

SOUTH AFRICA / JUDGMENT

N.E.M v H.C.C and Another (1790/2023) [2024] ZALMPTHC 30 (2 September 2024)

[2024] ZALMPTHC 30

COURT

Limpopo High Court, Thohoyandou

BEFORE

T C Tshidada

CASE / FILE NUMBER

1790/2023

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

LIMPOPO DIVISION,
THOHOYANDOU

CASE NO: 1790/2023

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE: 2/9/2024

SIGNATURE:

In the matter between: N[...]
E[...]
M[...]
Applicant
And
H[...]
C[...] C[...]
First Respondent
E[...]
N[...]
N[...]
Second Respondent

JUDGEMENT

TSHIDADA J

FACTUAL MATRIX

1. Having read, considered the documents filed on record and heard the submissions made by the parties' respective counsel, this court granted an order stated hereunder on 19 December 2023, against the first respondent from an application brought in terms of Rule 43 of the Uniform Rules of this Honourable Court.
2. The above referred order read thus:
 - 2.1 The first respondent is ordered to contribute Twelve Thousand Rand (R12 000.00) towards the applicant for spousal maintenance pendente lite.
 - 2.2 The first respondent further ordered to contribute an amount of Nine Thousand Rand (R9 000.00) towards the minor child in casu for maintenance or upbringing pendente lite.
 - 2.3 The first respondent is ordered to reimburse the applicant on any medical expenses incurred by the applicant on behalf of the minor child herein upon the applicant providing him with proof of the medical expenses incurred in respect of the minor child.
 - 2.4 The first respondent is ordered to contribute an amount of One Hundred and Fifty Thousand Rand (R150 000.00) towards the applicant's legal costs in the impending divorce proceedings between the applicant and the first respondent.
 - 2.5 The first respondent is therefore ordered to pay both the spousal maintenance and minor child's maintenance amounts from the first day of January 2024 and all the consecutive months thereafter pendente lite.

2.6 The first respondent is ordered to pay the contribution towards legal costs of the applicant in the amount of One Hundred and Fifty Thousand Rand (R150 000.00) in four equal instalments which first instalment shall commence on the last day of January 2024 and thereafter on the succeeding day of each last day of the month thereafter.

2.7 The first respondent is ordered to pay costs of this application, including the reserved costs of the 28th day of November 2023.

3. To date of writing this judgment, the foregoing order has never been challenged, appealed nor set aside by any other competent court of law. It therefore goes without saying that the order granted remains valid and enforceable by law. See in this regard what is commonly referred to as the Oudekraal principle in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[1].

4. Post seven months and odd days of granting of the above order, the applicant issued and launched an urgent application for declaration of contempt of this court's order against the first respondent.

5. The contempt application served before this court on the 13th day of August 2024 from which then applicant sought amongst others, the following order against first respondent:

5.1 Declaring that the first respondent is in contempt of paragraphs 2.1 and 2.2 as referred to in this judgment originally paragraphs 1 and 2 in the main order.

5.2 Directing the first respondent to forthwith purge his noncompliance or comply with paragraphs 1 and 2 of this court order granted on 19 December 2023, per paragraphs 2.1 and 2.2 herein.

5.3 That a warrant of arrest be authorised committing the first respondent to imprisonment for contempt of court for a period of sixty

(60) days, which warrant is to be suspended for a period of one (1) year on condition that the first respondent during the period of suspension, ...

5.3.1 Is not found in contempt of paragraphs 1 and 2 of this court order of 19 December 2023.

5.3.2 Is not found guilty of contempt of court.

5.4 The first respondent be directed to deliver to the applicant or her attorneys of record by electronic means (email), a copy of proof of payment on the 1st of each month in respect of both spousal and child maintenance for the applicant and her minor child.

5.5 Lastly, that the first respondent be ordered to pay the costs of the application on attorney and own client scale.

LEGAL PRINCIPLE

6. It is trite law and settled law in a plethora of court's decisions across the country that endorsed the fact that it is a criminal

offence to "unlawfully and intentionally" disregard and/or disobey a court order as envisaged in *S v Beyers*[2].

7. Notwithstanding, an applicant who seeks an order of contempt in terms of the requirements set out in *Fakie N.O. v CCII Systems (Pty) Ltd*[3] has a burden to demonstrate and prove to the court that:
 - (a) A court order against a contemnor exist.
 - (b) Such a court order has been served on the contemnor and/or that he/she is aware of it.
 - (c) Noncompliance with a court order was intentional, wilful and mala fide.
8. In the event these requirements and noncompliance is proven, and the contemnor fails to factually furnish evidence to rebut same, it was stated *supra* that an offence shall be deemed to have been established beyond reasonable doubt for the court to grant even a civil contempt of court order, and direct, if necessary, a committal to imprisonment of the contemnor. 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*[4].
9. It was enunciated in *Dreyer v Wiebols*[5], quoted with approval and reference from *De Lange v Smuts NO and Others*[6], that;

"When a High Court entertains an application, in civil proceedings, for committal for contempt of court, it does so in the exercise of its inherent jurisdiction to ensure that its orders are complied with."

10. In the main, the applicant undisputedly contended in its founding papers as it was also common cause that this court's Rule 43 order of the 19 December 2023 was granted in the presence of the first respondent and his legal representative, the first respondent undoubtedly was and remained fully aware of the order and its existence, to the extent that the applicant alludes that first respondent fully and honourably complied with the order granted against him until the applicant noticed that he (first respondent) abruptly neglected or failed to honour his obligation in terms of paragraph 1 and 2 *supra* for the month ending in July 2024, only at that stage.
11. As a result of an unusual encounter, the applicant through her legal representative benevolently caused a courteous letter to be written and addressed to the first respondent's legal representative on 2 August 2024[7], due to the urgent need, more significantly of the first respondent payment and contribution towards the minor child's daily maintenance and upbringing, not excluding spousal maintenance contribution towards the applicant pendente lite.

12. In summary, applicant requested to be furnished with proof of payment in respect of the child and spousal maintenance for the month July 2024 per court order. Further alerting the first respondent of his potential contempt of court order and that failure to comply or to furnish a reason explaining the cause for delayed payment shall prompt and/or precipitate the applicant to launch the current application.
13. Despite applicant's attempt to amicably resolve the impasse with the first respondent, first respondent was according to the applicant regrettably resolute not to either comply with the order belated as it were, or proffer any explanation towards delayed or noncompliance with the order altogether, in order to negate any presumed deliberate and/or wilful mala fide on his part.
14. Instead, the first respondent served and filed his opposing papers to the application.
15. This court was therefore enjoined to determine through the papers and submissions to be made by both counsel, if whether the first respondent's noncompliance and disregard of this court's order was deliberate, wilful and mala fide, so as to establish and prove a case of contempt against the first respondent.
16. The first respondent's answering affidavit was prefaced by a point in limine contesting the urgency of the application which the court allowed to be argued by the parties first.
17. I ruled that the matter justified hearing on urgent basis in terms of Rule 6(12) of the Uniform Rules of Court, mainly because the merits of the dispute involved maintenance of the applicant and the minor child herein. Maintenance entails unavoidable daily food provision to every human being.
18. Indeed, issues regarding one's hunger can never be postponed, neither can they be deferred for future redress in due course.
19. This court has a constitutional obligation as an upper guardian of the minor children to observe and uphold the children's rights and interests as enshrined in Section 28 of the Constitution of the Republic of South Africa.
20. However, the remainder of the issues raised and argued by the first respondent's counsel appearing on the answering affidavit, I found to have been irrelevant and not answering the applicant's averment in respect of the contempt application, neither did they have anything to do with Rule 43 application order granted by this court. Instead, they had more to do and were related to the issues involved in the pending divorce action proceedings between the applicant and the first respondent.
21. For instance, a court seized with a Rule 43 application and/or a court meant to determine a contempt of court order, has no authority or powers to decide on other unrelated issues other than those before it.

22. Hence this court could not deal with but had to dismiss first respondent's dispute and challenge over irregularities or applicant's defective summons of the main action. Secondly, the second respondent's pending Rule 30 application over the applicant's divorce summons, was also found to have nothing to do with the contempt application before court.
23. I was also dumbfounded on the relevance of first respondent's argument regarding alleged misrepresentation of facts in respect of the applicant and first respondent's alleged putative marriage and the alleged misrepresentation of facts by the applicant on who the actual biological father of the minor herein was, in respect of the application before court.
24. All the foregoing factors set to oppose the contempt application were by no stretch of one's imagination not related or of assistance to the case the first respondent had to answer. First respondent was required and expected to adduce reasons and/or explanation to prove that his default was neither wilful and/or mala fide.
25. The reasons advanced were all misplaced, unfounded and rejected by this court for they were unsustainable in law.
26. Essentially, the court could not adjudicate issues which have not been pleaded nor a case which the first respondent was not invited to answer to.
27. First respondent has however conceded and admitted on paragraph 26 of his answering affidavit that he was indeed in default and in 1 (one) month arrears of his maintenance contribution per court order.
28. The reason for default as stated above were nonetheless rejected, rendering his non compliance to have been wilful and deliberate, because the presented factors or reasons to cease maintenance contribution were known to him even during the first month he complied with the court order against him. That is something which this court is of the view that, the first respondent should have known better of its irrelevance since he is an astute admitted and practising legal practitioner of the Honourable Court.
29. The first respondent failed to present factual evidence to justify his inability to continue complying with the Rule 43 order of this court, instead, this court finds his noncompliance to have been determined, deliberate, wilful and in bad faith.
30. As a result, this court was satisfied that the applicant has satisfied and proven all the requirements for the first respondent to be held in contempt of its court order of the 19 December 2023, to wit the following order was consequently granted and varied on 13 and 15 August respectively, thus:

ORDER

30.1 This application is heard as one of urgency in terms of Rule 6 (12) condoning noncompliance with the Uniform Rules of this Honourable Court, relating to prior service of papers as well as the prescribed number of days for service of court processes.

30.2 That noncompliance with the Practice Manual or Directive of the Limpopo Division of the High Court, relating to filing of urgent applications and timeframes applicable thereof, is hereby condoned.

30.3 The first respondent, to wit (H[...] C[...] C[...] in his personal capacity) is declared to be in contempt of paragraphs 1 and 2 of this court's order granted by Tshidada J on 19 December 2023, under Case No.: 1790/2023.

30.4 The first respondent, one ((H[...] C[...] C[...]), is ordered to forthwith purge his noncompliance or comply with paragraphs 1 and 2 of this court's order granted by Tshidada J on 19 December 2023, under Case No.: 1790/2023 in the Limpopo Local Division of the High Court, Thohoyandou, by settling the accrued arrears of maintenance payments towards the applicant and minor child herein within a period of ten (10) days from granting of this order.

30.5 A warrant of arrest is authorised committing the first respondent (H[...] C[...] C[...]) to imprisonment for contempt of court for a period of sixty (60) days, which warrant is suspended of a period of one (1) year on condition that the first respondent during the period of suspension:

30.5.1 Is not found in contempt of paragraphs 1 and 2 of the 19th December 2023 court order per Tshidada J.

30.5.2 Not found guilty of contempt of court.

30.6 First respondent (H[...] C[...] C[...]) is ordered to deliver to the applicant or her attorneys of record, by electronic means (email) a copy of proof of payment by no later than the 3rd of each month in respect of both spousal and child maintenance for the applicant and her minor child.

30.7 The first respondent (H[...] C[...] C[...]) is ordered to pay costs of this application on High Court Scale B, in terms of amended Rule 69 of Uniform Rules of Court.

31. The court order above is accordingly confirmed per the reasons set out on this written judgment as requested by the first respondent.

T C TSHIDADA

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

APPEARANCES:

FOR THE APPLICANTS:

Adv Munzhelele

INSTRUCTED BY:

Ntsako Phyllis Mbhiza Attorneys

FOR THE RESPONDENTS:

Adv Kela

INSTRUCTED BY:

Uys Matyeka Schwartz Attorneys

DATE OF HEARING:

13 August 2024

ORDER GRANTED:

13 August 2024

ORDER VARIED ON:

15 August 2024

WRITTEN JUDGMENT

ELETRONICALLY TRANSMITTED TO PARTIES: 2 September 2024

[1] 2004

(6) SA 222 (SCA)

[2] 1968

(3) SA 70 (A)

[3] (653/04)

[2006] ZASCA 52

[4] (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021)

[5] (11/45575)[2012] ZAGPJHC 247; 2013 (4) SA 498 (GSJ) (5 December)

[6] 1998

(3) SA 785 (CC)

[7] See Annexure N8 on paginated page 68 of the applicant's founding papers

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Prepared on 14 October 2026 · Esheria