

SOUTH AFRICA / JUDGMENT

S v H (A5001/2022) [2022] ZAGPJHC 355 (24 May 2022) [2022] ZAGPJHC 355

COURT

South Gauteng High Court, Johannesburg

BEFORE

S C Mia, M Mdalana-Mayisela, G Malindi

CASE / FILE NUMBER

A5001/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

APPEAL

CASE NO: A5001/2022

COURT

A QUO CASE NO: 6573/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

24

May 2022

In

the matter between:

T[....]
W[....] S[....]
Appellant
and
D[....]
F[....] H[....]
Respondent
(This
judgment is handed down electronically by circulation to the parties'
legal representatives by email and by uploading
it to the electronic
file of this matter on CaseLines. The date for hand-down is deemed to
be APRIL 2022.)

JUDGMENT

MIA, J

INTRODUCTION

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Johannesburg, Matojone J, in the following terms:

“1. The application is heard as a matter of urgency and the applicant’s failure to comply with Rule 6 is condoned, in terms of Rule 6(12);

2. The respondent is ordered to pay the applicant the sum of R39 853.00 in terms of the maintenance order granted on 14 July 2016, being the arrears amount in respect of the maintenance order and the outstanding medical aid amount;

3 The respondent is ordered to pay the maintenance amount in terms of the order of 14 July 2016 religiously, every month, until it is varied or set aside by a court;

4. The respondent is declared in contempt of the maintenance order dated 16 July 2016;

5. The respondent is to be committed for a period of imprisonment not exceeding six months, which shall be suspended if he pays the full arrears maintenance in 2 above by close of business on 23 February 2021 and continues to pay the maintenance as per order 3 above;

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

[2] The court a quo dismissed the application for leave to appeal against the above order. The appeal proceeds with leave from the Supreme Court of Appeal (the SCA) to the Full Court of this Division. The appellant sought an order setting aside the order for contempt of court. The respondent opposed the application for leave to appeal.

[3] The appellant relied on the grounds of appeal that the court a quo erred as follows:

“2.1.1 Not finding that the applicant had failed to establish contempt on the part of the respondent beyond a reasonable doubt;

2.1.2 Not finding that the evidence before Court did not establish that the respondent's non-compliance with the maintenance order was wilful and mala fide; and

2.1.3 Not finding that an order for contempt in the circumstances of this matter was inappropriate as the maintenance order was ad pecunium solvendum and not per se ad factum praestandum.

2.2. In granting judgment in favour of the applicant, the Court:

2.2.1 Failed to take into account the undisputed evidence that the respondent was unable to pay maintenance in terms of the maintenance order due to his dire financial circumstances;

2.2.2. Failed to take into account the fact that the respondent -

prior to the applicant launching the application which resulted into the order being the subject hereof - was in the process of applying to the Maintenance Court for variation or substitution of the maintenance order due to his changed financial circumstances;

2.2.3. Failed to take into account the applicant's own evidence to the effect that since about July 2020, the respondent had indicated that he had financial problems; and

2.2.4. Failed to take into account the undisputed evidence that the respondent is under debt review, which is a strong indication that he has financial difficulties.”

BACKGROUND FACTS

[4] It is useful to provide the background to appreciate the context of the matter as it was presented in the court a quo. For convenience the parties will be referred to as they were in the court a quo. The applicant/the respondent in the present application for leave to appeal, and the respondent/ appellant in the present application were involved in a romantic relationship and a minor child was born of this relationship. The respondent had been employed as an engineer and held a senior position at Gold Fields Mines during when the child was born. The applicant was a geologist. The respondent paid maintenance in respect of the minor child in terms of a court order in the amount of R8500, which was granted in the Randburg Magistrates Court on 14 July 2016 (the maintenance order). In addition to the above amount, and in terms of the maintenance order the respondent also registered the minor child as his beneficiary on his medical aid scheme. The respondent complied with the order conscientiously. However, from August 2018 to November 2018 he removed the minor

child as a beneficiary from his medical aid scheme. Out of necessity, the applicant added the minor child to her medical aid scheme. The respondent undertook to pay her back for her contribution to the child's medical aid but did not do so. When the matter was enrolled before the court a quo, the respondent had resigned from his previous employment and was employed at Vedanta Zinc International. At this stage, the parties' relationship had come to an end.

- [5] In July 2020, the respondent got married to someone other than the applicant. He subsequently stopped paying maintenance in respect of the minor child in terms of the maintenance order. On 24 July 2020, he made an application for a variation or discharge of the maintenance order. From September 2020, before the variation application could be heard and resolved by a court of law, the respondent unilaterally reduced his maintenance payment from R8500 per month to R3500 per month. He also applied for debt review during this period. The applicant, in the interim had enrolled the minor child at a private school. The respondent disputed that he agreed that the minor child could attend the private school. The school fees were outstanding from 2020 and the child was excluded from attending school in January 2021.
- [6] The applicant brought an urgent application in the high court in February 2021 to secure relief and to hold the respondent in contempt of the court order. The defendant's default had left the plaintiff financially destitute and unable to pay the minor child's school fees. He was not responding to her calls. She alleged she bore the major responsibility for maintaining the minor child. The R3500 the defendant paid was insufficient to cover the minor child's expenses and the matter was urgent in view of the minor child's exclusion from school. The defendant opposed the matter disputing

urgency. He also denied that he was in contempt of the maintenance order alleging that he was not able to make payment in terms of the maintenance order and that such inability was not wilful.

ISSUES

- [7] The issues for determination in the appeal are:

7.1 Whether there was evidence beyond reasonable doubt that the defendant's non-compliance with the court order was wilful and mala fide;

7.2 Whether the court a quo erred in finding the defendant in contempt of court;

7.3 Whether it was appropriate for the court a quo to enforce the maintenance order as such order could be enforced through mechanisms provided in Chapter 5 of the Maintenance Act 95 of 1988 (the Act).

LAW

[8] In *Fakie N.O v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at paragraph 42, the familiar requirements for contempt were set out:

- a) the existence of a court order;
- b) service or notice thereof on the alleged contemnor;
- c) non-compliance with the terms of the court order by the alleged contemnor; and
- d) wilfulness and mala fides on the part of the contemnor.

[9] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2017

(11) BCLR 1408 (CC), the court stated at paragraph 67:

“Summing up, on a reading of Fakie, Pheko II, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual’s freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.”

Was there evidence beyond reasonable doubt that the appellant’s non-compliance with the court order was wilful and mala fide?

[10] Counsel appearing on behalf of the respondent submitted that there was no evidence that the respondent’s non-compliance with the maintenance order was wilful and mala fide. He argued that there was no inquiry into the respondent’s compliance by the court a quo. He argued furthermore that the respondent’s application for variation and discharge of the maintenance order and his application for debt review constituted undisputed evidence that the respondent was not able to comply with the maintenance order. He conceded, however, that the respondent did not attach the application for debt review to the answering affidavit. The respondent’s answering affidavit, whilst relying on the application for variation of the maintenance order and the application for debt review, only attached the application for variation and referred to his communication with the maintenance officer. He maintained, however,

that it constituted undisputed evidence of the respondent’s inability to comply with the maintenance order and his financial

difficulties which the applicant was aware of.

- [11] The respondent furthermore relied on the case of Matjhabeng[1] to argue that the onus fell on the applicant to prove that the respondent was in contempt of the order beyond reasonable doubt.

Counsel argued that the applicant bore the onus on the first three elements and that the respondent's onus only triggered once the first three elements were proved beyond reasonable doubt, which he argued, had not occurred.

- [12] Counsel appearing for the applicant argued that the respondent was aware of the existence of the order as he made payment in terms thereof until September 2020. Thereafter he failed to comply with the order. The first three elements had been met as set out in Fakie and approved by the court in Pheko.[2] The applicant had thus proved the first three elements. He argued that the respondent was in contempt as he was not able to discharge the evidential burden that was placed on him. In this regard, he relied on Pheko where the court held that :

"...therefore presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established."

- [13] Counsel for the respondent submitted that the applicant, acting in the best interest of the minor child in her care, was compelled to approach the court a quo when she did not receive maintenance from the respondent. The applicant had met all three elements to prove contempt. The respondent needed to take the court a quo into its confidence by presenting his financial status and adequately depicting his inability to comply with the maintenance order. He continued, furthermore, to state that the respondent having filed an application for the variation of the maintenance order and having applied for debt review, did not remove the legal obligation to comply with the existing order. He maintained that on the facts before the court a quo, the respondent failed to rebut the presumption that he was in wilful and mala fide contempt of the maintenance order.

- [14] Having regard to the record, it is evident that the respondent had notice of the order and was aware of it. This can be deduced from the application for variation of the order. The application for variation was attached to the respondent's answering affidavit. He indicated in the application for the variation that he was 'ordered on the 14 July 2016 to pay with effect from 31 July 2016'. This application for variation was made under oath and is dated 23 July 2020. It follows that he was aware of the order. It is common cause, as also indicated in his answering affidavit, that he paid R8 500 in terms of the order until September 2020 when he unilaterally reduced the payment. Thus, he complied with the order for a period of time.

[15] In his communication to the maintenance officer, which he referred to in the answering affidavit, he mentioned that the matter was postponed due to load-shedding. He noted the applicant's absence when she did not receive notice of the proceedings. He then noted that he would 'continue to pay the amount of R3500 until the judge makes a determination on the matter'. There was no change to the maintenance order granted on 14 July 2016 which ordered the respondent to pay R8500 per month and to retain the minor child on his medical aid scheme. The respondent's reduction was thus a unilateral reduction. He was required to comply with the order until it was varied by a court. In *Minister of Home Affairs and Others v Somali Association of South Africa EC and Another* [2015] 2 All SA 294 at paragraph 35, the court emphasised:

"...after all there is an unqualified obligation on every person against, or in respect of, whom an order is made by a court of competent

jurisdiction to obey it unless and until that order is discharged. It cannot be left to the litigants to themselves judge whether or not an order of court should be obeyed..."

[16] When the matter appeared before the court a quo, it was evident that there was an order in place, the respondent had notice of the order as he had referred to the order and he was not paying in terms of the order. On these facts, it was clear beyond reasonable doubt that the first three requirements for contempt were met. The onus was thus on the respondent to present sufficient evidence to the court a quo to indicate that he was not in wilful and mala fide contempt of the maintenance order. No such evidence was presented as the application for variation did not constitute sufficient evidence.

Did the court a quo err in finding the DEFENDANT in contempt of court?

[17] In view of what is stated above, the respondent bore the evidentiary burden to show, on a balance of probabilities, that he was not in wilful and mala fide non-compliance with the order. Counsel for the respondent already conceded that the application for debt review was not attached to the answering affidavit. The respondent would have disclosed his income and expenses to the court dealing with the debt review application. The application for debt review required his salary advice to be attached. The respondent did not disclose this before the court a quo when the onus was on him to show he was not in wilful contempt. The maintenance order would also have been attached to the application for debt review. The respondent did not take the court a quo into his confidence by attaching the application for debt review. Neither did the respondent explain why, based on the expenses listed in the application for variation of the maintenance order, he was unable to pay the maintenance in terms of the maintenance order.

[18] The application for variation of the maintenance order lists the respondent's income after deductions as R70 479 with a fuel expense of R5 000 each month and a bond/ rental payment of R46 983. The respondent did not attach his salary advice to support the version that he placed before the court a quo. It was not clear whether he received a fuel subsidy benefit which would be ascertainable if his salary advice were attached. It may well have been

attached to the application for debt review, however, that application was never placed before the court a quo. He also reflected a monthly expense of R800 for school clothing and R8 730 for school fees. These amounts were not amounts received by the applicant as the applicant approached the court a quo on an urgent basis for the relief relating to outstanding maintenance and the school fees that were in arrears. There was no indication by the respondent, either in the application for variation or in the answering affidavit, that there was another order that required the respondent to pay these amounts toward another child for school fees and school clothing. In short, there was no complete financial

disclosure on the part of the respondent.

[19] Having regard to the application for variation and the answering affidavit, there appeared to be no impediment to the respondent paying maintenance in terms of the maintenance order nor was it impossible for him to do so. In the absence of an explanation regarding the educational expenses in the amounts of R8 730 and R800 and how this served as an impediment to him meeting his obligation in terms of the order, there was no reasonable explanation. The expense in relation to his bond was not a reason to avoid paying in terms of the maintenance order.[3] The respondent raised his difficult financial circumstances without indicating how the change occurred from the time the maintenance

order was granted. Neither his resignation from his previous employment,[4] his change in accommodation if he moved to more expensive accommodation nor his changed marital status, was sufficient grounds not to comply with the order. In the absence of any reasonable explanation, the only conclusion was that he was in wilful contempt and was mala fide. The concession was made by counsel before the court a quo that the respondent was in contempt of the maintenance order. The submission made before us was that this concession was incorrectly made. The facts of the matter do not explain how the concession was incorrectly made. Neither was counsel able to suggest an explanation

why the concession was incorrectly made.

[20] The respondent failed to prove before the court a quo that his financial circumstances served as an impediment to paying in terms of the maintenance order. Considering the application for variation and the absence of evidence tendered in relation to the debt review application, there was no evidence, as suggested by the respondent, which served as an impediment to complying with the maintenance order and this is indicative of defiance of the maintenance order. Where the respondent's subsequent commitments and the change in his circumstances reduced his capacity, he was required to adjust his circumstances to bring it according to his means. It was not evident that he did so, especially as there was no full explanation regarding his income and expenses and the adequate reasons why he could not comply with the maintenance order. In view of the above, it cannot be said that the court a quo erred in finding the respondent had not met the burden of proof that he was not in wilful and mala fide contempt of the court order.

Was it appropriate for the court a quo to enforce the maintenance order through contempt proceedings as such order could be enforced through mechanisms provided in Chapter 5 of the Act.

[21] Counsel for the respondent submitted that the court a quo erred in enforcing the maintenance order through contempt of court proceedings. This was so as the Act provided for the recovery of arrear maintenance through Chapter 5. It was submitted that it permitted the applicant to apply for a garnishee order. The applicant

could also attach the respondent's property and sell the property to recover the amounts due. It was put to counsel for the

respondent that the application for a variation in terms of the Act would suspend any other application preventing the applicant from applying for the relief suggested. The response by counsel that this was not a response put forth by the applicant, rings hollow. This is the legal position that that ensued upon the application for variation and one that the court a quo could not ignore and one that this court cannot ignore.

[22] I had considered the submission on behalf of the applicant that the court a quo was correct in coming to the assistance of the applicant. Counsel for the applicant referred to the decision in *Bannatyne v Bannatyne and Another*[5] as support for the submission. In this case, the court found that an order of a maintenance court could be enforced in the High Court and stated at paragraph 20:

"There is however no need to forge new remedies permitting the High Court to enforce a maintenance order made by the maintenance court.

Process-in-aid is an appropriate remedy for this purpose. It is the means whereby a court enforces a judgment of another court which cannot be effectively enforced through its own process.²⁰ It is also a means whereby a court secures compliance with its own procedures.²¹ Although process-in-aid is sometimes sanctioned by a statutory provision or a rule of court,²² it is an incident of a superior court's ordinary jurisdiction.²³ Contempt of court proceedings are a recognised method of putting

pressure on a maintenance defaulter to comply with his/her obligation.²⁴ An application to the High Court for process-in-aid by way of contempt proceedings to secure the enforcement of a maintenance debt is therefore appropriate constitutional relief for the enforcement of a claim for the maintenance of children"[6]

The Court stated further in paragraph 23:

"It is for the applicant to show that there is good and sufficient reason for the High Court to enforce the judgment of another court. What constitutes "good and sufficient circumstances" warranting a contempt application to the High Court will depend upon whether or not in the circumstances of a particular case the legislative remedies available are effective in protecting the rights of the complainant and the best interests of the children. This much is confirmed in section 38 of the Constitution which permits a court to grant appropriate relief where it is alleged that a right in the Bill of Rights has been

infringed or threatened.”

[23] The applicant was supposed to show that there were good and sufficient circumstances for the High Court to enforce the judgment. The applicant proved that the maintenance order was in place. The child was entitled to maintenance as provided in terms of s15 of the Act[7] as well as s28 and 29 of the Constitution, Act 108 of 1996, encompassing the Bill of rights. The applicant, as the primary caregiver, had not received maintenance in terms of the maintenance order since September 2020. The minor child had been excluded from school and had no medical aid cover. Whilst the application for variation was pending, the applicant could not apply for a garnishee order. This was by operation of the Act. The applicant had no other option, in view of the Chapter 5 mechanisms being temporarily held in abeyance whilst the application for variation was being determined and in the face of the urgent need for maintenance by the minor child. This constituted good and sufficient circumstances.

[24] The court a quo considered that the respondent had unilaterally reduced the maintenance order since September 2020 and removed the minor child from his medical aid fund. The minor child had been excluded from school in January 2021. It is apparent from the child's exclusion from school that the child suffered prejudice due to the unilateral reduction in maintenance to R 3500.00 per month. In addition, the respondent removed the child from his medical aid fund during the Covid pandemic when it was important that medical assistance be readily available. The respondent indicated in his communication to the maintenance officer, which he referred to in his answering affidavit, that he would continue paying the reduced amount until an order was made by a judge. He could not

persuade the court a quo that his failure to pay maintenance in terms of a maintenance order was not wilful and mala fide. The Court in Bannatyne stated at paragraph 19 that:

“In terms of section 8 of the Constitution the judiciary is bound by the Bill of Rights.¹⁷ Courts are empowered to ensure that constitutional rights are enforced. They are thus obliged to grant "appropriate relief" to those whose rights have been infringed or threatened.¹⁸”[8]

[25] The Court indicated in paragraph 24 that, that process in aid is a remedy which the High Court may utilise to enforce a maintenance order. Thus, in the absence of an explanation to rebut the three requirements of contempt that had been met, it was evident that the respondent was in contempt of the maintenance order. In view of the applicant's indication that he would continue to pay the reduced amount whilst the maintenance order was still in place and had not been varied, the difficult financial circumstances were not explained to the court a quo because the respondent failed to disclose crucial information, namely the debt review application and other relevant information and this resulted in him not persuading the court that he was not wilful and mala fide. Instead, there was a concession that he was in contempt by the counsel appearing for the respondent. On the basis of the information before the court a quo, it cannot be said that the decision was incorrectly made when there was no information on which the respondent could rely. In enforcing the rights

that were being infringed, the court a quo granted an appropriate order for contempt. The court a quo considered submissions from both counsel before making the order, a portion which granted the respondent time to redress the arrears as requested. Having regard to the record as well as the submissions of counsel, it is clear that the order was appropriate under the circumstances.

[26] In the further submissions on appeal before the full court, the respondent requested 15 days to pay the arrears whilst the applicant requested that it be paid within 24 hours. The determination required to be made was whether the court a quo had erred. In view of the finding that it had not, there appears to be no reason why the order which had taken into account the respondent's submissions should not be upheld. There was no application for condonation or leave to place new information before us. We are thus confined to the record as it appeared before the court a quo.

[27] The order of the SCA ordered the costs of the leave to appeal before that court as well as the costs before the court a quo to be costs in the appeal. This has been taken into account in this order.

[28] For the reasons above, I make the following order:

ORDER

The appeal is dismissed with costs.

S C MIA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree/disagree

M MDALANA- MAYISELA

G MALINDI

Appearances:

On behalf of the appellant : Adv L Kalashe

Instructed by

: Modisane AT Attorneys

On behalf of the respondent : Mr M Hlungwane

Instructed by

: Legal Aid South Africa

Date of hearing :

18 March 2022

Date of judgment :

24 May 2022

[1] Supra.

[2] *Pheko and others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as amicus curiae) (No 2) 2015*

(6) BCLR 711 (CC) para 36.

[3] *MS v KS 2012*

(6) SA 482 (KZP): The father sought a reduction of maintenance due to a reduced salary. The Magistrate reduced the maintenance amount. On appeal, the High Court found the father was able to save by cutting clothing and entertainment expenses and by temporarily suspending payments on his retirement annuity and on a family loan to sustain the maintenance amount.

[4] *ibid.*

[5] *Bannatyne v Bannatyne and Another 2003*

(2) BCLR 111(CC).

[6] Footnotes as they appear in the judgment: “20 Van Zyl *The Theory of the Judicial Practice of South Africa* Vol. 1, 3 ed (Juta: Cape Town, 1921) at 370 describes process-in-aid as "an authority from a higher tribunal to supplement the jurisdiction of a lower tribunal". 21 See *Nel v Le Roux NO and others 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC)* at para 11; and *De Lange v Smuts NO and others*

[1998] ZACC 6; 1998

(3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 7, 14, 21, 33, 36, 84 and 91. 22 See, for instance, *Ex parte Rabinowitz NO: In re Estate Sirkin v Zahrt 1948 (4) SA 286 (SWA)* at 288. 23 *Riddle v Riddle 1956*

(2) SA 739 (C) at 745H. 24 *Sparks v Sparks 1998*

(4) SA 714 (W) at 725H.”

[6] Footnotes as they appear in the judgment:

“20 Van Zyl The Theory of the Judicial Practice of South Africa Vol. 1, 3 ed (Juta: Cape Town, 1921) at 370 describes process-in-aid as "an authority from a higher tribunal to supplement the jurisdiction of a lower tribunal".

21 See *Nel v Le Roux NO and others 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC)* at para 11; and *De Lange v Smuts NO and others*

[1998] ZACC 6; 1998

(3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 7, 14, 21, 33, 36, 84 and 91.

22 See, for instance, Ex parte Rabinowitz NO: In re Estate Sirkin v Zahrt 1948 (4) SA 286 (SWA) at 288. 23 Riddle v Riddle 1956

(2) SA 739 (C) at 745H.

24 Sparks v Sparks 1998

(4) SA 714 (W) at 725H."

[7] Duty of parents to support their children.

[8] Footnotes as they appear in the judgment: "17 Section 8(1) provides: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." 18 Section 38 of the Constitution states, "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights . . ."

[8] Footnotes as they appear in the judgment:

"17 Section 8(1) provides: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

18 Section 38 of the Constitution states,

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights . . ."

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