

SOUTH AFRICA / JUDGMENT

S.A v N.B.A (1238/2020) [2024]

ZAECQBHC 41 (26 November 2024)

[2024] ZAECQBHC 41

COURT

Eastern Cape High Court, Gqeberha

BEFORE

M Makaula

CASE / FILE NUMBER

1238/2020

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IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN CAPE

DIVISION, GQEBERHA)

CASE No: 1238/2020

In the matter between:

S[...]

A[...]

Applicant

and

N[...]

B[...]

A[...]

Respondent

JUDGMENT

MAKAULA J:

Background

[1] The applicant brought an urgent application on 4 August 2022 seeking the following order.

“1. That's the court dispense with the forms and service provided for in the rules and allow the matter to be heard as one of urgency;

2. That the Respondent be found to be in contempt of the order of court of 13 July 2021, a copy of which is annexure “SA1” hereto;
3. That if it is content be found to be liable to the applicant in the sum of R88 000.00 in area maintenance in terms of the order of court of 13 July 2021;
4. That the Respondent be directed to make immediate payment of the aforesaid sum of R88 000 00 in arear maintenance to the Applicant;
5. That the Respondent be imprisoned for a period of one month, or alternatively this court impose such sentence as it considers appropriate, in the event that the respondent fails to make payment of the aforementioned arear maintenance of R88 000 00 within 5 days of this order;
6. That the Respondent pay the costs of this application on a scale as between attorney and client;
7. Any further and/or alternative relief that this court may deem appropriate in the circumstances.”

[2] The urgent application was opposed by the respondent and papers were exchanged over a lengthy period. When the matter was argued before me on 20 June 2024, the amount had varied from R88 000 00 to R294 500.00. Noteworthy upfront is that it took 2 years before the application was ripe for hearing. Therefore, the issue of urgency has come and gone.

[3] Briefly, the parties are married to each other and are in an acrimonious divorce which is still pending. As aforesaid, my brother, Gqamane J issued an order, amongst others, that the Respondent should pay an amount of R22 000. 00 monthly, directly to the applicant on or before the 30th of each month. Such failure led to the application before me. It is not essential that I should delve into the background laid out in the founding affidavit as how the arrears came about since such is not hotly contested by respondent. It is common cause that the respondent defaulted in complying with the said order, adducing various reasons for doing so, which I shall deal with later.

B. The Facts.

- [4] As previously stated, the issue of the respondent being in arrears is not in dispute. What is whether the respondent is able to settle the arrears and carry on complying with the order. The applicant contends that the respondent can do so since he is a medical doctor who runs a private medical practice and is employed by the Department of Health at Livingstone Hospital in Gqeberha. The applicant, based on the calculations made by her attorneys for purposes of the Rule 43 application, avers that the respondent generates a monthly income from his practice alone, amounting to approximately R400 000 00 per month and from his employment with the Department of Health a salary of approximately R73 000 00 per month. Primarily, the applicant submits that the respondent is able to pay for the maintenance, put differently, to comply with the order for the reason that (a) he had just bought a house for R3.2 million, (b) has recently married two(2) wives in terms of Muslim Laws and fathered three (3) more children
- (c) has engaged no less than four firms of attorneys to represent him including a senior counsel. For those reasons, the applicant argues that the respondent is deliberately and unjustifiably disobedient to the court order and is also willfully disobeying it.
- [5] The respondent admits that there is an order for the payment of maintenance as stated above. Running the risk of repeating myself, the respondent further admits that he is in arrears in respect of his maintenance obligation as stated by the applicant. The respondent contends that his failure to adhere to the court order was not mala fide or willful in that he found himself in extreme financial predicament as he is the sole breadwinner and solely responsible for all their three children's tertiary education. He states that he has tried all means possible to rectify the situation but to no avail.

However, he continues to make meaningful payments as his financial position permits. To do so, he sold two of his vehicles, the proceeds of which were paid towards the settlement of the arrears. The respondent states that he has addressed correspondence to the applicant advising her that he is trying to access his pension fund through the Government Employees Pension Fund (GEPF) to liquidate the arrears. His attempts in this regard came to naught due to the 'two pot' system which would have enabled him to access a portion of his pension, had not been gazetted. In furtherance of his attempt to liquidate the arrears, he has put two of his immovable properties on the market for sale, also making an undertaking that the proceeds thereof shall be used to liquidate the amount outstanding. In this regard he undertook to provide the conveyancer with an irrevocable instruction to effect payment directly to the applicant's attorneys on registration of transfer of the full arrears amount owing by him. The respondent advises that he is taking all reasonable steps to liquidate assets to meet the full extent of the arrear amount due to the applicant.

C.

Analysis.

[6] Cameron JA (as he then was)[1]summed up the requirements of contempt of civil proceedings as follows

“1. The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders and survived constitutional

scrutiny in the form of the motion court application adapted to constitutional requirements.

2. The respondent in such proceedings is not an ‘accused person’ but is entitled to analogous protection as are appropriate to motion proceedings.
 3. In particular, the applicant must prove the requirements of contempt (the order; service or notice; non-compliance; willfulness and mala fides beyond reasonable doubt.
 4. But once the applicant has approved the order, service or notice and non-compliance the respondent bears an evidential burden in relation to willfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and mala fides, contempt will have been the established beyond reasonable doubt.
 5. A declarator and other appropriate remedies remain available to a civil applicant on proof on the balance of probabilities.”
- [7] It is common cause that the first three (3) requirements i.e. the order, service or notice and non-compliance with the order dated 13 July 2021 has been established beyond reasonable doubt by the applicant and conceded by the respondent. What remains is whether the order was disobeyed willfully and with mala fides by the respondent. As authoritatively stated above the respondent must establish beyond reasonable doubt that he was not in willful default of the court order and did not do so with mala fides.
- [8] The submission by the applicant is that the respondent has dismally failed to discharge the evidential burden that rested in him to disprove willfulness and mala fides. The applicant further places reliance on the judgment of my brother Lowe J in an application in terms of Rule 43(6) to disprove the assertion by the respondent that he cannot afford to pay the maintenance ordered by the court and to liquidate the arrears. Starting with the latter submission, Lowe J did not decide whether the respondent had sufficient cash to pay for the maintenance. Two issues served before him namely, (a) an application for further contribution towards the applicant’s costs of litigation, and (b) an application by the respondent to rescind the order by Gqamane J in terms of Rule 46(6). The application therefore before Lowe J, is distinguishable from the current application. In resolving the issue, Lowe J said the following about the affordability of the respondent.

“50. The fact of the matter is that whilst the respondent complains that his financial position has deteriorated, and that his income is insufficient to meet his expenses by a considerable margin, what he does not appreciate is that there are a considerable number of immovable properties either in his name, or in his and the applicant's name jointly, of which he is essentially in control,

which would enable him without difficulty to meet whatever claim is reasonable as to a contribution to costs, having regard to the equity today even after deduction of bond indebtedness.

[9] This is the contention proffered by the respondent in that the applicant is not prepared to come on board in assisting him to dispose some of the properties to meet the maintenance demands. I am not in the list deciding the issue except to say there is such an averment by the respondent.

[10] As stated in the authorities cited above; it is incumbent upon the respondent to discharge the evidential burden resting upon him as to his willingness to comply with the order. Further, it is for the respondent to establish that his non-compliance with the order was not mala fides, in other words, done with malicious intent.

[11] The SCA in Fakie[2] the court said the following about the test;

“10. These requirements – that the refusal to obey should be both wilful 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.¹⁵ Honest belief that non-compliance is justified or proper is incompatible with that intent.” (Footnotes omitted)

[12] As adumbrated above, the respondent cites instances where he tried to purge his contempt by, for example, selling his two motor vehicles, trying to access his pension fund, putting two of his properties on the market for sale, approaching standard bank to register a new bond on any of the properties to no avail. He attached documentary proof, which was sent to the plaintiff's attorneys, to substantiate his claims by annexing annexures “NA7 to NA11” respectively.

[13] The applicant neither denies nor deals with the issue of selling the two motor vehicles. Further, the issue of access to the pension fund is not denied by the applicant except to say that she was not going to be party to any court order granting access to the respondent pension fund with GEPEF. In essence that indicates that the applicant was not willing to assist in accessing the pension fund to liquidate the maintenance arrears. In respect of the denial of a new bond by Standard Bank, the applicant denies knowledge of that except to say that the correspondence attached was illegible. The applicant does not dispute the fact that two properties have been placed on the market as the correspondence indicated except to say nothing indicates that the properties are on market based on the correspondence from Just Properties which is an estate agent. The latter concern by the applicant should be viewed in

the light of the undertaking by the respondent that the properties will be sold, and the conveyancer will be given instructions to pay the proceeds thereof to the applicant's attorneys. The correspondence was attached merely to establish the values of the properties as the contents so reveal.

[14] Gleaning from the efforts made by the respondent in attempting to sell his properties and collecting money to settle the maintenance arrears it cannot be said that the latter did not make a concerted effort to pay his contempt. It is further so that the respondent cannot be said to have been willful and mala fides in not abiding with the court order dated 13 July 2021. I cannot even find that the steps taken and undertaken by the respondent and not denied by the applicant are unreasonable in the circumstances. It is my finding that the respondent has discharged the evidential burden bestowed upon him to prove that he did not willfully and with mala fides disobeyed the said court order.

[15] I find it difficult based on the papers and the submissions made by counsel as to exactly how much the respondent is in arrears with his maintenance. As stated above, the amount was said to be R88 000. 00 and it later was amended to be R294 500.00. I shall work on the assumption that the latter amount is the correct one. In the event I am wrong, the trial court shall well vest to deal and revisit the order in this regard. I consider it appropriate

that the issue of the costs of this application be held over until the end of the divorce proceedings.

[16] Consequently, I make the following order:

1. The application to hold the respondent in contempt of the order of this court dated July 2021 is dismissed.
2. The respondent is ordered to pay an amount of R30 000,00 monthly, on or before the seventh (7) day of each month until the arrears amounting R294 500,00 are paid.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances

For the Applicant

: Bukky Olowookorum

Instructed by

: BUKKY OLOWOOKORUN ATTORNEYS

For the Respondent

: Adv Nepgen SC

Instructed by:

: JOYZEL OBBES INC.

Date heard

: 20 June 2024

Judgment

delivered

: 26 November 2024

- [1] Fakie NO v CCII Systems (PTY) LTD 2006(4) SA 326 (SCA) at para 42. Fakie was confirmed by the Constitutional Court in Pheko and Another v Ekuruleni City 2005(5) SA 600 at para 36)
- [2] “9.The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide’.¹² 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.¹³ Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).¹⁴

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