

SOUTH AFRICA / JUDGMENT

M.O v R.O (15617/2022) [2025]

ZAWCHC 37 (27 January 2025)

[2025] ZAWCHC 37

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

15617/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 15617/2022

In the matter between:

M[...] O[]

Applicant

and

R[...] O[]

Respondent

JUDGMENT DELIVERED ON 23 JANUARY 2025

VAN ZYL AJ:

Introduction

1. The parties to these proceedings were married in March 2012. They have three minor children. Unfortunately, the marriage has since broken down, and a divorce action was instituted in September 2022. There are now two applications serving before this Court:

1.1 The first is an application by the applicant seeking to hold the respondent in contempt of court for failure to comply with his obligations under an order granted on 6 October 2023 in terms of Rule 43 (“the Rule 43 order”).

1.2 The second is an application by the respondent pursuant to the provisions of Rule 43(6), for the variation of his obligations under the Rule 43 order.[1]

2. The issues raised in the applications are intertwined and I shall accordingly address the issues on the basis of the evidence as a whole.

The relevant legal principles

Contempt of court

3. The applicant seeks, in the first instance, an order of civil contempt against the respondent. Contempt of court, in the present context, has been defined as “the deliberate, intentional (i.e. wilful), disobedience of an order granted by a court of competent jurisdiction”. [2]
4. Wilfulness is an essential element of the act or omission alleged to constitute contempt. [3] In addition to the element of wilfulness, there must be an element of mala fides. [4] Once it is shown that the order was granted (and served on or otherwise came to the notice of the respondent) and that the respondent had disobeyed or neglected to comply with it, both wilfulness and mala fides will be inferred. [5] Thus, once the applicant has proved the order, service or notice, and non-compliance, an evidentiary burden rests upon the respondent in relation to wilfulness and mala fides, that is, to advance evidence that establishes a reasonable doubt as to whether non-compliance with the order was wilful and mala fide. [6]
5. Even though the defaulting party may be wilful, such party may still escape liability if they can show that they were bona fide in their disobedience. Where the defaulting party has genuinely tried to carry out the order and has failed through no fault of his or her own, or has been unable but not unwilling (for example, by reason of poverty), to carry out the order, proceedings for committal will fail. [7]

Applications for the variation of a Rule 43 order

6. Rule 43(6) provides for a change in a party’s circumstances subsequent to the grant of a Rule 43 order. The Court may, “on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate.”
7. Rule 43(6) is strictly interpreted. [8] There must be a material change in the relevant party’s circumstances. It is not permissible to seek a re-hearing or a review of an existing order under the guise of a Rule 43(6) application, or effectively to appeal the existing order.
8. In an application for a reduction in the interim maintenance payable based on a decline in the financial situation of an applicant under the subrule, a full and frank disclosure of all of the elements which make up the broad overview of such applicant’s financial situation

should be made. The applicant bears the onus of establishing on a balance of probabilities that a material change has occurred. To succeed, an applicant must demonstrate not only that a change or even a significant change in circumstances has occurred, but must place sufficient facts before the Court to enable it to determine the materiality of that change in the context of the applicant's broader financial circumstances.[9]

9. The facts giving rise to the present applications are considered against this background.

The Rule 43 order

10. The applicant launched a Rule 43 application in June 2023. The Rule 43 order granted on 6 October 2023 directed, inter alia, the respondent to make payment to the applicant of the following:

10.1 R18 000,00 per month as cash maintenance for the applicant and the parties' three minor children.

10.2 The costs of retaining the applicant and the children as dependent members of the respondent's medical aid scheme, and further to pay the costs of all reasonably incurred private health care expenses not covered by the medical aid (this part of the order was granted by agreement between the parties).[10]

10.3 Certain specified motor vehicle and fuel expenses (this was granted by agreement).

10.4 Rental in respect of the applicant's and the children's residence (this was granted by agreement).

10.5 The monthly salary of the applicant's domestic worker (this was granted by agreement); and

10.6 A contribution of R50 000,00 towards the applicant's legal costs.

11. The Rule 43 order contained a recordal reading as follows:

"It is recorded that O[...] A[...] D[...] (Pty) Ltd[11] has been placed in provisional liquidation by the Gauteng High Court under case number 2023-017995 with an expected return date of 24 October 2023. In the event of a final order of liquidation being granted this may constitute a material change in the

respondent's circumstances for purposes of rule 46(3)".

12. The respondent, together with his brother, was a co-founder, co-director and 50% shareholder of O[...] at the time, from which he would pay various of the expenses referred to in the Rule 43 order, including the applicant's and the children's housing, the vehicle instalment, the medical aid costs, and the domestic worker's salary.
13. The enforcement of the Rule 43 order was arduous. The applicant launched a contempt application for the first time during November 2023 when the respondent failed to make payment in terms of the order. After initially opposing the contempt application the

respondent tendered the arrears, and an order by agreement between the parties was granted on 28 November 2023. The November 2023 order granted the applicant leave to approach the Court again, on supplemented papers, in the event of the respondent defaulting again.

14. Although the respondent defaulted again on 1 December 2023, the applicant used the mechanism provided for in section 26(4) of the Maintenance Act 99 of 1998, read with section 37D(1)(d)(iA) of the Pension Funds Act 24 of 1956, to recover some of the maintenance due to her and the parties' children from the available funds in the respondent's

retirement annuities. The initial application, in respect of arrear maintenance which was due and payable on 1 December 2023, was heard on 19 December 2023. Judgment was granted in the applicant's favour on 5 January 2024.[12]

15. The respondent defaulted again on 1 January 2024, and the applicant launched a second application under section 26(4) of the Maintenance Act. The second application was heard on 7 June 2024 and the applicant was able to recover some of the arrear maintenance due to her and the children for the period 1 January 2024 to 16 May 2024.
16. The present contempt application, which was instituted in August 2024, arises from the respondent's failure to comply with the Rule 43 order from 1 June 2024 onwards. According to the applicant, the respondent has consistently failed to comply since that date, not only in respect of the cash payments for maintenance, fuel, rent and the domestic worker, but also in respect of his other obligations pertaining to the medical aid and the applicant's vehicle. [13]
17. The mechanism provided in section 26(4) of the Maintenance Act is no longer available to the applicant, as the funds in the respondent's retirement annuities have been depleted.
18. The applicant accordingly seeks an order that the respondent is in contempt of court and that he be sentenced to imprisonment or community service of a specified period, suspended on condition that he comply with the Rule 43 order.

The respondent's default, and his alleged changed circumstances

19. Over the period January 2024 to August 2024, the respondent has paid an amount of R10 000,00 (sometimes R10 250,00) per month to the applicant, except in April 2024 when he paid R16
850. His arrears in respect of maintenance stood at almost R140 000,00 as at 1 August 2024. In addition, he has not yet paid the R50 000,00 owing in respect of a contribution towards the applicant's legal costs.
20. The applicant describes the hardship that she has endured as a result of the respondent's default. She is herself under debt review, and therefore unable to procure loans from financial institutions. As the respondent has relocated to Johannesburg (he is renting a

cottage from his sister) and sees the children for the period of a week every month, the applicant is essentially a single mother left to shoulder most of her and the children's day to day expenses by herself. Her net salary is about R46 600,00 per month. Having regard to the papers as a whole, there is no doubt that the applicant and the minor children

need the interim maintenance as set out in the Rule 43 order, although there are in my view justified concerns raised by the respondent regarding the need for the applicant to scale down by, for example, moving to a more affordable residence (the applicant is currently renting an apartment in Bakoven, although she points out that she is paying a rental that is lower than the market-related rental).

21. The question remains, however, whether the respondent can afford to pay such maintenance,[14] given what the respondent says was a material change in his financial circumstances. It appears from the history of this matter that the respondent has never complied with the Rule 43 order except during the time that the applicant had access to his retirement annuity funds to pay the monthly obligations under the order.
22. I have mentioned the fact, recorded in the Rule 43 order, that O[...] was provisionally liquidated in May 2023. The application was brought by a creditor, and was not a friendly liquidation. In response thereto O[...] agreed to a payment arrangement with the creditor, to which it was unable to keep. It closed its doors at the end of November 2023, and was finally voluntarily liquidated on 28 February 2024.
23. The respondent points out that O[...]’s winding-up has resulted in him, as surety, being sued for O[...]’s debts, and it appears that two judgments have been granted against him[15] in a total sum of about R4 million.
24. The respondent says that, because of O[...]’s demise, he can no longer pay the maintenance stipulated in the Rule 43 order, as he has no income from O[...], and he cannot make drawings from O[...] to pay his and the applicant’s expenses.

He says that the fact that O[...]’s provisional and possible final liquidation was recorded in the Rule 43 order was an acknowledgement of the fact that the respondent’s financial position depended on that of O[...], and would influence the respondent’s ability to fulfil his Rule 43 obligations.

25. The respondent accordingly asks that the cash maintenance payable to the applicant and the children be reduced to R5 000,00 per month, and that the other expenses (rental, utilities, domestic worker, school fees, books and stationery and other school expenses) be shared equally between the parties. He offers to pay 25% of the vehicle instalment and 50% of the vehicle insurance, and to pay the children’s medical aid cost.
26. The variation application was foreshadowed in correspondence dated 5 December 2023 from the respondent’s attorney, and instituted on 8 December 2023. It was however never prosecuted until it was finally set down for hearing together with the applicant’s present contempt application. The respondent explained that he had no funds to advance the

variation application while having to deal with the litigation instituted by the applicant since the grant of the Rule 43 order. He has since entered into a payment arrangement with his attorney.

27. Although there are insinuations in the applicant's papers that O[...] was allowed to fail financially as a stratagem on the respondent's side to avoid his financial liabilities after divorce, there is nothing of substance on the papers as a whole to support this. It is not disputed that O[...] has in fact been liquidated. It has substantial judgment debts. The respondent indicates that the applicant was fully aware of the company's financial difficulties while the parties were still together. She is a former employee of the company, and witnessed it deteriorating during the Covid pandemic.
28. The respondent has since December 2023 taken a salaried job, working for a company called I[...] as its national sales manager.[16] The applicant argues that I[...] is effectively O[...] in a new form but this is, again, not substantiated on the papers. O[...]’s business was different from that of I[...]. O[...] was a wholesaler and distributor of various goods, whilst Ignite sells vapes. The respondent was a co-founder,

co-director, and co-shareholder of O[...], but has no interest in the ownership of I[...]. As a director of O[...] the respondent could structure his finances to arrange for some of the payment of the family's expenses from the business.[17] For example, the applicant used to have the use of an O[...] fuel card, loaded with the stipulated amount for fuel. Due to O[...]’s liquidation this facility is no longer available. As an employee of I[...], the respondent can no longer make these types of arrangements.

29. I agree with the respondent's submission that O[...]’s final liquidation, together with the need to accept salaried employment, constitute material changes in his circumstances as contemplated in Rule 43(6). In addition, the respondent no longer has assets in the form of his retirement annuities that can be used to pay his maintenance obligations.
30. A consideration of the papers indicates that the respondent is not making ends meet, but that he is setting aside R10 250,00 per month as maintenance for the applicant and the children. The applicant receives assistance from family and friends, rents a vehicle from her mother and stepfather, and is employed by her current life partner. The respondent accuses her of refusing to make lifestyle changes and wishing to maintain an unaffordable lifestyle, which he - the respondent – can no longer finance:

“The parties are no doubt aware that in most cases persons who have become divorced will be compelled by necessity to reduce their standards of living, for where the available means of support are not adequate to maintain both according to their former scale of living, each must of necessity scale down his or her budget. In the case of most of us divorce brings a measure of hardship or at least some degree of deprivation. To say that two can live as cheaply as one is not true. The fact of the matter is that two living together can live more cheaply than two living apart, for obvious reasons such as the need for two residences plus rates, maintenance, service charges and all the rest of it; two cars plus the concomitant expenses; two lots of household goods to buy and maintain; and so forth. ... The fact that each former

spouse now has to pay for things formerly enjoyed in common places a heavier burden on the finances than was formerly the case. It is therefore clear that in most cases both parties will

have to reduce their standard of living to some extent.”[18]

31. The respondent concedes that he is in default of the Rule 43 order, but argues that such default is not wilful and mala fide:

“[9] ... 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).”

- [10] 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.”[19]

32. The Rule 43 order was granted with the spectre of O[...]’s liquidation looming in the background. The monthly total of the payments to be made under the Rule 43 order is R67 000,00. The respondent’s salary is about R41 400,00 after the deduction of tax. His expenditure (including R10 250,00 in respect of maintenance) amounts to about R43 000,00 per month. The respondent’s only other assets were his retirement annuities, which have now been depleted. He owns no other assets of significant value, and has no vehicle. His debts – including credit card debt of R100 000,00 and, particularly, the judgments granted against him – run into millions of rands. The applicant argues that the existence of the credit card debt shows that the respondent has “further bank/credit card accounts” which he has failed to disclose. This may be so but it does not take matters much further, as the account is (or the accounts are) on the respondent’s version woefully overdrawn.

33. The applicant argues that the respondent’s income and expenses are deliberately contrived to create the impression that he earns an insignificant salary. She argues that the expenses are “conveniently placed within the parameters of the respondent’s income”. In this respect, the applicant points out the following:

- 33.1 The respondent has not produced his employment contract and it is therefore unclear whether he earns commission (the respondent states that he does not).

33.2 The respondent's payslips indicate that he receives a fixed salary of R30 000,00 per month and an allowance of R19 500,00 per month, including a seemingly fixed expense claim of R3 726 per month. There is no provision for a company vehicle or vehicle allowance (the respondent does not own a vehicle). The respondent has previously indicated that he receives a reimbursement for fuel.

33.3 It is strange that the respondent was required to purchase a cell phone for work purposes, and that he has to pay for his own data.

33.4 In his answering affidavit in the contempt application, the respondent avers that he pays a rental amount of R8 000,00 per month, inclusive of lights and water, and that his travel allowance of R10 000,00 is used for when he spends the week in Cape Town with the children, and includes his food. In his supplementary affidavit, the respondent states that the rental amount includes his food.

33.5 The respondent was able to pay an additional R6 850,00 to the applicant in respect of a "medical issue" in April 2024, but is silent on where those additional funds came from.

34. It is so that there are inconsistencies in the respondent's various affidavits. They are, however, relatively minor in the context of the bigger picture. I agree with the submissions made by the respondent's counsel that his financial position necessitates a variation of the Rule 43 order. Even taking account of the issues raised by the applicant in relation to the respondent's financial circumstances, the respondent is not able to comply with the order as it stands. As indicated, his retirement funds have been deleted, and he has no assets. He has provided his most recent bank statements as well as his salary slips, from which it appears that his only source of income is his salary (the applicant speculates that he must have an additional source of income, but there is no substantiation for this on the record). The parties earn roughly similar net salaries. They both have substantial debts. According to the applicant, her and the children's monthly expenses amount to about R106 000,00, of which R55 000,00 relate to the children. Given that the parties' combined income after tax amounts to only about R87 000, this is clearly unsustainable.

35. In conclusion, *FS v ZB*[20] it was held that the lack of financial instructions is a plausible reason for a delay in lodging a variation application under Rule 43(6).[21] The Court can assess whether a respondent in contempt proceedings can make payment under the Rule 43 order.[22] Contempt must be proved beyond a reasonable doubt. Unsubstantiated allegations of other, undisclosed financial recourses have little weight, if any, and the Court looks at the financial position as stated by the respondent.[23]

36. In the circumstances I am unable to find that the respondent is in contempt of court because of his default after June 2024.

37. I am further of the view that the Rule 43 order stands to be varied in the respects set out in the order below. The proposed order does not in all respects align with what the respondent suggested; for example, the respondent's offer is too low in some respects, and it is not

necessary for the respondent to pay the applicant's service providers directly in all instances, except where indicated (which instances were stipulated in the Rule 43 order). The respondent can pay the required funds to the applicant, who can manage her own financial administration.

I am also not inclined to do away with the contribution towards the applicant's legal costs as stipulated in the Rule 43 order, but shall allow it to be paid in instalments.

Costs

38. Each of the parties has sought costs against the other in both applications. I am not inclined to grant a costs order against

either. The parties are currently awaiting a trial date in the long-pending divorce action, but they should nevertheless seriously attempt to settle it sooner rather than later, making an end to the ongoing and pricey interlocutory disputes.[24]

Order

39. In the premises, it is ordered as follows:

1. The applicant's application to hold the respondent in contempt of court is dismissed.
2. The respondent's application in terms of Rule 43(6) is successful to the extent that paragraphs 3 and 4 of the Rule 43 order dated 6 October 2023 are varied to read as follows:

"3.The respondent shall maintain the applicant and the children pendente lite as follows, as from 1 February 2025, and thereafter on the first day of every month by way of electronic funds transfer or debit order, into such bank account as the applicant may nominate from time to time:

3.1 By making payment to the applicant in the amount of R10 000,00 per month as cash maintenance for the applicant and the children, without deduction or set-off.

3.2 By paying 50% of the children's school, creche and aftercare fees, as well as 50% of the costs of school books and stationery, extramural activities, and other reasonable education-related expenditure.

3.3 By bearing the costs of retaining the applicant and the children as dependent members on his current medical scheme.

3.4 By bearing 50% of the cost of all reasonably incurred medical expenses for the children in private health care which are not covered by the medical aid scheme, including but not limited to medical, dental pharmaceutical (both prescription and non-prescription and including levies and all required supplements), surgical, hospital, orthodontic, ophthalmic (including the provision where necessary of spectacles and/or contact lenses), psychological, psychiatric, physiotherapeutic, occupational therapeutic, chiropractic and similar medical expenses. The respondent shall reimburse the applicant for any such costs incurred by her or pay the relevant service provider within 7 (seven) days of presentation of the relevant invoice or receipt.

3.5 By paying 50% of the following expenses in respect of the motor vehicle currently in the applicant's possession:

3.5.1 Finance or lease instalments, if any;

3.5.2 Comprehensive motor vehicle insurance (including excess);

3.5.3 Licensing, maintenance, repairs and servicing, the replacement of tyres and wheel balancing where necessary.

3.6 By paying an amount of R1 000,00 to the applicant per month for fuel.

3.7 By paying 50% of the rental (which rental is currently an amount of R24 000,00) in respect of the applicant's and the children's dwelling, and any annual increases due to be paid, directly to the lessor.

3.8 By paying 50% of the monthly salary of the applicant's domestic worker directly to the domestic worker.

4. The respondent shall pay an initial contribution towards the applicant's costs in the divorce action in an amount of R50 000,00, which sum is to be paid directly to the applicant's attorneys of record in three instalments, being R20 000,00 (payable on or before 28 February 2025), R20 000,00 (payable on or before 31 March 2025) and R10 000 (payable on or before 30 April 2025)."
3. The balance of the Rule 43 order remains in place.
4. Each of the parties will pay their own costs of suit in relation to the Rule 43(6) application and the contempt application.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant: Ms J. McCarthy, instructed by Maurice Phillips Wisenberg

For the respondent: Mr L. van Zyl, instructed by JJB Attorneys

[1] The application included relief for the variation of the contract regime in respect of the parties' children. The respondent has, however, abandoned such relief, and nothing needs to be said about it.

[2] Consolidated Fish Distributors (Pty) Ltd v Zive 1968

(2) SA 517 (C) at 522B–D.

[3] Culverwell v Beira 1992

(4) SA 490 (W) at 493D–E.

[4] Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004

(2) SA 611 (SCA) at 621E.

[5]

Townsend-Turner v Morrow 2004

(2) SA 32 (C) at 49C–D.

[6] Fakie N.O. v CCII Systems (Pty) Ltd and another

[2006] ZASCA 52; 2006

(4) SA 326 (SCA) at paras [42]–[43].

[7] Matjhabeng Local Municipality v Eskom Holdings Ltd and others; Mkhonto and others v Compensation Solutions (Pty) Ltd 2018

(1) SA 1 (CC) at paras [85]–[88]; and see the discussion in Erasmus Superior Court Practice Vol. 1 (revision service 18, 2022) at A2-173.

[8] See Greenspan v Greenspan 2001

(4) SA 330 (C) at 335E–F.

[9] See CLJ v CLG [2023] ZAGPJHC 386 (26 April 2023) at para [22].

[10] The respondent says that the portions of the order indicating that it was done by agreement are not correct – he did not agree to it. The applicant disputes this. Nothing much turns on this, but the fact remains that the order stands as it is, and the respondent has done nothing to have it corrected or rescinded on the basis that there is an error in it.

[11] “O[...]”.

[12] MO v RO and another [2024] ZAWCHC 8 (5 January 2024).

[13] The vehicle belonged to O[...] and has been repossessed because of the company’s failure to pay the instalments due in respect

thereof.

[14] Grauman v Grauman 1984

(3) SA 477 (W) at 479F.

[15] Jointly and severally with his brother as co-surety.

[16] There is a dispute as to whether the respondent received his first salary in January 2024 (which is what the respondent says) or in December 2023 already (which is what the applicant believes). In the bigger scheme of things this dispute does not take matters much further.

- [17] A monthly payment used to be made from a loan account in O[...] to the respondent's mother. These payments ceased upon the closure of O[...]’s doors in November 2023.
- [18] Kroon v Kroon 1986
- (4) SA 616 (E) at 637C-F.
- [19] Fakie NO supra at paras [9]-[10].
- [20] [2023] ZAWCHC 152 (20 June 2023).
- [21] In para [1] of the judgment.
- [22] Para [22].
- [23] Para [36].
- [24] See the admonition in FS v ZB supra at paras [20]-[21].
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