

SOUTH AFRICA / JUDGMENT

R.H.M v C.D.M (37409/2018) [2023] ZAGPJHC 1176 (18 October 2023)

[2023] ZAGPJHC 1176

COURT

South Gauteng High Court, Johannesburg

BEFORE

Liebenberg

CASE / FILE NUMBER

37409/2018

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

CASE

NO: 37409/2018

NOT REPORTABLE

OF INTEREST TO OTHER

JUDGES

REVISED

18.10.23

In the matter between:

R.H.M

Applicant

And

C.D.M

Respondent

JUDGMENT

CORAM: LIEBENBERG AJ

[1] In this application, the applicant seeks inter alia an order, on an urgent basis, for the committal of the respondent to prison.

[2] The parties, who are married in community of property, are in the throes of what appears to be unnecessarily drawn-out divorce litigation which commenced, as the case number shows, some five years ago. By now the children born of the marriage are majors and self-supporting,

and the issues in dispute in the divorce action centre around the extent of the joint estate to be divided and the applicant's

claim for maintenance after divorce.

[3] To contextualise the relief sought by the applicant in this urgent application, a brief exposition of the forensic history is apposite.

[3.1] The action commenced sometime in 2018.

[3.2] The applicant herein launched proceedings in term of Rule 43 for interim maintenance. By order dated 4 May 2021, the respondent was to contribute towards the applicant's maintenance needs pendente lite in the form of a monthly cash contribution and the payment of certain specified expenses directly to certain service providers. He was also ordered to pay an initial contribution towards her legal costs ("the Rule 43 order").

[3.3] The respondent did not acquit himself of his obligations in terms of the Rule 43 order and the applicant launched application to convict the respondent of contempt of court and sentence him ("the contempt application").

[3.4] By judgment and order dated 19 June 2023, the respondent was convicted of contempt of the Rule 43 order and the following sentence was imposed:

"The respondent is committed to prison for a period of 14 (fourteen) days, which committal is suspended for the period pending the finalization of the divorce between the parties on condition that the respondent complies with the Order granted on 4 May 2021 which includes but is not limited to paying all the outstanding amounts in respect of the Order dated 4 May 2021 within 30 (thirty) days from the date of this Order."

[4] There is no debate that the respondent has not complied timeously or in full, with the conditions laid down in the contempt order of 19 June 2023. The respondent paid the arrears late, he continued to short-pay the monthly cash amount, and only after service of this application did he make good on the arrears due.

- [5] I was called upon to determine, as a matter of urgency, the following relief sought by the applicant in her notice of motion:

“2. The respondent is committed to prison for a period of 14 days in accordance with the Order granted by the Honourable Acting Judge

Mokoena on 19 June 2023.

3. The respondent is directed to identify and to provide the applicant with full details of all pension interests and/or related interests held by him and/or the joint estate.
4. The respondent is directed to cause to pay out all pension interests and/or related interests, referred to in 3 above, to the applicant

within 30 days of date of this Order.

5. In the event that the respondent fails to comply with 4 above:

5.1. The respondent is a member of Liberty Retirement Annuity with policy number[...]. The applicant, as non-member spouse, is assigned

100% (hundred percent) of the respondent’s pension interest, as defined by section 1 of the Divorce Act 70 of 1979 (“the

Divorce Act”), in the last-mentioned retirement fund, as calculated at the date of this order by virtue of the provisions of sections 7(7) and (8) of the Divorce Act. The Liberty Retirement Annuity is ordered, in terms of section 37D(4) of the Pension Funds Act 24 of 1956 (“the Pension Funds Act”), to pay 100% (hundred percent) of the respondent’s pension interest to the non-member spouse, being the applicant, or an approved fund on her behalf within 30 (thirty) calendar days of the exercise by the applicant of her election as to payment thereof.

5.2. The respondent is a member of Liberty Retirement Annuity with policy number[...]. The applicant, as non-member spouse, is assigned

100% (hundred percent) of the respondent’s pension interest, as defined by section 1 of the Divorce Act, in the last-mentioned retirement fund, as calculated at the date of this order by virtue of the provisions of sections 7(7) and (8) of the Divorce Act. The Liberty Retirement Annuity is ordered, in terms of section 37D(4) of the Pension Funds Act, to pay 100% (hundred percent) of the respondent’s pension interest to the non-member spouse, being the applicant, or an approved fund on her behalf within 30 (thirty) calendar days of the exercise by the applicant of her election as to payment thereof.

5.3. The respondent is a member of Momentum Retirement Savings with policy number[...]. The applicant, as non-member spouse, is assigned 100% (hundred percent) of the respondent’s pension interest, as defined by section 1 of the Divorce Act, in the last-mentioned retirement fund, as calculated at the date of this order by virtue of the provisions of sections 7(7) and (8) of the Divorce Act. The Momentum Retirement Savings is ordered, in terms of section 37D(4) of the

Pension Funds Act, to pay 100% (hundred percent) of the respondent's pension interest to the non-member spouse, being the applicant, or an approved fund on her behalf within 30 (thirty) calendar days of the exercise by the applicant of her election as to payment thereof.

6. The applicant shall invest the money referred to in 4 to 5.3 above in any interest bearing account pending the finalisation of the divorce. The applicant shall draw monthly payments from the invested money referred to in 4 to 5.3 above in an amount equal to the respondent's obligations as contained in the Court Order granted by the Honourable Judge Maier-Frawley dated 4 May 2021.
7. After the divorce proceedings between the parties have been finalised, the money in the interest bearing account will be distributed between the parties in accordance with the provisions of the decree of divorce.
8. The respondent shall cancel the life insurance policy against the applicant's name, of which he is a beneficiary, and pay the monthly instalments in respect thereof towards the applicant in accordance with his liabilities as contained in the Court Order

granted on 4 May 2021 by the Honourable Judge Maier- Frawley.

9. The respondent is ordered to pay the costs of this application on the scale as between attorney and client out of his portion of the joint estate.”
- [6] For the sake of convenience, I group the various prayers as follows: paragraph 2 is referred to as ‘the committing order’; prayer 3 I refer to as ‘the discovery order’, prayers 4 to 7 is grouped together as the ‘pension interest orders’ and prayer 8 is referred to as ‘the variation order’.

Ad urgency

- [7] Having heard argument, I was prepared to entertain the application in terms of Rule 6(12), in respect of some of the relief sought by the applicant.

- [8] In *Protea Holdings Ltd v Wriwt and another*[1] Nedstadt J held that

“As one of the objects of contempt proceedings is by punishing the guilty party to compel performance of the order, it seems to me that the element of urgency would be satisfied if in fact it was shown that respondents were continuing to disregard the order... . If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed.”

- [9] In *Victoria Park Ratepayers Association v Greyvenouw CC and others*[2] it was held that ongoing contempt of court is in its very nature urgent, and all matters in which an ongoing contempt of an order is brought to the attention of the court, must be dealt with as expeditiously as the circumstances, and the dictates of fairness

allow. It is not only the object of punishing recalcitrant respondents to compel them to obey orders that renders contempt

proceedings urgent, but the public interest in the administration of justice and the vindication of the Constitution also render ongoing failure or refusal to obey a court order a matter of urgency.

- [10] The Constitutional Court, in *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others*,^[3] approved and applied both *Protea Holdings* and *Victoria Park Ratepayers*, and regarded itself enjoined to take stock of the relentlessness of the alleged contempt of court.
- [11] Mindful of the degrees of urgency,^[4] I am satisfied the applicant afforded the respondent sufficient time to file his answering affidavit on slightly truncated time periods, albeit I do not consider all the relief sought to be matters of urgency.

Ad the discovery order

- [12] The applicant is not entitled to the relief she seeks in prayer 3. Not only does she fail to make out a case for urgency, but she is also at liberty to utilise the Rules of Court to obtain discovery or subpoena witnesses to procure the evidence she seeks.

Ad the pension interest orders

- [13] It is only upon the dissolution of a marriage, whether by death or divorce, when patrimonial benefits are to be determined, that a spouse's 'pension interest'^[5] is deemed to form part of that spouse's estate.^[6]
- [14] During the subsistence of the marriage, a non-member spouse is not entitled to insist on payment of the member-spouse's 'pension fund' unless the claims came be brought within the very strict confines of section 37D of the Pensions Fund Act. One such exception is founded on the provisions of section 37D(1)(d)(ii) of the Pension Funds Act, which allows for deductions to be made from the member-spouse's pension benefits to satisfy a maintenance order.
- [15] The case the respondent was called to meet was not premised on the latter section, and I am not prepared to accede to the request of Mr Bornman, for the applicant, to grant the applicant relief on those provisions. In addition to the applicant's failure to formulate her case properly, none of the relevant pension funds and/or pension fund administrations were joined in these proceedings.
- [16] As such, the pension interests' orders are doomed to fail in this application.
- [17] This finding must not be taken to mean that the applicant cannot execute on the Rule 43 against the respondent's pension benefits. The Uniform Rules of Court are at her disposal, and she may case the necessary writs of executions to be issued by the Registrar.

Ad the variation order

- [18] On the affidavits before me, I am not inclined to grant an order for the cancellation of the life insurance policy and payment to her of an amount equal to the monthly premiums.

- [19] The relief sought falls within the provisions of Rule 43 (6), and the applicant fails to provide cogent evidence of the material change in circumstances. Additionally, she does not detail which policy she refers to, with reference to the Rule 43 order.

Ad the commitment order

- [20] By my reckoning, the only meritorious issue for determination is the relief sought for the respondent's commitment to prison, based on his admitted failure to adhere to the conditions of the suspension of his sentence as is provided for in the order of 19 June 2023.
- [21] In the parties' respective heads of argument, much space was unnecessarily dedicated to the law on contempt of court. The question for determination for this court is not whether the respondent is in contempt of court, for that order was already made. This order is not the subject of any application for leave to appeal. The only question to be adjudicated is whether this court should order the implementation of the suspended sentence, and if so, whether the implementation should be with without more or subject to some or other amendment.
- [22] Whilst both parties' counsel conceded that this court has a discretion as to the implementation of the sentence, neither referred to any authorities nor relevant legislation.
- [23] Albeit granted in a civil context, the contempt order amounts to a criminal conviction. As such, when considering the matter at hand, and the discretion I have regarding implementation of the suspended sentence previously imposed, I am guided by the provisions of section 297(7) of the Criminal Procedure Act[7] which permits this court
- “if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine, as the case may be, subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.”*
- [24] The onus rests on the accused to satisfy the court, on a balance of probabilities, that he is entitled to a reprieve as envisioned by section 297(7).[8]
- [25] The respondent's case is that his business, called CDM, which constitutes both his and the applicant's sole livelihood, is 'terminally ill'. Should he be incarcerated, the business will fail. The doomed future of the business does not appear to be a recent development. In fact, already in the contempt application the respondent raised the issue, yet failed to provide documentary evidence to the satisfaction of the court that convicted him.
- [26] It is most likely because of the criticism against the respondent in the judgment in the contempt application, that, in this application, the respondent attached copies of various financial documents to bolster his case that the business of CDM is no longer financially viable, and thus his only source of income has dried up.

- [27] According to the respondent, the COVID pandemic has decimated businesses, and accuses the applicant for not believing that to be the case with CDM. The most recent financial statements of CDM which form part of the record is for the financial year ending February 2022, upon which the independent auditor's certificate of 3 October 2023 is based. I am not satisfied that the outdated financial statements alone assist the respondent's case for leniency.
- [28] The banking accounts of CDM demonstrate the business running on an overdraft. To my mind, a bank overdraft is not necessarily indicative of a financially crippled individual or entity, as such a facility is often utilised as a source of easily available, relatively cheap credit.
- [29] The respondent was able to fulfil some of the conditions of the suspended sentence, including the late payment of the arrear maintenance due, an amount equal to more than 14 months of cash maintenance payable. Unfortunately, the respondent's explanation of how he funded the (late) payment does not redound to his credit. Instead, it tends to support the applicant's complaints that he is denuding the joint estate.
- [30] The respondent paid the arrear maintenance due from the proceeds of a retirement investment policy which matured during or about July 2023. He explains that he took one-third of the proceeds, some R 400 000.00, in cash, and the remaining two-thirds of some R 800 000.00 were invested in what is called a 'living annuity'; that is a financial product that, in return for a cash payment, entitles the respondent to periodic payments for so long as he remains alive. My concerns about the respondent's explanation stem from the following:
- [30.1] Of the amount of R 400 000.00 credited to the respondent's banking account on 14 July 2023, he paid to the applicant the amount of R 130 556.50 only on 24 July 2023. The respondent does not explain why some 10 days passed before he made good on the condition of the suspended sentence already imposed.
- [30.2] Of greater concern is the respondent's decision to alienate the sum of R 800 000.00 by investing it in a living annuity, without the respondent's consent, as is required by section 15 of the Matrimonial Property Act.[9] By its very nature, a living annuity constitutes a disposition (of assets in the form of cash) to a fund in which one has no rights to the underlying capital, but only to the annuity income.[10] Thus, what was an asset of the joint estate, the amount of R 800 000.00, is no longer an asset. Although the Matrimonial Property Act affords the applicant remedies in this regard, it will necessarily entail further litigation and legal costs.
- [31] The respondent has not approached the Maintenance Court for a variation of the Rule 43 order, and whilst the Rule 43 order remains extant, he is obliged to adhere thereto. Repeated disobedience cannot be countenanced, as it is an affront not only to the applicant but also to the court.
- [32] During argument, I invited the parties to address me on the discretion I have in terms of section 297(7) of the Criminal Procedure Act.

- [33] The applicant persisted in the relief she sought – immediate implementation of the sentence, as is.
- [34] The respondent's counsel raised four alternatives: Firstly, that a fine be imposed rather than imprisonment. Secondly, it was suggested that the respondent be ordered to pay an amount of money into a trust account from which any future shortfalls in his payment of maintenance are to be made good. Thirdly, it was mooted that a warrant of arrest be issued but execution thereof be suspended pending the respondent paying, within a specified time, an amount of money into a trust account. Fourthly, it was suggested that the respondent be sentenced to periodic imprisonment over weekends, and rather than in a correctional facility, he be held at the holding cells of a local SAPS station.
- [35] Creative as first three alternatives are, they all lose sight of the respondent's pleas of poverty. Even should I order that the amount of the fine or the payment into a trust account shall be reckoned to form part of the respondent's share of the joint estate, it is not clear when and from whom the respondent would source the funds he professes not to have.
- [36] In the circumstances, the reasonable alternative is a sentence of periodic imprisonment over weekends. Such a sentence serves the very purpose of the sentence imposed in the contempt application, but will also allow the respondent to ply his trade, earn an income, and pay his dues to the applicant.
- [37] Section 285 of the Criminal Procedure Act regulates the imposition of periodic imprisonment, which sentence is to be undergone in accordance with the laws relating to prisons.[11] The 'laws relating to prisons' are found in the Correctional Services Act[12] and the regulations promulgated thereunder.
- [37.1] Section 73(6)(b)(i) stipulates that a person sentenced to periodical incarceration must be detained periodically in a correctional centre as prescribed by regulation.
- [37.2] Regulation 29 of the Correctional Services Regulations[13] provides as follows:
- (1) A person sentenced to periodical incarceration, in terms of section 285 of the Criminal Procedure Act, must serve the sentence in uninterrupted periods of not less than 24 hours and not more than 96 hours at a time as determined, with due regard to such person's employment, by the Head of the Correctional Centre, at which the person surrenders him or herself to undergo such incarceration.
 - (2) Subject to the provision of subregulation (2) the Head of the Correctional Centre must determine the periods of incarceration with due regard with the circumstances of the person serving periodical incarceration.

...

- (5) Whenever a person's period of periodical incarceration expires at any time after 15h00 on any day and before 06h00 of the following day, the person's release may be postponed with his or her written consent.
- (6) Reasonable steps must be taken to prevent a prisoner serving periodical incarceration from associating with other categories of prisoners.
- [38] In section 1 of the Correctional Services Act a 'correctional centre' is defined as any place established under the Act as a place for the reception, detention, confinement, training or treatment of persons liable to detention in custody or to placement under protective custody. It is only the purpose of sections 115 and 117 of this Act that it includes every place used as a police cell or lock-up.
- [39] Thus, I cannot accede to Mr Cremen's invitation to order the respondent to be held in the holding cells of a local SAPS station. In any event, I have no evidence from the station commander of the unidentified local SAPS station that the respondent can be accommodated in the holding cells. In the result, the department of correctional services will determine where the respondent is to be held.

Conclusion

- [40] The applicant was only successful in respect of one of her claims, yet had it not been for this application, it is unlikely that the respondent would have made good on his admitted late and short payment of lifeline to which the applicant is entitled in terms of the Rule 43 order. The applicant ought not bear the consequences of the respondent's failure to abide orders of court, and his liability to pay the costs of the application should be borne from his share of the joint estate.
- [41] It is most regrettable that the divorce action has dragged on for as long as it has and has become a war of attrition, which does not serve the parties. After a marriage of nearly four decades, the parties owe each other and themselves peace in what are to be their retirement years. I urge both to seriously consider alternative dispute resolution before the capital in the joint estate is completely eroded.
- [42] In the result, I make the following order:
- [42.1] The matter is heard as one of urgency in terms of Rule 6(12).
- [42.2] The respondent is sentenced to periodic imprisonment for a period of 14 days.
- [42.3] It is recommended to the Department of Correctional Services that the sentence of periodic imprisonment is served on consecutive weekends from Friday at 15:00 to Sunday at 15:00.
- [42.4] The remainder of the application is dismissed.

[42.5] The respondent is ordered to pay the costs of the application, which costs are to be paid from the respondent's share in and to the joint estate between the parties.

SARITA LIEBENBERG

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Heard on 10 October 2023

Judgment granted on 18 October 2023

For the applicant:

Adv JC Bornman instructed by SKV Attorneys

For the respondent:

Adv C Cremen instructed by Marques Hatting Inc.

[1]1978

(3) SA 865 (W).

[2] [2004] All SA 3 623 (SE) at 26-27.

[3] 2021

(5) SA 327 (CC) at 30 -34.

[4] See *Luna Meubel Vervaardigers (Edms) Bpk v Makin And Another (T/A Makin's Furniture Manufacturers)* 1977

(4) SA 135 (W) and the Practice Directives of this Court.

[5] As defined in section 1(1) of the Pension Funds Act 24 of 1956 as referred at section 1 of the Divorce Act 70 of 1979.

[6] Sections 7(7) and (8) of the Divorce Act read with sections 37D(1)(d)(i) and 37D(4) of the Pension Funds Act.

[8] *Kriegler & Kruger: Hiemstra Suid-Afrikaanse Strafproses* (6th Ed) at 769.

[9] Act 88 of 1984.

[10] *CM v EM* 2020

(5) SA 49 (SCA).

[11] Section 285 (1).

[12] Act 111 of 1998.

[13] GN R914 GG 26626, 30 July 2004.

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