

SOUTH AFRICA / JUDGMENT

M.T v W.M.M (59806/2021) [2023] ZAGPPHC 1818 (17 October 2023)

[2023] ZAGPPHC 1818

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

59806/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

number: 59806/2021

Date

of hearing: 13 September 2023

Date

delivered: 17 October 2023

1.

REPORTABLE: YES / NO

2.

OF INTEREST TO OTHER JUDGES: YES / NO

3.

REVISED.

DATE: 17/10/23

In

the matter between: M[...]
T[...]
Plaintiff
and
W[...]
M[...] M[...]
Defendant

JUDGMENT

SWANEPOEL J:

- [1] This is an application in which applicant seeks an order that respondent be held in contempt of an order granted by this Court on 11 September 2018, under case number 95168/2016, which was varied by the maintenance court on 1 June 2023. Applicant also seeks an order that respondent be incarcerated for a period that the Court deems fit, which is to be suspended on condition that respondent complies with his obligations arising from the order. Applicant seeks punitive costs in the event of opposition.
- [2] The parties were previously married, from which marriage two children were born. Respondent also customarily adopted applicant's third child, born from a previous relationship. On 11 September 2018 this Court granted the parties a decree of divorce, incorporating a settlement agreement entered into by them. The relevant provisions of the settlement agreement are the following:
- [2.1] Respondent undertook to pay applicant R 300 000.00 on or before 31 July 2018, in lieu of spousal maintenance;
- [2.2] Respondent undertook to purchase an immovable property for applicant to a maximum of R 2 620 000.00 and to pay the transfer costs of such property;
- [2.3] Respondent undertook to maintain applicant's Mercedes Benz motor vehicle;
- [2.4] Respondent undertook to pay 50% of the cost of purchasing certain specified furniture and household effects;
- [2.5] Respondent undertook to pay the three minor children's school fees, maintenance of R 7 500.00 per month per child, and the salary of the au pair who is caring for the children.
- [3] This matter commenced as an urgent application in November 2022. At that stage applicant alleged that respondent owed her R 225 542.00 in respect of arrear maintenance for the minor children. She also alleged that he owed her R 110 375.00 in respect of spousal maintenance, and R 2 250.00 in respect of the au pair's salary. Furthermore, she said that the children had been suspended on three occasions due to respondent's failure to pay the school fees. Applicant also alleged that respondent had failed to purchase an immovable property, as he was obliged to do. He had signed an offer to purchase, but had not yet arranged for the transfer of the property to applicant.

- [4] Applicant said that respondent lived a luxurious lifestyle. He lived in Silver Lakes estate, and drove five luxury vehicles. He also travelled extensively. These allegations are not denied.
- [5] In his answering affidavit respondent denied being in arrears with maintenance, even though his attorneys had admitted in an email dated 7 September 2023 that he was in arrears, and had given an undertaking that the arrears in the sum of R 120 000.00 would be paid that day. Respondent admitted that he had not paid the spousal maintenance of R 300 000.00 by 31 July 2018, but said that he had paid part of the amount (an unspecified amount) in tranches. He said that his business relied upon tenders from the State, and that his financial fortunes fluctuated, which is why he did not fulfil his obligations to applicant. As far as the immovable property is concerned, respondent said that he had signed a purchase agreement on 11 September 2018. In

terms of an addendum to the agreement respondent was to pay the purchase price in instalments of R 25 000.00 on 13 September 2018,

two further instalments of R 660 000.00 each, on 1 October 2018 and 1 November 2018 respectively, with a final instalment of R 650 000.00 payable on 1 December 2018. He had only paid R 995 000.00 towards the purchase price by November 2022. His inability to fulfil his obligations was apparently due to the effects of the Covid-19 pandemic on his business. He had, however, entered into a further written agreement with the seller on 6 February 2020 to pay the balance in instalments of R 200 000.00 per month, commencing in February 2022. That agreement was evidently also not complied with.

- [6] In respect of the household items that he had to purchase, respondent said that he had agreed with applicant that she could take whatever items she wanted from the matrimonial home, and he would replace items as and when needed. He admits that "on limited occasions" he failed to pay the school fees on due date, but he said that he had settled the arrears when necessary, and that there was never a suggestion that the children's attendance at school was in jeopardy.
- [7] The urgent application was removed from the roll in December 2022, and that application has now been overtaken by subsequent events.
- [8] On 21 November 2022 respondent was placed on terms to comply with the agreement in respect of the immovable property. Save for having made some payments towards the purchase price, respondent had failed to pay monthly occupational rent, rates and taxes, and levies. Respondent did not rectify the breach, and on 14 February 2023 the sale agreement was cancelled. Respondent was told to vacate the property as it would be placed for sale at an auction. On 22 February 2022 respondent's attorney wrote to the seller's attorneys denying that the cancellation was valid, on the alleged basis that further interim agreements had been entered into, and that the breach letter of 21 November 2022 was of no force and effect. On 23 February 2023 the seller's attorneys provided the respondent with a further indulgence, giving him until 6 March 2023 to pay R 300 000.00 in order for the sale to continue. He did not do so.

[9] On 1 June 2023 the parties went before the maintenance court where the monthly maintenance amount was amended, and an order was made that Respondent must pay maintenance of R 25 000.00 per month (R 8 333.00 per child), with the first payment to be effected on 27 June 2023, and thereafter on the seventh day of each successive month. On that same date respondent paid applicant R120 000.00 that he had previously admitted was due in respect of maintenance for 2022, and which he had promised to pay by 7 September

2022. That payment, though delayed for some nine months, purged any contempt in respect of arrear maintenance up to 1 June 2023.

[10] On 31 August 2023 applicant delivered a supplementary affidavit to the urgent application of December 2022, in which she alleged that respondent was again in contempt of the order, and she set the matter down for hearing on 5 September 2023. She alleged that respondent had not paid the maintenance due for June 2023. She also alleged that respondent had not complied with his obligation to purchase an immovable property, and that her and the children were about to be evicted from their home. Applicant alleged that the au pair's salary was in arrears, but most importantly, she alleged that the children were about to be suspended from school for failure by the respondent to pay their school fees.

[11] Respondent did not deliver an answering affidavit to the supplementary affidavit, but rather delivered a notice in terms of rule 30, alleging that the filing of the supplementary affidavit without leave of Court was an irregular step. When the matter came before me, I granted applicant leave to file the supplementary affidavit. I did so on the grounds that contempt of court proceedings

are innately urgent in my view, more especially where the best interests of children are concerned, their suspension from school was imminent, and it was in the interests of justice, I believed, that the recent events be dealt with. I stood the matter down for respondent to file an answering affidavit, and for applicant to reply. Respondent later raised the objection that the replying

affidavit contained new allegations, and I afforded respondent another opportunity to file a further affidavit. I did so as I am

fully aware of the seriousness of a contempt order, and I wished to afford respondent the fullest opportunity to state his case.

[12] As regards maintenance, it is not in dispute that respondent paid the first maintenance in terms of the amended order on 3 July 2023. He then made a further payment of R 25 000.00 on 29 August 2023. It is clear that respondent did not abide by the order of 1 June 2023, which was taken by agreement between the parties. Respondent says that the order was taken in his absence after he had left court, and that he did not know the exact terms thereof. He says that the consent order does not reflect the actual agreement between the parties.

- [13] The consent order was indeed not signed by either party. I find respondent's version, that a consent order would be made which did not reflect the agreement reached by the parties, unlikely. Respondent also says that he had agreed with applicant that the payment of R 120 000.00, which was intended to address the arrear maintenance for 2022, would also cover the June 2023 maintenance. I find this hard to believe. Once again, if that was their private agreement, it begs the question why the arrangement was not incorporated in the consent order?
- [14] However, the order was never served on respondent, and I am faced with two conflicting versions, albeit that the respondent's version is highly unlikely, and can be rejected on the papers as false on a balance of probabilities[1]. The problem lies, as I will address hereunder, in the standard of proof required to prove the offence of contempt of court.
- [15] As far as the maintenance payable to applicant as spousal maintenance is concerned, respondent relies on a spreadsheet to show that he has paid some R 1.4 million to applicant and to other entities to her benefit. However, respondent does not directly tackle respondent's averment that he is still indebted to her in the sum of some R 110 000.00. Furthermore, it is undisputed that he did not comply with the order to pay the R 300 000.00 by 31 July 2018.
- [16] In the founding affidavit applicant says that respondent's failure to pay school fees timeously resulted in the children being suspended from school on three occasions. Respondent's answer in December 2022 was that on 'limited' occasions he had failed to pay the school fees on due date, but when he was told that he had to pay, he settled the arrears. In her supplementary affidavit applicant says that respondent had not paid school fees for the entire third term, and that she had been warned that unless payment is made, the children would be suspended. In support of this averment applicant attached a letter from the school dated 16 August 2023 in which respondent was told that unless he paid the fees within 7 days the children would be suspended. Needless to say, respondent did not pay the arrears within 7 days.
- [17] Respondent says that he is not in arrears with school fees. He says that he has an arrangement with the school that the fees would be paid at the end of each term. He denied receiving any demand for payment. He says that the demand dated 16 August 2023 was made "following issuance of the Applicant's urgent application", and he suspects that the school made the demand at applicant's instigation. Respondent's version is littered with deception. He did not deny that previously the children were suspended for non-payment of fees. He was advised by email on 16 August 2023 that the fees for the third term were in arrears. Respondent's attorneys replied to the email on 16 August 2023, stating that the obligation to maintain the children rested on both parties. Respondent's attorneys did not deny that he was in arrears. Respondent's denial now that he was advised of the pending suspension is false.

- [18] Respondent's allegation that he has an arrangement with the school is also false. Had there been such an arrangement, respondent could surely have provided proof thereof. He would then have said to the school that their demand was premature, in light of the alleged arrangement. Instead, respondent paid the school fees on 7 September
2023. Respondent's current version also contradicts his version in the answering affidavit deposed to by him in December 2021, in which he admitted that he had been in arrears on limited occasions. I have no doubt that respondent has failed, on a number of occasions, to pay the children's school fees as they fell due, in breach of his obligations.
- [19] As far as the immovable property is concerned, respondent's counsel conceded that although the settlement agreement did not specify a date by which respondent had to purchase and transfer the property, he had to do so within a reasonable time. That concession seems to me to be correct. The divorce decree was granted on 11 September 2018, more than five years ago, and there has been no progress made towards finally resolving the problem. Respondent has been in default of the sale agreement on various occasions, resulting in the cancellation of the sale agreement in February 2023, and the immovable property then being sold to a third party. Applicants now face the prospect of being homeless, unless respondent fulfils his promise to rent another property. There is no doubt that respondent has failed to comply with the order of 11 September 2018 as far as the immovable property is concerned.
- [20] The final issue was that of the arrears for the au pair's salary. There was some doubt as to the amount due, whether it was R 24 000.00, or R 3 300.00. At present the family does not employ an au pair, and I do not believe that this issue is of significance to the case.
- [21] In order for applicant to succeed in proving that respondent is in contempt of a court order, she must prove the existence of the order, that respondent was aware of the order, and that he willfully and with *malice* failed to comply with the order. In *Uncedo Taxi Service Association v Maninjwa and Others*[2] Pickering J pointed out that previously the civil standard of proof had been applied in contempt applications. He referred to *Kamma Park Properties (Pty) Ltd v Ngesi and Others*[3], a case of the same division, in which the learned judge held that in cases where a party chooses to follow the route of bringing civil contempt proceedings by way of application, the civil standard of proof applied. In such cases, Kamma said, if the order and its breach are proven, the respondent bore the onus of rebutting the inference of willfulness and *malice*.
- [22] Pickering J held that such an approach was unconstitutional. He pointed out that although a civil procedure was used to bring the matter to court, the relief sought, punishment for contempt, has a criminal law element to it. He relied upon *Re Bramblevale Ltd*[4], and *Churchman and Others v Joint Shop Stewards' Committee of the Workers of the Port of London and Others*[5], both English authorities, and *Miller*,[6] to hold that the application of two different standards of proof, depending on the remedy chosen, is unreasonable and unjustified. The elements of contempt must be proven beyond a reasonable doubt. Pickering

J also held that the shifting of the onus to the respondent is unconstitutional.

[23] The approach followed in *Uncedo* was also applied in *Uncedo Taxi Service Association v Mtwala*[7] and *Victoria Park Ratepayers Association v Greyvenouw CC*[8], and ultimately approved by the Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd*[9].

[24] In *Burchell v Burchell*[10] Froneman J (as he then was) was faced with circumstances very similar to this case. The learned Judge held that committal for civil

contempt remains a form of the crime of contempt of court, and that a person brought before court in civil contempt proceedings remains an 'accused person' under section 35 of the Constitution. The guilt of the perpetrator, therefore, has to be established beyond a reasonable doubt. However, Froneman J said that contempt proceedings have a dual nature, incorporating both a civil and a criminal aspect. The learned Judge held that if the offence is not established beyond a reasonable doubt, but it is possible to find on a balance of probabilities that the contempt has been proven, then a declaratory order may be made that the person is in contempt, together with other civil sanctions. The Court made the point that "...upholding the rule of law and ensuring the effective administration of justice is not wholly dependent on the effectiveness of civil contempt proceedings in its guise as the prosecution of a criminal offence that allows committal to goal of the offender. Other possibilities, purely civil in nature, need to be explored and developed as well."

[25] That brings me to the facts of this case. The existence of the order, and its later amendment has been established. Although I am inclined not to believe the respondent that he was not aware of the terms of the maintenance order of 1 June 2023, I cannot reject his version beyond a reasonable doubt. However, respondent was clearly aware of his obligations relating to the immovable property, the payment of spousal maintenance, and the payment of school fees. He has not complied with those obligations, and non-compliance with the order has been established.

[26] The final elements that have to be established is whether he failed to fulfil his obligations deliberately, and *mala fide*. Respondent seems to have disregarded the terms of the order on numerous occasions and for a number of years. However, he seems to have held the view that if he more or less complies with the order, he has fulfilled his obligations. In *Fakie* (supra) Cameron JA said the following:

"A deliberate disregard is not enough [to establish *mala fides*], since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith). These requirements - that the refusal to obey should both be willful 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 is incompatible with that intent."

[27] Can I say that respondent is in civil contempt of the order on a balance of probabilities? The answer is in the affirmative. However, I cannot say beyond a reasonable doubt that he deliberately and with mala tides failed to comply with the order, and I cannot, therefore impose a punishment at this stage.

[28] I will therefore make a declaration that respondent is in contempt, and I will make ancillary orders to ensure respondent's compliance with the order in future. The question whether respondent is guilty of the offence of contempt must be determined by the leading of oral evidence, if the applicant wishes to pursue that avenue. This approach is in line with the approach in Burchell.

[29] As far as costs are concerned, applicant sought a punitive costs order if respondent were to oppose the application. As I have said, I cannot establish whether respondent acted with mala tides, and consequently I shall make a normal costs order.

[30] I make the following order:

[30.1] It is declared that respondent is in contempt of the order of 11 September 2018, as amended by the order of the Magistrates Court dated 1 June 2023 ("the order").

[30.2] Respondent shall abide strictly by the terms of the order, and specifically:

[30.2.1] Respondent shall make all payments timeously in accordance with the order;

[30.2.2] Respondent shall pay all school fees of the minor children, every term in advance, in accordance with the policy of the relevant school, unless respondent enters into a written agreement with the school to vary the terms of admission.

[30.3] Respondent shall, within 120 days, purge the contempt in respect of his obligation to purchase and transfer to applicant an immovable property as required by clause 5.1 of the settlement agreement.

[30.4] In the event that respondent does not purge the contempt as set out in 30.3 above, then applicant may re-enroll the matter for oral argument on:

[30.4.1] The terms on which respondent shall comply with clause 5.1 of the settlement agreement.

[30.4.2] Whether further sanctions should be imposed on respondent which may ensure purging of the contempt.

[30.5] Should applicant re-enroll the matter in accordance with paragraph 30.4 above, each party may file a supplementary affidavit addressing the steps taken by respondent to purge the contempt.

[30.6] Applicant may, within 10 days of this order, set the matter down for argument on whether the matter should be referred to oral evidence on the issue whether respondent deliberately and with mala fides disobeyed the order, for the purpose of determining whether respondent should be committed to goal for the crime of contempt of court.

[30.7] Respondent shall pay the costs of the application.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

COUNSEL FOR APPLICANT: Mr.

Lazarus

ATTORNEY FOR APPLICANT: Shapiro

& Ledwaba Inc

COUNSEL FOR RESPONDENT: Adv. K Slabbert

ATTORNEY FOR RESPONDENT: Weavind and Weavind

HEARD ON: 13

September 2023

JUDGMENT

HANDED DOWN ON: 17 October 2023

[1] See: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984

(3) SA 623 (AD)

[2] 1998 (3) SA 417 (E)

[3] Eastern Cape unreported case no 1220/97

[4] [1963] 3 ER 1062 (CA)

[5] [1972] 3 ALL ER 603 (CA)

[6] Contempt of Court 2nd Ed at 425

[7] 1999

(2) SA 495 (E)

[8] [2004] 3 ALL SA 623 (SE)

[9] 2006 (4) SA 326 (SCA)

[10]

[2005] ZAECHC 35 (3 November 2005)

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