the salaries to be drawn and can access "other amounts to maintain the standard of living [which] can be drawn is loans through other devices" is telling. His cryptic response is simply to state, "the only income I get paid, is a fixed income from HD Jewellers, as detailed further below." He simply treated her assertion as pro non-scripto and made no attempt to deny or disprove her allegation, by for example, producing financial statements or obtaining a sworn statement from the accountant that this is not the case.

[30] The Respondent at no stage in the proceedings furnished statements in respect of his Discovery Platinum Account or Credit Accounts. The Respondent also failed to furnish a set of financials for subsequent months, nor any details of his credit card transactions.

- [31] As already indicated, no less than 2 courts considered all the relevant facts and details regarding the Respondent's financial position and concluded that he is able to pay pendente lite maintenance as stipulated in the Rule 43 Order. The Respondent has not furnished any facts or evidence to show that his financial circumstances have substantially or materially changed since the findings by these 2 courts were made.
- [32] It is also to my mind of some significance that the Respondent undertook to immediately comply with the Rule 43 Order in the Order in terms of the order granted by agreement between the parties on 15 June 2021. This is particularly noteworthy when regard is had to his affidavit jurat 14 June 2021 in which he alleges an inability to comply with the Rule 43 Order. It is inconceivable that the Respondent would agree to an order in those terms if it were indeed so that he could not comply with the terms thereof. In any event, the Respondent failed to comply with the order taken by agreement as regards his obligation to pay interim maintenance to the Applicant for the months of June and July 2021. No explanation is given as to why the Respondent would inexplicably agree to comply with a court order on 22 November 2022 when he was
- and is - adamant that he is unable to comply with the financial obligations imposed, nor is an explanation given for the failure to file a permitted supplementary affidavit to augment his answering affidavit and furnish adequate evidence and proof of an inability to pay. The fact of the matter is that the Respondent repeatedly failed to comply with court orders including an order taken by agreement and with his consent. The latter, to reiterate, is irreconcilable with a plea of lack of financial means.
- [33] The evidence clearly shows that the Respondent has a propensity to simply disregard court orders and has no compunction in doing so. It was a mere four months after the Rule 43 Order was granted that the Respondent first failed to pay the interim maintenance due to the Applicant and failed to pay the full maintenance due in respect of the minor children. After the Respondent's Rule 43(6) application was dismissed by Sher, Jon or about 8 January 2020, the Respondent persisted with his non-compliance. The Respondent was in arrears for 21 months at the time the contempt Application was initially launched.
- [34] I am of the view that the Respondent has not made a full disclosure of his finances notwithstanding that he bears an evidential burden to advance evidence to establish a reasonable doubt as to whether his non-compliance was wilful and mala fide.
- [35] No explanation is given as to why he only pays "half of everything" apropos his personal expenses such as rent, Internet, electricity, food and water. Portions of the Respondent's affidavits are coy to the point of concealment and raise more questions than answers. An example of this is his explanation that his father assisted him to pay the children's school fees without furnishing a tittle of detail as to extent and duration of this financial assistance. It is then alleged that in order for his father to continue to assist him in order to pay the 2022 school fees, his father had to, "borrow money from his friend." Once again, no details are placed before the court as to who this 'friend' is, nor the extent of the assistance provided by

this unknown 'friend'. It goes without saying that there is no confirmatory affidavit from his father either. No indications are given as to the attempts made to sell the immovable property and there is again a bald assertion that the main reason why the house has not been sold is because of the, "state of the house" according to - yet again an unnamed and unidentified person - in this case an estate agent. Once again, there is no confirmatory affidavit nor details or facts furnished.

- [36] What is also not explained is how the Respondent managed to purchase a property in a private estate, namely Stonehurst Mountain Estate. No details are furnished at all as to which estate agents were mandated to sell the property. It is perplexing and stretching credulity that not a single offer has been received notwithstanding that the property has apparently been on the market for over 2 years (once again a mere assertion with no confirmatory affidavit in support thereof). It is also striking that the Respondent furnishes almost no details whatsoever as to the extent of his legal fees and how these were paid.
- [37] It is also striking that the Respondent has seen fit to only annex a document from ABSA bank dated 8 July 2021 which merely stipulates that his home loan application has conditionally been granted. Notwithstanding that he is employed in a family business and he stipulates that the business was "severely and negatively affected by the 'Covid lock down'", no confirmatory affidavits, nor any details or financial statements were furnished to support this assertion and how this impacted on his income and continues to do so now that Covid is no longer a consideration.
- [38] The Respondent simply asserts that he has exhausted all avenues to obtain further loans without furnishing any proof that he submitted any further applications, nor does he furnish proof that any such applications were rejected. On the last known occasion that he applied for a loan it appears to have been approved and that was in July 2021.
- [39] The Respondent asserts that the R600,000 (six hundred thousand rand) which he received from ASSA bank by way of a loan is now "depleted" without providing any details or proof as to how these substantial funds were entirely depleted if indeed this is the case. There is a mere assertion that, "this money was used to pay the arrears and to top up what I can afford of the future payments and my legal expenses." This is a wholly incomplete and inadequate explanation, and does not constitute evidence that the funds were indeed depleted. The loan, it should be noted was only, in principle, approved in July 2021 and yet the Respondent admits his default in August 2022. No details are given as to the extent of his legal expenses, nor is there any proof of these payments. In fact, the Respondent stated in his affidavitjurat 21 November 2022 that he has, "... not used legal representation this entire year as I do not have the funds." It is also noteworthy that he expressly states that he does not know how he will afford to pay for legal representation for the trial in February 2023, which clearly is intended to suggest that he has no funds. The fact of the matter is that he was legally represented at the hearing in 2023.

[40] In response to the Applicant's averment that the Respondent's affidavit jurat 29 July 2022 did not provide any evidence of his inability to comply with the Rule 43 Order the Respondent replied as follows:

"I deny the contents of this paragraph. I have provided documentary proof of my inability to pay these amounts. These documents are discovered by me. Given more time, I can present these documents to this court. " This denial is later repeated in his affidavit and he states that he submitted documentary proof multiple times of the reasons for his inability to continue to pay the educational costs and comply with the Rule 43 order and that, uif given the opportunity, I will provide proof thereof."

[41] Notwithstanding that the matter was only heard during 2023, and the above statements were made by the Respondent on 21 November 2022, he has, to date, not seen fit to "present these [unidentified] documents to this court" and this in circumstances where he had until 24 February 2023 to file a supplementary affidavit. The Applicant's attorney was notified on 28 February 2023 that he elected not to file a supplementary affidavit.

[42] There are also indications that the Respondent is not being entirely open and honest with the court. He, for example, gives different explanations as to why the property was not sold. In the first instance, relying upon hearsay, he alleges that he was informed by an unknown estate agent that the reason why the house could not be sold was because of its condition and elsewhere avers that the house cannot be sold as the Applicant "stubbornly refuses to let him sell the house."

[43] I accordingly find myself unable to agree with Mr Gagiano's submission that we are not dealing with a Respondent who is deliberately disregarding a court order and his submission that it can be inferred from his conduct that he tried everything within his means to comply with the relevant order and, as he put it, "to prevent further disputes of the current nature." This submission

is unsupported by the above factual matrix.

[44] It is noteworthy that in the sworn statement deposed to by the Respondent on 14 June 2021 he pertinently states, "I understand that a court order is valid until set aside" and he subsequently stated that if a loan is granted by a financial institution he is aware that this will not put him in a position to comply with the maintenance obligations ordered in terms of the Rule 43 Order indefinitely and that he, "... May also need to again apply for a reduction of those amounts at some point, in terms of Rule 43 (6), should we not get a trial date for our divorce soon."

[45] On a conspectus of the evidence, it is therefore clear that the Respondent was contemptuous of the court order and his disobedience

thereof was deliberate and intentional i.e. wilful. His conduct in this regard has been shown beyond a reasonable doubt.

[46] In all the circumstances, I am satisfied that the Respondent has not met the evidentiary burden upon him to establish a reasonable doubt, and it follows that as he failed to discharge this burden, his contempt has, as indicated, been established.

SENTENCE

[47] All South Africans have a duty to respect and abide by the law. As the Constitutional Court stated in *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*,^[6] courts 'unlike other arms of the State ... rely solely on the trust and confidence of the people to carry out their constitutionally mandated function'^[7] which is to uphold, protect and apply the law without fear or favour.^[8] It is an accepted principle that the disregard of court orders is tantamount to an attack on the very fabric of the rule of law and is thus to be taken seriously.

[48] The evasion of the payment of maintenance orders is particularly egregious as it also undermines the best interest of the child

principle.^[9] The Constitutional Court^[10] has emphasised that if court orders in respect of maintenance are habitually evaded with relative impunity, not only is the justice

system discredited but also the interests of the child are not adequately protected and that Courts are enjoined to be alive to

recalcitrant maintenance defaulters who side-step their obligations towards their children.

[49] The Applicant seeks the incarceration and deprivation of liberty of the Respondent and this is not a punishment which should be imposed unless there is good cause. The Respondent also has children and his incarceration will have an impact on them too and he should have considered this aspect as a parent. The effect can nonetheless be impacted by granting an order that will not impact on his contact with the children.

[50] The Respondent's flagrant, repeated and ongoing refusal to comply with the court order cannot, however, be overlooked. His conduct evinces a complete disregard for the dignity of this court and respect for the orders made by courts is an integral part of the effectiveness and success of any legal system and public order.

[51] The period of incarceration is at the discretion of a court and in maintenance matters it appears from the case law that the time periods imposed can generally be said to vary between 1 week and 3 months in maintenance matters. I also take into consideration the amount that is in arrears and the serial nature of the breaches by the Respondent.

[52] In the event that it is not made clear to the Respondent that his contempt and disregard for orders of this court are wholly

unacceptable there is a strong likelihood that his conduct will continue unabated. Moreover, if he is not to be punished in manner

that brings home the seriousness of his misconduct, and it is not addressed by an appropriately severe punishment the integrity of the judiciary will be undermined.

[53] In all the circumstances, the period of incarceration of 10 (ten) days proposed and sought by the Applicant is not only justified but more than fair to the Respondent given his repeated egregious conduct and complete lack of remorse. If anything he evinces an air of arrogance as regards his flagrant and continued contempt.

[54] Be that as it may, I shall lean in favour of leniency and impose a periodic period of imprisonment.

[55] The Applicant sought that any order made in regard to this application shall not be suspended pending any appeal. I am of the view that it is not competent for a Court to make such an order as it flies in the face of an express statutory provision. The Legislature has seen fit to provide as a default setting that the appeal process, by operation of law, suspends the operation and execution of an order, and s 18 of the Superior Courts Act 10 of 2013 reads thus:

"18. Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2)

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

[56] In the circumstances, what the Applicant seeks would drive a coach-and-four through the above provisions and render them nugatory. In the circumstances, I decline to make such an order.

COSTS

[57] In the light of the Respondent's contempt and longstanding and repeated non-compliance with the court order, there is no justification not to order that he pay costs and that he pay such costs on a punitive scale. It is appropriate for a punitive costs order to be imposed as a measure and indication of the Court's displeasure of the Respondent's conduct.

- [58] This is precisely the kind of matter where a punitive order of costs is justified. would be justified. The failure to honour the Rule 43 Order and the resultant need for the Applicant to approach a court to compel compliance and to preserve this Court's core integrity, is precisely the kind of "extraordinary" conduct worthy of a court's rebuke in the form of a punitive sanction by way of a costs order on an attorney and client scale.
- [59] The Respondent must accordingly pay the costs of the Applicant on an attorney and client scale.

CONCLUSION

(60) In the circumstances, I make the following order:

1. The Respondent is found guilty of the crime of contempt of court for his failure to comply with the provisions of the Court Order of the Honourable Mr. Justice le Grange, dated 3 April 2019 in case number 618/2019, and specifically is found and declared to be in contempt of the following provisions thereof:

Clauses 3.1 and 3.2;

Clause 4.4; and

Clauses 5 and 6.

2. The Respondent is directed and ordered to pay the arrears maintenance ("the arrears") in full within 7 (seven) business days without set-off or deduction of any kind;
3. In the event that the Respondent fails to make payment of the arrears within 7 (seven) business days, a warrant of arrest may be issued for his committal by reason of his failure to adhere to the Court Order, and the Respondent shall, in such event, be sentenced to imprisonment for a period of 10 (ten) days.
4. The Respondent is directed and ordered to comply with the provisions of the Order referred to in paragraph 1 (one) above, and is sentenced to 1000 (one thousand) hours of periodical imprisonment, from 6pm on Friday until 6am on Monday, which sentence is suspended for a period of 5 years, on condition that the Respondent is not convicted of a similar offence committed during the period of suspension, and in the event of non-compliance an emoluments attachment order shall be issued.
5. The Respondent shall pay a fine of R10 000 (ten thousand rand) in respect of the aforesaid finding of guilt and his contempt of Court, which fine shall be paid within 10 (ten) days.
6. The service of any Order made in regard to this Application shall be effected on the Respondent via email or any other form of service provided for in Uniform Rule of Court 4.
7. The Respondent shall pay the costs of this application on an attorney and client scale.

AD MAHER

ACTING JUDGE OF THE HIGH COURT

- [1] 2021
- (5) SA 327 (CC) at para 37.
- [2] Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at paras 19-20.
- [3] Fakie NO, supra at para 42.
- [4] Consolidated Fish Distributors (Pty) Ltd v Zive 1968 (2) SA 517 (C) at 522B.
- [5] Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others 2021 (5) SA 327 (CC) at para 2.
- [6] See: 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] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC).
- [7] Ibid at para 1
- [8] See, also S v Mamabolo [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 17.
- [8] See, also S v Mamabolo [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 17.
- [9] Section 28(2) of the Constitution provides that, '[a] child's best interests are of paramount importance in every matter concerning the child.'
- [10] In Bannatyne v Bannatyne and Another [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) at para 32.

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