

SOUTH AFRICA / JUDGMENT

# ND v PT (25792/2020) [2022] ZAGPJHC 13 (18 January 2022)

[2022] ZAGPJHC 13

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

A A Crutchfield

## CASE / FILE NUMBER

25792/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 25792/2020

## REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED.

18.01.2022.

In

## the matter between:

N;

D

Applicant

and

P;

T

Respondent

---

**JUDGMENT**

CRUTCHFIELD AJ:

- [1] This application was brought urgently in the week commencing 20 December 2021. The applicant, referred to herein as 'D N' claimed an order of contempt against the applicant, referred to herein as 'T P', pursuant to the respondent allegedly failing to comply with an order of this Court granted on 11 November 2021 (the 'order'), regulating the applicant's contact to the parties' minor son, D N, (the 'child'). The applicant is the child's father and the respondent is the mother, with whom the child resides. The child is approximately 19 months of age.
- [2] The respondent allegedly failed to comply with the following provisions of the order:
- 2.1 Clause 3.1 to the effect that the respondent facilitate video call contact between the applicant and the child every afternoon between 17h00 and 18h00;
- 2.2 Clause 3.2.1.1.2 that the respondent pay the social worker's costs;
- 2.3 Clause 3.2.2 that the respondent permit the applicant contact with the child;
- 2.4 Clause 3.2.2.1.2 that the respondent allow the applicant's mother to facilitate the applicant's contact with the child in Johannesburg; and
- 2.5 Clause 3.2.2.1.3, that the respondent make the child available to the applicant for collection from the respondent's parents' home in Johannesburg.
- [3] The respondent initially permitted the stipulated 'in person' contact between the applicant and the child on 13 and 14 November 2021, the applicant's first contact in more than one year. The daily video call contact endured until 24 November 2021, being the last occasion of such contact. Subsequently, the respondent withheld both video and in-person contact between the applicant and the child.
- [4] The social worker's invoice became due and payable by the respondent on 14 November 2021 but the respondent failed to paid those costs.
- [5] The background to this matter, briefly stated, is the following:
- 5.1 The parties' marriage relationship subsists but it is common cause that it has broken down irretrievably. The parties separated during July 2020 and the applicant struggled to exercise contact to the child from August 2020.
- 5.2 The applicant alleged that he made all reasonable attempts to procure contact to the child, including by way of letters written by his attorney of record, an invitation to the respondent to participate in mediation and two attempts to resolve matters through the Office of the Family Advocate, all to no avail. The applicant instituted a Rule 43 application on 30 August 2021 that resulted in the judgment and order of Clarke AJ delivered on 11 November 2021.

5.3 The judgment criticised the respondent for her conduct in deliberately withholding contact with the child from the applicant and referred to the respondent's contravention of sections 31(2) and 35(2) of the Children's Act 38 of 2005 (the 'Act'), absent the applicant's prior knowledge of the respondent's move to Cape Town with the child.

- [6] The applicant alleged that the respondent used the litigation process as a means to delay and frustrate the applicant from exercising his statutory right to contact with the child.
- [7] Shortly after delivery of the judgment, the respondent withdrew the divorce proceedings, forcing the applicant to launch divorce proceedings afresh. The applicant alleged that the purpose of the withdrawal was to fabricate a defence of 'no pending lis' to the respondent's noncompliance with the order.
- [8] In addition, the respondent applied for leave to appeal the judgment, which was heard on 13 December 2021 and dismissed with costs on an attorney and client scale.
- [9] The respondent filed two additional affidavits, thus necessitating the applicant filing a further replying supplementary affidavit. The respondent did not seek the leave of the Court to file such further affidavits.
- [10] Notwithstanding, I perused and considered the content of both parties' documents given that this matter deals with the best interests of a child. The court in *J v J*[1] stated that a court:

'... is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child.'

- [11] In *Terblanche v Terblanche*,[2] it was stated that when a Court sits as upper guardian in a custody matter –

'... it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural

strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have

recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.'

- [12] Clarke AJ in the judgment, detailed the correspondence between the parties leading up to the Rule 43 application, including the plethora of reasons and attempts by the respondent to justify her refusal of contact by the applicant with the child, finding that the respondent was alienating the child from the applicant and acting contrary to the child's best interests.
- [13] Clarke AJ noted that the respondent relied half way through her opposing affidavit for the first time, not having done so in her particulars of claim in the divorce action or in the correspondence preceding the application, on the applicant being 'a drug user' during the marriage and that she 'believes he still is now that he is a single person'. Clarke AJ found that

the respondent did not provide evidence of this allegation, including when the applicant allegedly used drugs, what drugs were used, how often he made use thereof, the effects thereof or whether this was an area of conflict in the marriage. Moreover, the respondent failed to explain why she did not raise the issue pertinently in her pleadings or why if she was concerned about

the drug use, she did not accept the applicant's proposal made more than a year previously, for a social worker to investigate the matter. Thus, Clarke AJ concluded that that Court could not give credence to the respondent's bald and unsubstantiated

allegations regarding the applicant's alleged drug use.

[14] Clarke AJ found that the respondent 'flagrantly disregarded the applicant's role as a parent, denying him contact for almost the entire young life of the child, at a time when attachment to both parents is critical to the long-term emotional well-being and psychological health of the child. Compounding this wrongdoing, (the respondent) relocated with the child to Cape Town without telling the applicant. Clarke AJ found that the respondent intended to alienate the child from his father.

[15] In this, the respondent was aided and abetted by her attorney, who, as an officer of this Court was under a duty to act in the best interests of the child and not to advance the mala fide cause of his client. The attorney's willingness to fuel the flames of conflict was evident from both the tone and content of his correspondence as annexed to the founding affidavit and the reply, both to the applicant's attorneys and even to and about the Family Advocate'.

[16] Clarke AJ found further that pursuant to the absence of contact between the applicant and the child for so long, the services of a social worker were required to facilitate a 'reintroduction and to reconstruct the father-child bond. This would not have been necessary had it not been for the respondent's actions in wilfully withholding contact. As such, the costs of the

social worker to be appointed in this role must be paid by the respondent'.

[17] The Court in *Fakie NO v CCII Systems (Pty) Ltd*[3] summarised the position in respect of contempt proceedings as follows:

'1. The civil contempt procedure is a valuable and important mechanism for securing compliance with Court orders, and survives constitutional scrutiny in the form of a Motion Court application adapted to constitutional requirements.

2. The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

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

4. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.
  5. A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'
- [18] Both wilfulness and mala fides on the part of the respondent must be shown to be present.
- [19] The respondent admitted the order, that she received notice of the order and did not comply fully with the content of the order. The respondent denied that she acted wilfully and mala fide insofar as she failed to comply fully with the order, alleging that she acted in the best interests of the minor child.
- [20] Accordingly, the issues are whether the respondent's non-compliance with the order rises to the level of wilfulness and whether it is mala fide.
- [21] The respondent raised the absence of both urgency and a pending lis pursuant to the respondent withdrawing her action for a divorce on 23 November 2021, as points in limine.
- [22] In respect of the alleged absence of urgency, the respondent argued that the fact that the applicant relied on contempt of a court order was insufficient to justify the matter being heard urgently and that additional facts substantiating the alleged urgency of the application were required.
- [23] The respondent alleged that the applicant did not see the child for approximately 15 months and thus there was no basis on which to find that the application was urgent.
- [24] In my view, s 28 of the Constitution together with non-compliance of the order justified this matter being heard urgently. The absence of contact and the resultant failure to establish a relationship between a young child and one of the parents is not in the best interests of a child. Additionally, the longer a young child is denied such contact the more difficult it becomes to establish a relationship between the relevant parent and the child. The applicant's newly established relationship with the child should not be further disturbed.
- [25] The respondent raised the point that she should not be expected to deal on an urgent basis with an application for contempt. The respondent, at the hearing of the matter, however, did not request further time within which to augment or supplement her answering papers. Hence, there was no basis upon which to find that the respondent was prejudiced by the limitation of time periods to answer to the application imposed by the applicant.

- [26] In addition, the applicant's attorney of record utilised all means over an extended period of time in order to engage amicably with the respondent and reach agreement in respect of the applicant's exercise of contact to the child. The respondent was wholly unwilling to engage meaningfully or reach any such agreement. The applicant cannot be penalised for the delay in bringing the rule 43 application pursuant to his attempts to settle the issues at hand.
- [27] As to the absence of a pending lis, the applicant averred that he was on the verge of instituting divorce proceedings and that is intention to do so sufficed as a 'pending lis' in the matter.
- [28] The applicant referred to and relied upon *Bienenstein v Bienenstein*[4] to the effect that a divorce action that was about to be instituted was sufficient to serve as fulfilment of the requirement of a 'pending lis'. There are however numerous authorities to the effect that *Bienenstein* was incorrectly decided on this point.[5] The practitioners appearing in this matter did not refer me to those authorities as they ought to have done,
- [29] The circumstances of the matter before me are somewhat different to those of *Bienenstein* in that a pending lis existed at the time that Clarke AJ delivered the judgment. Subsequent thereto, the respondent withdrew the pending divorce proceedings. The respondent did not allege an intention to reconcile with the applicant or to restore the marriage. Nor did the respondent provide
- a cogent explanation for the withdrawal. Accordingly, the only reasonable inference in the circumstances of this matter is that the respondent's intention was to preclude the applicant from enforcing the order.
- [30] Davis J in *LS v GAS*,[6] found that the issue of interim custody and access to a child fell within a court's 'residual jurisdictional power'. [7] Davis J heard the Rule 43 application in order not to leave children unprotected, finding that their interests were served by them being 'protected by the inherent jurisdiction of the Court'. [8]
- [31] Davis J included a provision in the order that the applicant issue summons in the proposed divorce action within a limited duration, failing which the applicant's rights in terms of the interim maintenance order would be of no force and effect. The provisions of Davis J's order in respect of interim custody and access however were not made subject to the requirement that the summons be issued within a certain period of time failing which the applicant's rights would be of no force and effect.
- [32] In *TH v LAH*[9] the summons had not yet been issued. The court agreed with *Moolman*[10] and *AD v ZD*, [11] but considered whether notwithstanding the absence of a pending lis certain orders might be made by the court as the upper guardian of all minors. The court concluded that it should not do so as the respondent's version of the facts was not before the court and issues could not be determined piecemeal. [12]

- [33] The concerns and constraints that caused the courts in the abovementioned cases not to hear the applications before them are not decisive of the issue before me.
- [34] The test that I must apply is whether it is in the interests of justice for the order to be enforced despite the subsequent withdrawal of the divorce proceedings and the applicant's failure as at the date of the hearing before me, to issue fresh divorce proceedings.
- [35] The fact that I am dealing with the paramount interests of a very young child is an integral component of the interests of justice.
- [36] The best interests of the child require that he exercise contact with both the applicant and respondent and that he develop a relationship with each parent.
- [37] Furthermore, the applicant has a right at common law to reasonable contact including interim contact with the child and both the applicant and the child have rights of contact under the Act. Rule 43 proceedings are not substantive but merely procedural by nature, regulating the process to be adopted by parties in order to obtain the permitted relief under the rule. Rule 43 does not deal with the substantive rights of either the applicant or the child to contact with the other and thus the applicant and the child are both entitled respectively to such contact notwithstanding such flaws as may exist in the Rule 43 process.
- [38] As stated, the facts in the present matter differ insofar as the respondent withdrew the divorce action subsequent to Clarke AJ's judgment. In addition, there is a pattern of conduct by the respondent preventing the applicant from exercising contact to the child, and, in respect of which Clarke AJ found that the respondent's attorney had aided and abetted the respondent in her attempts to preclude contact between the applicant and the child.
- [39] The respondent's conduct in withdrawing the divorce proceedings in circumstances where she does not allege an intention to reconcile with the applicant or restore their marriage relationship but is motivated apparently by a desire to preclude the enforcement of the Rule 43 order and contact between the applicant and the child, cannot be countenanced. An outcome that permits a deliberate attempt to undermine or subvert the proper administration and the interests of justice will not be tolerated by this Court.
- [40] Insofar as the respondent's attorney of record may have advised the respondent to withdraw the divorce action in order to prevent the enforcement of the order, such conduct is incompatible with the conduct of an officer of this Court.
- [41] In the circumstances and by reason of the factors referred to above, I am of the view that the order, in the specific circumstances of this matter, remains enforceable and should be enforced by me if the requirements for the respondent to be found in contempt of the order are met.

- [42] The respondent's complaint that the applicant has no real interest in the child and embarked upon the proceedings to gain contact as a means to harass her was not borne out by the objective conduct of the applicant who struggled for an extended and unreasonable period of time to enjoy contact with the child.
- [43] The respondent alleged that she permitted the video conference calls between the applicant and the child initially but that the stipulated time of 17h00 to 18h00 was not appropriate for the age and the needs of the child. The respondent sent the applicant a cellular short message system ('sms') in this regard to which the applicant allegedly did not reply. However, the respondent failed to engage either directly with the applicant or through her attorney in order to agree on a different time suitable to both parties and the child's needs for the video calls.
- [44] Nothing prevented the respondent from complying with the provision of the order dealing with the video calls by reaching agreement with the applicant on an alternate time suitable to both parties. Absent the parties agreeing on a different time appropriate to the child, the time stipulated in the order remained applicable and the respondent was not entitled to ignore the provision in the order to facilitate the video calls at the stipulated time.
- [45] The respondent's averments that the applicant should not exercise contact without supervision, be it in Johannesburg or in Cape Town, were substantiated by her reliance upon the applicant having a lithium deficiency and requiring medication, the applicant allegedly being a 'drug user' and the fact that the applicant informed the respondent during the course of the marriage that he was molested as a child, allegedly by a person living in the household in which the applicant is currently living and that she was concerned for the child's safety.
- [46] The allegations of the applicant having been abused as a child were not raised before Clarke AJ, who noted in her judgment that the applicant's alleged drug use was raised at a late stage in the respondent's Rule 43 affidavit and had not been raised previously by her either in correspondence or in her pleadings.
- [47] Notwithstanding, the respondent's concerns are all adequately catered for by the provision for supervision ordered by Clarke AJ, which supervision exists in the form of the presence of the social worker in respect of the contact in Cape Town, and the presence of the applicant's mother during the applicant's contact in Johannesburg.
- [48] The respondent did not allege that the applicant's mother would not ensure that proper care was taken of the child whilst the applicant exercised contact to the child.
- [49] Insofar as the respondent alleged that she could not afford the costs of the monthly flights to and from Johannesburg and the social worker's costs ordered by Clarke AJ, the respondent carried an evidentiary burden to place sufficient facts, duly substantiated by documentary evidence, of her alleged financial inability before this Court.

- [50] The respondent disclosed six months' salary slips that indicated different amounts of gross and net monthly remuneration, ranging from net pay of R10 000.00 on 30 September 2021 to R50 000.00 in respect of June and July 2021.
- [51] The respondent's remuneration advice dated 30 June 2021 reflected a basic salary of R50 000.00, a travel allowance of R5 309.81 and an 'income non-taxable' of R12 000.00, aggregating gross earnings of R67 309.81. Subsequent to statutory deductions of PAYE, UIF contribution, medical aid and a medical aid tax credit applied, the total deductions amounted to R17 309.81 giving net remuneration of R50 000.00.
- [52] The July 2021 salary advice reflected the same figures whilst the advice dated 31 August 2021 did not reflect the non-taxable income of R12 000.00 evident on the June and July 2021 salary slips. Thus, the respondent's net salary for 31 August 2021 was R38 800.01.
- [53] The remuneration advice of 30 September 2021 disclosed a basic salary of R12 000.00 as opposed to R50 000.00 for the previous months and no non-taxable income.
- [54] The salary slip dated 31 October 2021 reflected a gross monthly income of R67 309.81, comprised of a basic salary of R50 000.00 and a travel allowance of R5 309.81, resulting in a variance of approximately R12 000.00 between the described amounts and the total amount of gross earnings.
- [55] The respondent did not provide an explanation for the discrepancy on the salary slip dated 31 October 2021 or the differences between the various salary slips. Nor did the respondent disclose the provisions of her employment contract in respect of her monthly remuneration.
- [56] The respondent alleged that her reasonable monthly expenses amounted to R79 400.00. The expenses included R22 000.00 in respect of the mortgage bond on the parties' property in Johannesburg, a levy of R1 400.00, rent on the respondent's home in Cape Town of R23 000.00 and a vehicle repayment of R16 000.00 per month. The respondent did not furnish the invoices in respect of her monthly expenses or her bank statements in support of her alleged income and expenditure.
- [57] There is a marked discrepancy between net monthly income of R38 133.33 and expenditure of R79 400.00, more than double the alleged disposable income. The respondent alleged that she received financial assistance in discharging her monthly expenditure from her father and various family members. The respondent did not detail the amount that each specific family member provided to her or furnish any documentary proof, including confirmatory affidavits, regarding the alleged assistance. Nor did the respondent furnish her bank statements reflecting income paid into her bank account.

- [58] In the circumstances, I cannot make a finding as to the amount of the respondent's monthly disposable income. The respondent's stated version was that her income exceeded her alleged net monthly salary of R38 133.33, but the applicant declined to state what amount was made available to her by her family members. In addition, the respondent's averment of the amount of her average net monthly salary and the content of her salary slips was not reliable.
- [59] Furthermore, I cannot find that the respondent's monthly expenses total an amount of R79 400.00 as alleged by her, in the absence of documentary proof thereof.
- [60] In the result, I am unable to conclude that the respondent discharged the evidential burden resting on her in respect of her alleged inability to pay the relevant costs of the social worker and the monthly flights from Cape town to Johannesburg.
- [61] The applicant's attorneys corresponded with the respondent's attorney prior to issuing this application but to no effect. The respondent's reply was not constructive and was devoid of any attempt at co-operation.
- [62] The correspondence sent by the respondent's attorney on the respondent's behalf failed to either address the issues at hand or assist in resolving the respondent's alleged non-compliance with the order. The respondent was not constructive or bona fide in her attempt to resolve the issues, such attempt being a single sms to the applicant in respect of the video call conferences.
- [63] The respondent consistently sought to frustrate the applicant's exercise of contact with the child. The lengths to which the respondent was prepared to go to prevent such contact was demonstrated by the respondent's withdrawal of the action proceedings. Such conduct, being an attempt to subvert the order, reflected not only the respondent's wilfulness but also her mala fides.
- [64] The respondent's conduct has the effect of the child being deprived of contact and a relationship with his father. That is not in the best interests of the child. The respondent has to understand and accept that the child is entitled as of right to contact and a relationship with the applicant and that the respondent is not permitted to deny or withhold the exercise of that right by the applicant and/or the child.
- [65] In my view, the respondent failed to furnish an exculpatory explanation regarding her non-compliance with the relevant clauses of the order. The respondent's explanation was not sufficient for me to find that she was not wilful.
- [66] The absence of bona fides on the respondent's part in resolving the issues at hand demonstrated mala fides on her part.

- [67] Mala fides is a conclusion of law to be drawn from the facts in respect of the respondent's conduct. The withdrawal by the respondent of the divorce proceedings in the circumstances referred to above, her failure to negotiate an alternate time for the video conference calls and her failure to engage in respect of the contact in Johannesburg, were indicative of the respondent's wilful and mala fide failure to comply with the order.
- [68] On the respondent's version before this Court, the evidentiary burden resting on her in terms of the Fakie[13] judgment was not met by her. The respondent failed to advance evidence that established a reasonable doubt that her non-compliance with the order was wilful and mala fide.
- [69] The respondent's conduct, objectively assessed, demonstrated in my view, wilful and mala fide non-compliance.
- [70] Absent compliance with the order, unless a respondent is able to establish conduct that is not wilful and mala fide, that respondent is in contempt of a court order and is obliged to suffer the consequences thereof.
- [71] Objectively considered, the respondent did not provide an exculpatory version for her non-compliance. In my view, a finding of wilfulness and mala fides against the respondent is justified. It is the only reasonable inference established by the respondent's conduct.
- [72] In the circumstances, I am of the view that the respondent is in wilful and mala fide contempt of the order, and that the applicant discharged the onus resting upon him on the standard of beyond a reasonable doubt.
- [73] As to the costs of this application, the respondent's conduct in this matter justifies a punitive costs order against her as a mark of this Court's displeasure at her conduct and resolute refusal to abide by the order. In the circumstances, I intend to order costs against the respondent on an attorney and client scale.
- [74] By reason of the aforementioned, I grant the following order
1. The respondent is found to be in contempt of the Court order granted by Clarke AJ and issued out of this Court on 11 November 2021, in that the respondent failed to comply with the following provisions of the Court order:
    - a. Clause 3.2.2, in that the respondent withheld the applicant's contact with the minor child;
    - b. Clause 3.2.2.1.2, in that the respondent failed to allow the applicant's mother to facilitate the applicant's father-son contact session/s in Johannesburg;
    - c. Clause 3.2.2.1.3, in that the respondent failed to avail the child to the applicant for collection from the respondent's parents' home in Johannesburg in order for the applicant to exercise contact with the minor child in Johannesburg;

2. The respondent is ordered to comply with all of the clauses of the Court order dated 11 November 2021 as stipulated in paragraph 1 above within ten (10) days from the delivery of this judgment.
3. The respondent is committed to prison for a period of twenty (20) calendar days.
4. The committal order granted in paragraph 3 above is suspended for a period of one (1) year on condition that the respondent complies with the Court order granted on 11 November 2021 within ten (10) days from the date of the delivery of this

**judgment.**

5. The respondent is ordered to pay the costs of this application on an attorney and client scale.

A A CRUTCHFIELD J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 18 J

COUNSEL FOR THE APPLICANT:

Adv Z Kara.

INSTRUCTED BY:

Van Rhyns Attorneys.

ATTORNEY FOR THE RESPONDENT: Mr C Janeke.

INSTRUCTED BY:

C Janeke Attorneys.

DATE OF THE HEARING:

23 December 2021.

DATE OF JUDGMENT:

18 January 2022.

- [1] J v J (A101/2008)
- [2008] ZAWCAC 27; 2008 (6) SA 30 (C) (20 May 2008).
- [2] Terblanche v Terblanche 1992
- (1) SA 501 (W) at 504C.
- [3] Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 325 (SCA) ('Fakie') para 42.
- [4] Bienenstein v Bienenstein 1965
- (4) SA 449 (T) at 451D-H ('Bienenstein').
- [5] RO v MO [Case no 5834/2017] (unreported) dated 14 November 2017, Limpopo Division, Polokwane and see the cases referred to therein ('RO').
- [6] LS v GAS [Case no 2258/2016] delivered on 26 August 2016 (WCD) ('LS').
- [7] Id p 15 line 6 – 14.
- [8] RO note 5 at
- [17] quoting from LS.
- [9] TH v LAH [Case no 10554/20] dated 6 April 2020 (Gauteng Division) ('TH').
- [10] Moolman v Moolman 36397/2007
- [2007] ZAGPHC 273 (15 November 2007) ('Moolman').
- [11] AD v ZD [Case no 23031/2017] dated 29 June 2017 (Gauteng Division).
- [12] TH note 9 at [12].
- [13] Fakie note 1 above.

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Prepared on 11 October 2026 · Esheria