

SOUTH AFRICA / JUDGMENT

# O.S v T.C (54838/2018) [2020] ZAGPPHC 134 (23 April 2020)

[2020] ZAGPPHC 134

## COURT

North Gauteng High Court, Pretoria

## BEFORE

Cowen

## CASE / FILE NUMBER

54838/2018

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IN THE HIGH COURT OF SOUTH

AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF INTEREST

TO OTHERS JUDGES : NO

(3)

REVISED

CASE

NO: 54838/2018

23/4/2020

In

the matter between

O[....]

S[....]

Applicant

and

T[....]

C[....]

Respondent

**JUDGMENT**

COWEN AJ

[1] This is an application for relief pursuant to the civil remedy for contempt of court, more specifically contempt of a court order

regulating a father's right of access to and contact with his minor child.

[2] The applicant is the minor child's father. He lives in Centurion in Pretoria. The respondent is the minor child's mother. She lives in Kempton Park. The applicant and the respondent were previously married, but were divorced on 24 April 2018. The minor child was born on 10 July 2015 and now lives with his mother. The decree of divorce,

which incorporated a settlement agreement dated November 2017, ('the divorce order') regulated the applicant's access to and contact with the minor child as contemplated by section 18(2)(b) of the Children's Act 38 of 2005. The applicant has come to court alleging that the respondent has flouted the terms of the divorce order, and a related subsequent order made by this Court on 4 June 2019 (per Kollapen J) ('the 4 June 2019 order').

[3] In the notice of motion, the applicant seeks the following primary relief.

3.1. A declaration that the respondent is in contempt of court;

3.2. An order committing the respondent to prison for 90 days or more;

3.3. An order that the primary residence of the minor child vests with the applicant.[1]

[4] The applicant's rights of access to the minor child are regulated by the divorce order. More specifically, clause 1.3 of the settlement

agreement provides that the issue of the applicant's contact with the minor child would be referred to the family advocate whose

recommendations would be accepted as if agreed to by the parties. The family advocate made the relevant recommendations on 19 March 2018. Central to the recommendations was a recognition of the importance that the applicant have regular structured contact with the minor child which should be phased in according to the child's age and development. None of this is in dispute.

[5] The contact during the periods relevant to these proceedings was to be structured as follows:

5.1. Until the child was three (on 10 July 2018): Every alternative weekend on Saturdays and Sundays from 09h00 to 17h00;

5.2. From 3 to 4 years (11 July 2018 to 10 July 2019): Every alternative weekend for one-night sleepover, from Saturday at 09h00 to Sunday at 17h00, and telephonic contact as arranged;

5.3. From 4 to 5 years (11 July 2019 to 10 July 2020): Every alternative weekend for a two-night sleep-over, from Friday at 17h00 to Sunday at 17h00 and telephonic contact as arranged.

- [6] Material to securing the right of access and for purposes of placing the minor child into the applicant's care, the parties were to 'meet at a neutral place, ie Mall . A procedure was put in place for arranging contact through intermediaries , being family elders. Though not named in the settlement agreement or recommendations , in the case of the applicant, this was (at least for a short period) a person I shall refer to as Mr S and in the case of the respondent , a Mr M. In short, the recommendations contemplated that the applicant and respondent should communicate regarding contact arrangements through their nominated elders, who would communicate with each other until arrangements are made.
- [7] According to the founding affidavit, the applicant was initially denied access to the minor child on five different days in May, June and July 2018 .
- [8] The application was instituted on 1 August 2018 and was served personally on the respondent on 17 September 2018. The respondent 's attorney sent a notice of opposition by e-mail on 19 September 2018. On 11 October 2018, and in circumstances where no answering affidavit had been timeously filed, the applicant's attorneys set the matter down for 7 November 2018 on the unopposed roll. On 5 November 2018, the respondent delivered an answering affidavit by e-mail. On 19 November 2018, the applicant filed a replying affidavit.
- [9] The application was set down for hearing on 4 June 2019 when the matter came before Kollapen J. At that point, the parties reached an agreement, which was made an order of court. The respondent was not personally present in court but her legal representative was present. The order of Kollapen J, (the 4 June 2019 order) postponed the application sine die and made provision for the applicant to approach the Court on the same papers supplemented if necessary in the event that the order granted was not complied with. It also made material changes to the access arrangements. The order reads as follows:

'2.1. That the settlement agreement that is made an order of Court in the Divorce Proceedings remains in full force and effect, however, the specific contact rights will be exercised every alternative weekend with effect from the 14th June 2019 as per the Family Advocate 's report including phases as stipulated in paragraphs 12.3.1 - 12.4.5.

2.2. The pick-up and drop-off will take place at BP Garage opposite Greenstone Mall as per Family Advocate's report.

2.3. In the event that either party cannot honour the arrangements they will seek indulgence from the other party and if it is granted the weekend contact will be exercised on the following weekend .

2.4. All contact between the parties will be facilitated between the attorneys of record by means of email.'

- [10] As matters transpired, the applicant remained aggrieved as, he alleges, the respondent thereafter breached the 4 June 2019 order. He accordingly supplemented his papers setting out the further alleged non-compliance, at this stage with that order.
- [11] On 25 July 2019, the matter came before Louw J, who issued a rule nisi calling on the respondent to show cause why the order contemplated should not be made. The return date was set for 16 October 2019 and the respondent ordered to pay the wasted costs. The order contemplated was in line with the applicant's notice of motion.
- [12] Initially, no affidavit was filed. The matter was set down on the unopposed roll on 16 October 2019. Shortly beforehand, the respondent filed an answering affidavit (dated 14 October 2019) and the matter was removed from the roll with costs reserved. The applicant replied thereto in an affidavit dated 24 October 2019. Notably, in response to an allegation by the respondent, made in her answering affidavit, that the applicant had of late had no difficulty with procuring access, the applicant, in reply, detailed a series of further instances of alleged non-compliance running from the date of Louw J's order to the date of the replying affidavit.
- [13] The matter came before me on the opposed roll during the week commencing 2 March 2020 and argument was presented on 4 March
2020. Ms Joubert appeared for the applicant and Mr Ndlovu appeared for the respondent. After hearing argument, and in view, amongst other things, of the alleged ongoing breach of the court orders in issue in the application, detailed in the applicant's replying affidavit of 24 October 2019, I authorised the respondent to provide a further response on affidavit. The respondent thereafter supplied her response.

#### The requirements for civil contempt

- [14] The Constitutional Court has recently pronounced on the law relating to contempt of court and has explained its source in the Constitution.[2] In short, the duty to observe court orders is a constitutional imperative flowing from the rule of law protected in section 1 of the Constitution and the provisions of section 165, which vouchsafe judicial authority. As the Constitutional Court held:

'... disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery' and the 'effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.'[3]

- [15] In *Pheko*, the Constitutional Court explained:

"Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: willful disobedience and resistance to lawful court orders. . . . Willful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's

honour , consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.’[4]

[16] This case is concerned with civil contempt *ex facie curiae*, specifically, disobedience of a court order. Civil contempt is a criminal act but its remedies can be sourced through civil process. The requirements that must be established are:[5]

16.1. The court order must exist;

16.2. The order must have been duly served on, or brought to the notice of the alleged contemnor;

16.3. There must have been non-compliance with the order; and

16.4. The non-compliance must have been willful and *mala fide*.

[17] In the constitutional era, the standard of proof for a finding of contempt where the sanction is committal in prison is the criminal standard, in other words, proof beyond a reasonable doubt.[6] However, once an applicant has established the first three elements for contempt, *mala fides* and willfulness are presumed and the

contemnor is required, to avoid a finding of contempt, to lead evidence to create a reasonable doubt as to their existence.[7]

[18] Should a court nevertheless find that a litigant who has breached a court order did so willfully and *mala fide* on a balance of probabilities, the court may impose civil contempt remedies other than committal such as declaratory relief, a *mandamus*

that a contemnor behave in a particular manner, a structural interdict, a fine or another order that would have the effect of coercing compliance.[8]

[19] In *Fakie* , the SCA emphasized that both the requirements of willfulness and *mala fides* must be met. It held:[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).'

The SCA continued:[10]

'... These requirements - that the refusal to obey should be both 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 or proper is incompatible with that intent.'

The issues in this case

[20] The first two requirements for contempt are not in issue in this case. The questions for decision, rather, are:

20.1. First, whether the applicant has demonstrated that the respondent has breached the court orders and in what respects;

20.2. Second, if so, whether the respondent has done so willfully and mala fides .

[21] In respect of the first question, it must be borne in mind - as set out above - that there are various features of the court order that are designed to ensure that the applicant has access to the minor child. Compliance does not start or stop with any willingness on the part of the applicant to exercise access or the respondent to enable access . Rather access can only be realized as a matter of fact if the parties comply with the terms of the court orders regarding access and more specifically with the requirements regarding communication about contact and the time and place for pick-up. Compliance with these requirements needs to be viewed holistically.

The

## facts

[22] These being motion proceedings, the principles relating to the finding of facts articulated in the cases of Plascon-Evans[11] and Wightman[12] are applicable. Ultimately, the case can and should be decided on common cause facts and the respondent's version, especially her explanation for breach. Nevertheless, to the limited extent that I have made factual findings based on the applicant's version it is because the facts as alleged by the respondent cannot be accepted when applying these principles. One factor in this regard is the applicant's failure to procure any confirmatory affidavit from her family elder, Mr M.

[23] In considering the facts, I distinguish between the events prior to the 4 June 2019 order and those that took place thereafter due to the differences in the nature of the legal duties that arose from the court orders in place. The primary right of access and the times when it would be exercised were at all material times regulated by the decree of divorce incorporating the settlement agreement. However, there were differences in the legal position before and after 4 June 2019 as regards how that right would be enforced in respect of the pick-up point and communications regarding contact arrangements .

[24] As to the pick-up point, both the divorce order and the 4 June 2019 order required that the pick-up take place at a neutral venue. However, prior to 4 June 2019, there was a level of uncertainty as to where this would be, the divorce order apparently contemplating that it could be a number of places, eg a Mall. In this regard, it is important to appreciate that ,

prior to the 4 June 2019 order, the respondent had agreed to pick the minor child up at the respondent's home. Indeed, the applicant intimates in his initial replying affidavit that the parties had agreed that this would be the neutral venue. The respondent adopts a somewhat different view of things apparently adopting the stance that pick-up venues could be arranged as the occasion required. The 4 June 2019 order, however, specifically and clearly regulated this feature of the contact arrangements by specifying the place for pick up and drop off, this being the BP Garage opposite Greenstone Mall. In light of the course of events relating to these proceedings, it must be accepted that, whatever the respondent's view of things, this order was made in circumstances where the applicant had explained in some detail in his initial papers how the pick-up process in the preceding period had not worked, to the detriment of the exercise of his right of access.

- [25] A further important feature of the 4 June 2019 order is that there was a change in the manner of communications on contact arrangements. Where the divorce order entailed that communications be made via the parties' nominated elders, the 4 June 2019 order removed the roll of the elders and, rather, contemplated that '[a]ll contact between the parties will be facilitated between the attorneys of record by means of email'.

Events prior to the 4 June 2019 order

May 2018

- [26] It is common cause that the applicant was able to secure access to the minor child on Saturday 5 May

2018. However, on 6 May 2018, the respondent declined to grant him access as the minor child was sick. It is also common cause that on Sunday 20 May 2018, the applicant was again denied contact at the instance of the respondent as the minor child had a 'runny tummy'. The communication to that effect is in terse terms and was supplied approximately one hour before the planned collection on 20 May 2018: 'Don't fetch the child, he's sick again... ... 2. Don't introduce new food, stick to the food plan provided, he's got a runny tummy.'

- [27] On these common cause facts, the respondent's non-compliance with the primary right of access in the divorce order is undisputed and willful. The question is whether it was mala fide having regard to the explanation proffered by the respondent. In my view, on the limited information supplied by the respondent, while her conduct was both in breach of the order and unreasonable, viewed on its own and at that point in time, I am unable to conclude, on either the criminal or civil standard, that it was mala fide as it is probable that the respondent breached the court order genuinely believing that she was entitled to do so in the best interests of her child.

June 2018

- [28] It is common cause that the applicant again had no access to the minor child on 2 June 2018. The applicant explains that he had confirmed the contact arrangements through Mr M but that to his dismay, he was not granted contact. While waiting outside on the Sunday morning, the respondent is alleged to have driven out and when asked where the child was, she allegedly 'flicked her hand'. This, he thereafter reported to the police and made a statement regarding the incident.
- [29] The respondent explains that this took place in circumstances where she had entertained a concern about whether the applicant's swimming pool was secured. She alleges that through Mr M, this issue had been raised earlier and the applicant requested to confirm arrangements for securing the pool. There is a dispute of fact as to whether the applicant supplied the confirmation to Mr M. According to the respondent, Mr M informed her that the applicant did not confirm the arrangements with him. However, the applicant has supplied proof of the confirmation to Mr M to the Court. The evidence shows that on 30 May 2018, at about midday, the applicant had sent through photographs of the swimming pool duly secured with a safety net. At best for the respondent, Mr M did either did not receive these photographs or if he did, he failed to communicate this fact to the respondent. The respondent's explanation must be understood against this background.
- [30] Whatever the position, it is clear from the respondent's explanation that on 1 June 2018, she was under the impression that the applicant would be exercising contact on 2 June 2018 and was not, herself, awaiting any further confirmations from the applicant. She explains that on 1 June 2018, she informed Mr M that she had to attend an event that night and that the minor child would be staying with her mother. She says she requested Mr M to inform the applicant to arrange to fetch the child at her mother's place of residence or to make an alternative arrangement with her mother. She explains that she returned to her home from the evening event only on the Sunday morning and was planning to change her clothes to go to church, but she found the applicant 'blocking her entrance at the gate'. She further explains that she 'informed Mr M about his presence at her home' and Mr M informed her that the applicant did not revert regarding the swimming pool and he was thus not informed about the child's location. She indicates that a few days later, she then satisfied herself about the security of the pool by inspecting it at the applicant's home, accompanied by South African Police located in Centurion. Accordingly, on the respondent's version, when she saw the applicant at her gate and was informed by Mr M (incorrectly) that the applicant had not secured his pool with a safety net, she drove away without further communication or taking any other steps.
- [31] Again, it is common cause that the respondent did not comply with at least the primary duty in the decree of divorce incorporating the settlement agreement to enable access and that she did so willfully. The question again is whether her conduct was *ma/a fide* having regard to her explanation regarding her concern with the swimming pool. Again, I am of the view that her conduct was at best unreasonable as even accepting that she at that stage entertained genuine concerns about the safety of the swimming pool, she did not take

adequate steps to engage through the elders to ascertain the true position not least in view of the applicant's presence at her home (which she would have expected) and thereby facilitate access. A simple enquiry would or should, if conducted properly, have ironed out any miscommunication that may have existed at the moment the applicant and respondent found each other outside her home. Indeed, her conduct displays a readiness to preclude the applicant obtaining contact rather than acting so as to ensure contact as the court order requires. At least on the probabilities, I am of the view that, on a civil standard, this evidences some bad faith in her conduct as it reveals a disregard for the rights of the applicant, the authority of the court and its dignity and repute.

July 2018

- [32] It is common cause that the applicant did not have contact with the minor child on 14 July 2018. The applicant explains that on that day, he arrived at the respondent's home but it looked vacant. The applicant again went to the police station to prepare a statement. The applicant explains further that on enquiry with Mr M, Mr M's response was 'you know how women are'.
- [33] The respondent on the other hand explains in effect that she was under the impression that there would be no contact that day and had gone to church with the minor child. This explanation is offered against a background that she understood that the arrangements had not been properly confirmed with Mr M. Rather, the applicant had, on 27 June 2018, advised Mr M that he should no longer expect prior telephonic arrangements but that visits should be expected in accordance with a schedule that he had previously prepared and supplied. This, she says, was not accepted by Mr M who insisted that prior telephonic arrangements be made through him. She then explains that although the applicant had contacted Mr M that morning, (which she learnt only later that day) Mr M had reiterated to the applicant the importance of 'properly arranging visitation'. None of this is confirmed. However, in respect of this incident, I am unable to conclude that the respondent willfully breached the primary requirement of the court order as I must accept that it was her understanding that there was no planned contact. However, I am of the view that her conduct again reveals an apparent disregard for the importance of seriously engaging the systems of communication regarding contact. However, on its own, the incident does not manifest willful and mala fide disregard of a court order as at that stage there was clearly an element of miscommunication between the parties that can probably be attributed to each of their conduct.
- [34] The next date in contention was 28 July 2018. It is, again, common cause that the applicant did not have access to the minor child. He explains, in effect, that his attempts to arrange contact according to the respondent's 'requests' regarding compliance with the court order were met with a non-response. The respondent says, on the other hand, that she had 'prepared the minor child with the assumption that the applicant would be exercising his visitation right' and was surprised when he did not arrive.

[35] At first blush, it seems that this instance entailed no breach of the court order. However, on the evidence I am unable to conclude that the respondent complied with the order because it required her to engage co-operatively with Mr M regarding the contact arrangements to ensure that contact can proceed. On the evidence, and on the probabilities, I cannot conclude that she did. Rather, the applicant's attempts to engage the contact communications process as the respondent had demanded, resulted again in a failure of access. To the extent that Mr M may have been at fault and not the respondent, the court has not been afforded the benefit of an explanatory affidavit from him and the respondent is unapologetic.

[36] On a civil standard, I am of the view that her conduct on this occasion was unreasonable. Viewed on its own, this incident would not in my view manifest bad faith, but given the history at this stage, I conclude that her conduct again manifests an element of ongoing disregard for the rights of the applicant, the authority of the court, its dignity and repute.

#### Events after the 4 June 2019 order

[37] As indicated above, there are material points of difference between the position prevailing prior to the 4 June 2019 order and thereafter.

First, the need for a mutual venue is again confirmed via a court order and is specified to be the BP Garage opposite Greenstone Mall and second, the communications required to facilitate access were now to be between attorneys and not with the assistance of family elders. This substantially eliminated any uncertainty in the position prevailing prior to 4 June 2019 regarding venues and reduced the scope for any miscommunication through the elders.

[38] The first contact after the grant of the 4 June 2019 order was to commence on 15 June 2019. At that point, the contact would be exercised every alternative weekend from Saturday at 09h00 to Sunday at 17h00 until the child turned four. When the child turned four (which was to be on 10 July 2019), the contact would be from Friday at 17h00 to Sunday at 17h00.

#### Events on 15 June 2019

[39] It is common cause that the applicant had no contact with the minor child on 15 June 2019. The applicant explains that he duly attended

at the BP Garage opposite Greenstone Mall to pick up the minor child at 09h00 but the respondent was nowhere to be found. At 09h10 he contacted his attorney, Mr Meso who in turn contacted Mr Zwane, who said he would contact the respondent and revert in 5 minutes. After 15 minutes, Mr Meso again contacted Mr Zwane who advised him that he could not get hold of the respondent and had sent her a text message advising that she should attend the garage with the child. At 09h45, Mr Meso again contacted Mr Zwane advising that the respondent was nowhere to be found. Mr Zwane requested that the respondent be granted an indulgence until 10h15 but she did not show up and he then left the garage. On 18 June 2019, Mr Meso wrote to Mr Zwane confirming the events.

[40] The respondent does not dispute that she did not comply with the court order on this day but offers an explanation. She says that her motor vehicle had broken down. In the answering affidavit, however, she states as follows in

this regard : ' I indicated to my attorney of record that I will prepare the minor child, however, the Applicant may pick-up the minor child at my place of residence.' She continues: ' For reasons only known to the Applicant , he refused to pick up the minor child, insisting that I should make arrangements to get to BP garage, Greenstone Shopping Mall, notwithstanding my challenges with my motor vehicle, the time it takes for me to travel from work to the creche and the fact that the creche is in a different area. It is my respectful view that the Applicant deliberately refused to come pick up the minor child at my place of residence in order to justify his claim for contempt of court.' These remarks must be understood in light of the fact that the pick- up was on a Saturday morning. The only relevant issue that day could have been the applicant's motor vehicle .

[41] On the face of it, this explanation is hard to reconcile with the applicant's evidence and importantly, the applicant's attorney and officer of the court, Mr Meso, confirmed the applicant's evidence where Mr Zwane, the respondent's attorney did not. However, a further explanation was then forthcoming after the Court afforded the respondent a further opportunity to file affidavits in part to address this specific issue. More specifically , the respondent informed the Court that in fact the applicant informed her attorney later on the 15th that she had challenges with her motor vehicle but that the respondent could collect the child from her place of residence . Mr Zwane, though purporting to confirm the respondent's ' founding (sic) affidavit ... insofar as it relates to me' , effectively confirms Mr Mesa's evidence regarding the 15th but also explains that later that day, the respondent returned his call advising him that her 'phone was off and that her motor vehicle experienced a mechanical problem, as a result, she could not make it to the venue .'

[42] Accepting this version , what is notable is the absence of timeous or voluntary communication by the respondent to her attorney and the absence of any communication to the applicant's attorney or the applicant himself. There is also an absence of any alternative steps taken to comply with the order whether borrowing her mother's vehicle (as she explains she is able to

do) or using a taxi service . In my view, this manifests willful and mala fide breach of the court order on a civil standard.

[43] I am mindful that in the respondent's affidavits, the respondent asks the court to accept that it has always been her intention to facilitate a relationship between the applicant and the minor child and she claims that the applicant has at all times been aware that there will be practical difficulties with the pick-up. She goes further and requests the court to infer from the applicant's conduct that his conduct in coming to court is itself vindictive and his conduct in refusing to comply with her 'slight amendments' to the order - more specifically insisting that he pick the child up from her home - is unreasonable. Even accepting that the

respondent has genuine difficulties in managing her arrangements, her conduct is not that of a person seeking to comply or showing respect for the applicant's rights, the court order or the authority of the court itself. At least on a civil standard, it is the conduct of a person who chooses not to comply, fails to communicate and insists that the applicant conducts himself on her dictates. This reveals fundamental disrespect and disregard for the applicant's rights, the court's authority, dignity and repute. Furthermore, on the facts of this case, I am unable to conclude that there is anything unreasonable should the applicant, absent a variation, insist on compliance with the truly neutral venue requirement of the court order granted. Indeed, on the information before me, his conduct reveals general flexibility and accommodation in an endeavor to ensure contact with his child.

[44] It was these events that resulted in the applicant again approaching the court for relief and obtaining an order before Judge Louw on 25 July

2019. It appears that there was no contact in the interim.

Events from 25 July 2019

[45] In her answering affidavit, the respondent alleged that since the 25 July 2019 the applicant 'has been exercising his right of contact with the minor child without any difficulty.' In reply, however, the respondent disputed this and set out detailed allegations of non-compliance. The Court order dated 4 March 2020 specifically allowed for the respondent to deal with these allegations, which she duly sought to do in her further affidavit. The events and related disputes are summarised below. It can be noted that at this stage, contact was to be exercised every alternate weekend from Friday at 5pm. It was only at this stage that any practical challenges relating to the respondent's place of work and collection from creche would arise.

[46] Controversy emerged on Friday 9 August 2019 although the applicant was able to secure contact with the child that weekend. In short, the applicant had agreed, on the respondent's request, to move the date for recommencing contact from 2 to 9 August 2019, but had declined to concede to a request to move the place for pick up insisting that the 4 June 2019 order be complied with in that regard. The applicant explains that he had proceeded to the pick-up point and notified his attorney, who in turn notified Mr Zwane. Mr Zwane informed Mr Mesa that the child was ready but pleaded with him to collect the child at the place of residence saying that it would be for that weekend only. The applicant says that he agreed because of the assurance it would only be for that weekend. The respondent takes the view that the

applicant's stance is unreasonable as it is challenging for her to get to the pick-up point timeously from work given traffic and the need to collect the child from creche. However, she also states that her vehicle had again broken down and that she had informed her attorney of this.

[47] While access was ultimately granted, the controversy of the events of this weekend remain material to this application as they again reveal the respondent's state of mind regarding her duties of compliance. In short, her view is that the order she agreed to does not suit her and the applicant must agree to her demand that he come to her place of residence to collect the child. Furthermore, they demonstrate an ongoing failure in communications, for example there is no explanation why the respondent did not satisfy herself that Mr Zwane had informed the applicant that again the vehicle had broken down.

[48] It is common cause that there was no contact on 23 August 2019. The applicant's version is merely 'noted' and is, in effect, undisputed. In short, the applicant arrived at the pick-up place but

the respondent did not show up. At the time, Mr Meso contacted Mr Zwane who confirmed that his client knew that she should meet him at the garage and that if she did not show up by 17h30, 'we will conclude that she has defied the arrangement.' Willful and mala fide non-compliance is presumed and there is no explanation tendered.

[49] It is common cause that the applicant did not have contact with the minor child during the next period for contact being 6 to 8 September 2019. Where the applicant alleges non-compliance with the arrangements made by Mr Meso with Mr Zwane in terms of the court order, the respondent informs that Court, in effect, that she had informed her attorney that 'if [the applicant] wants to exercise his right of contact, he was more than welcome to pick up the minor child from my place of residence.' The admitted breach, is thus in respect of the place of pick up. Though no specific explanation is given for this occasion, I will assume that she adopted the general approach to the matter referred to in paragraph 43 above.

[50] The next period for contact was for 20 to 22 September 2019, which Mr Meso confirmed with Mr Zwane. It is common cause that some three hours prior to the time for contact, Mr Zwane informed Mr Meso that the respondent had left for the weekend with the child to attend a family event and would instead offer contact the following weekend. As the applicant explains, there was no request for any indulgence prior to the event as required by the Court order.[13] The respondent rather took it upon herself to alter the arrangements. In her further affidavit she contends that the applicant's conduct evidences his repeated unreasonable refusal to grant indulgences. There is thus an admitted breach of the court orders on these dates with the explanation being that the applicant, if reasonable, ought to have agreed to a change of plan. The applicant's difficulty is that she did not request any indulgence but, without explanation or apology, unilaterally implemented her plans. This again evidences mala fides on her part.

[51] Contact was then arranged on behalf of the applicant for the following weekend and the alternative weekends thereafter in accordance with the court order. In her further affidavit, the respondent's stance is, in effect, that she is willing to grant access to the minor child but the respondent should pick the child up from her home. On the weekend of 27 September 2019, the respondent explains that her inability to go to the venue was 'due to unforeseen

circumstances' and she expressed the general view that it is unreasonable for the applicant to refuse to pick the child up from her home given that the venue designated in the court order is impractical for her. Thus, on the common cause, for these dates, there is an admitted breach of the court order as regards the place for pick-up. I have dealt with this general stance to the order in paragraph 43 above.

#### Conclusion on the evidence

- [52] I have concluded above that the affidavits reveal a persistent, usually willful, breach of the divorce order and 4 June 2019 from mid 2018. I am unable to conclude that each incident manifest bad faith on the part of the respondent. On the contrary, in certain instances, I must conclude that her conduct probably reveals a mother genuinely concerned about her child, albeit in willful breach of a court order. However, on other occasions, the respondent's conduct is either unexplained, not adequately explained or the explanation itself reveals bad faith, in varying degrees. In the result, the applicant is entitled to relief.
- [53] To the extent it may not be clear from the detailed analysis above, my findings are all made on a civil standard. I am not able to draw these conclusions, at least on affidavit, beyond a reasonable doubt.
- [54] In the circumstances, the applicant, while entitled to relief, is not entitled to the relief seeking a committal of the respondent. He is entitled to the declaratory relief sought. Furthermore, I grant further relief designed to ensure compliance with the court orders going forward mindful that the child's interests should be treated as paramount in accordance with section 28(2) of the Constitution. Given the history of this matter, this requires a level of oversight.

#### Covid-19

- [55] This order is made during the period of lock-down in place as a result of the declaration of a national disaster under the Disaster Management Act 57 of 2002 flowing from the Covid-19 pandemic. I am mindful that there was some uncertainty regarding the legal position of movement of children between parents during this period. However, that uncertainty has been removed by an amendment to the governing regulations and in the result, there is no obvious impediment to the respondent complying with the court orders flowing from the regulations.
- [56] I am however mindful that the lockdown period may pose other practical difficulties with compliance and to restrict unnecessary movement and further dispute, I accordingly make an order that the applicant shall until end April 2020 or any extended period of lock-down, collect the minor child at the respondent's place of residence. I also make provision for the parties to approach the court urgently if need be should the ongoing pandemic cause any disputed impediment to access. This is warranted by the need to protect the interests of the minor child.

[57] I make the following order:

57.1. The respondent is declared to be in contempt of the divorce order and the 4 June 2019 order.

57.2. During the period of lock-down (end April 2020 or any extended period during which the parties' free movement within Gauteng is restricted) , the applicant is directed to pick-up the minor child at the respondent's place of residence and the respondent shall ensure the child is ready for collection at the dates and times contemplated by the court orders.

57.3. During the period mentioned in 57.4, the parties are granted leave to approach the court on an urgent basis for any further order that may be required to ensure that there is no disputed impediment to access as a result of the Covid-19 pandemic.

57.4. For a period of six months (which may be extended by the court on application or otherwise) the respondent is to deliver (serve and file) a monthly report with the court confirming her compliance with the divorce order, the 4 June 2020 order and this order, which shall be filed on or before the 5th calendar day of every month.

57.5. To facilitate this procedure and in view of the urgency of the matter, the applicant shall take such steps as are necessary to ensure that the papers in this matter are uploaded onto the court's Caseline system as soon as possible and the applicant 's attorney may rely on this order to travel to the applicant's place of residence or his office for this purpose.

57.6. The applicant is granted leave to approach the court for further relief on the same papers duly supplemented where necessary.

57.7. The parties shall comply with any further directions the court may issue.

SJ COWEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 4 MARCH 2020

DATE OF JUDGMENT: 23 APRIL 2020

APPEARANCES:

Applicant: M Joubert instructed by Phuti Manamela Attorneys

Respondent: WB Ndlovu instructed by Peter Zwane Attorneys

[1] During the hearing the applicant's counsel confirmed that this prayer is only sought for the duration of the committal.

- [2] Matjhabeng Municipality v Eskom 2018(1) SA (1) ('Matjhabeng Municipality') at paragraph 46 to 67 and Pheko and others v Ekurhuleni City ('Pheko') 2015(5) SA 600 (CC); 2015(6) BCLR 771 (CC); [2015] ZACC 10 at paragraphs 1-2 and 25 to 37 with reference inter alia to Fakie NO v CCII Systems (Pty) Ltd 2006(4) SA 326 (SCA) ('Fakie' ).
- [3] Matjhabeng Municipality at para 1.
- [4] Pheko at para 28.
- [5] Pheko at para 32 read with para 36.
- [6] Pheko at para 33 to 36 with reference to Fakie.
- [7] Pheko at para 36
- [8] Pheko at para 35 and Matjhabeng Municipality at paras 54 and 63 to 67 esp para 67.
- [9] At para 9, footnotes omitted.
- [10] At para 10, footnotes omitted.
- [11] Plascon-Evans Paints v Van Riebeeck Paints 1984(3) 623 (A) at 634H-635C. On these principles, final relief may be granted ' if the facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent , justify such an order ' In certain instances, the respondent's denial of an alleged fact may ' not be such as to raise a real, genuine or bona fide dispute of fact' There may also be exceptions such as where the allegations or denials of the respondent are ' so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers .'
- [12] Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008(3) SA 371 (SCA) at para 13. The SCA explained: ' A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment . When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit , he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a

legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit . If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[13] Prayer 2.3 reads: ' In the event that either party cannot honor the arrangement they will seek indulgence from the other party and if it is granted the weekend contact will be exercised on the following weekend .'

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