

SOUTH AFRICA / JUDGMENT

S.F.S. v A.J.S (11676/2018) [2023] ZAGPJHC 1142 (11 October 2023)

[2023] ZAGPJHC 1142

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

11676/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 11676/2018

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED:

YES/NO

DATE:

11/10/2023

In

the matter between:

S[...],

S[...] F[...]

Applicant

and

S[...],

A[...] J[...]

First

Respondent

JUDGMENT

Nkutha-Nkontwana J:

Background

[1] In this matter the Applicant has approached the court by way of urgency, seeking an order in the following:

“1. Enrolling this application as an urgent application and that the Rules relating to the forms, notices and time periods be dispensed with to the extent necessary in terms of Rule 6(12) of the Rules of the above Honourable Court;

2. The Respondent, A[...] J[...] S[...], is held in contempt of the Court orders granted on 29 June 2018 by Mokose AJ and on 15 October 2021 by Windell J, under case number 11676/2018;
3. The Respondent is to pay the Applicant the arrear maintenance and related expenses totalling the sum of R264 639.00, within 48 (forty-eight) hours of the granting of this order;
4. A warrant of arrest be authorised and issued for the arrest of the Respondent by the Sheriff of the Court operating within the jurisdiction of the place where the Respondent resides and/or is found, and committed to prison for a period of 6 (six) months, alternatively, that the committal be suspended provided that the Respondent complies with prayer 3 above;
5. Costs on the attorney client scale;
6. Further and/or alternative relief.”[1]

[2] It is common cause that the parties are involved in an acrimonious divorce and are married in community of property. On 29 June 2018, Mokose AJ made the following Rule 43 of the Uniform Rules:

“1. The Respondent is ordered to pay maintenance in respect of the Applicant and the two children as follows:

1.1 In the sum of R30 000.00 (thirty thousand rand) per month, payable to the Applicant into a bank account nominated by her from time to time by email, on or before the first day of every month, commencing in the month following the date of the Court Order.

1.2 The Applicant and the children may continue to take groceries, including meat, fish, pasta, milk and tinned foods, as reasonably required, from the family business supermarket, R[...] D[...] Fisheries and Butchery, every month.

1.3 Payment to the relevant supplier and/or creditor, of the following direct expenses per month:

1.3.4 Necessary and reasonable swimming pool and home maintenance for the matrimonial home;

1.3.5 DSTV on the current membership level for the matrimonial home;

1.4 Payment to the relevant supplier and/or creditor, of the following direct expenses per month, up to the amount specified per expense:

1.4.1 Gardener; and

1.4.2 Cellphone accounts for the Applicant, C[...] and A[...], up to an amount of R2 100,00 (two thousand one hundred rand).

1.5 By retaining the Applicant and the two children as registered dependants on his current medical aid scheme, at his costs, and, but for the costs associated with and/or arising from the Applicant's cancer treatment, by payment of all necessary and reasonable excess medical expenses not covered by medical aid for the family.”[2]

[3] Paragraph 1.2 of the Order granted by Mokose AJ was subsequently substituted by the order by Windell J, dated 15 October 2021 as follows:

“The Respondent is ordered to pay the Applicant the sum of R7 000.00 per month for groceries, which is in addition to the cash amount referred to in paragraph 1.1, such payment to be made on the 15th day of each and every month commencing from November 2021.”[3]

[4] The Applicant contends that the Respondent is in contempt of the Order granted by Makose AJ, as amended by the Order granted by Windell J (Rule 43 Order). This is the second contempt application against the Respondent. The first contempt application served before Tshombe AJ on 20 June 2023. The Respondent was accused of contemptuous refusal to make payment of the utility charges in respect of the former matrimonial home in which the Applicant resides. He was found to be in contempt and ordered to make payment of the arrear amounts owed to the City of Ekurhuleni Metropolitan Municipality with a punitive costs order.[4] It would seem that the applicant has subsequently purged the above contempt.

[5] The Applicant contends that the arrear amounts the respondent is obliged to pay in terms of a Rule 43 Order equal to R264 639.00 for the period between December 2022 to September 2023 which comprises:

[1]

[2]

[3]

[4]

[5]

[5.1] R110 997.00 in respect of the cash maintenance and grocery allowance;

[5.2] R25 891.00 in respect of swimming pool and home maintenance expenses;

[5.3] R20 700.00 in respect of the gardener's wages;

[5.4] R11 140.00 in respect of cell phone accounts;

[5.5] R47 143.00 in respect of medical expenses for the children (When the Rule 43 Order was granted, C[...], who was a university student and A[...] who was school going);

[5.6] R48 768.00 in respect of the applicant's medical costs.

[6] It is common cause that C[...] is now an independent adult and married but still lives with the applicant in the matrimonial residence. While A[...] is a student at Stellenbosch university. The Respondent is blatantly refusing to pay for A[...]’s

university fees because they are not part of the Rule 43 Order, so he contends. As such, the applicant contends that she has to use whatever maintenance and loans from family members to pay for A[...]’s rental of R8300,00 and allowance of R6000,00, and often

cannot do so. A[...]’s university fees are outstanding by sum of R60 951,20 and if not paid, she will not graduate this year.

[7] The Applicant is totally dependent on the Respondent for maintenance. Her ABSA bank account statement of 7 September 2023 shows a balance of R106.74. She also has health issues which include auto-immune diseases, namely Rheumatoid arthritis and Hashimoto disease; she recently had a full knee replacement on 16 February 2023, being the second knee replacement operation in 10 months; and compressed spine fractures due to osteoporosis and osteopenia of the bones which cause her constant chronic pain. At the time that the Rule 43 Order was granted she suffered aggressive HER2 positive breast cancer for which she had chemotherapy and radiation treatments as well as undergoing a double mastectomy in 2018. Yet, the Respondent is refusing to pay her medical expenses per the Rule 43 Order.

[8] The Applicant has demonstrated that she does not have the means to litigate and as such tried to obviate same by sending e-mails with schedules of the arrears that were due and payable per the Rule 43 Order to the Respondent through his attorney of record, Mr Vardakos, but to no avail. Mr Vardakos has been on record since October 2020 and conceded having received the communication from the Applicant but either did not attend to it because he was traveling abroad or was busy with other matters, so he submitted.

Urgency

[9] The Respondent is obstinately castigating the Applicant for bringing this application on an urgent basis. The basis for taking issue with urgency of the matter is that the Applicant ought to have availed herself to alternative remedies in a form of round table discussion, alternatively, by issuing a writ of execution.

[10] Clearly, the Respondent's contention is founded in oblivion as it is negated by the history of the litigation between the parties and concession that their relationship is obviously defined by rancour. While it is conceded that, a failure to pay maintenance entitles an applicant to issue a warrant of execution immediately, as mentioned elsewhere in this judgment, the Applicant's

writ of execution in relation to the arrears up until 22 January 2022 has been met with serious opposition by the Respondent.

[11] Likewise, to impugn that the Applicant failed to avail herself to a round table discussion to deliberate on the contents of the schedules and invoices detailing the computation of the amount in arrears is untenable. Mr Vardakos conceded that the Respondent has never looked at these schedules even after receiving the Applicant's founding papers in this application. The reason that was given from the bar by Mr Vardakos for the Respondent's remiss conduct is that he is a director and his position occupies him seven days in a week.

[12] Clearly, the Respondent is not a man of straw but hardworking business man with many assets including some which are abroad, as contended by the Applicant. Yet, he is a repeated contemnor who has deliberately frustrated the ordinary enforcement of the Rule 43 Order. As a result, there is an accumulation of significant arrears which include monies payable for medical care.

[13] The Respondent's contention that the Applicant should continue depleting her assets and/or live on borrowed funds pending the final determination of the Rule 43(6) application is flawed. He seems to forget that they are still married and as such he cannot divest himself from the duty to maintain the Applicant. Most importantly, the Rule 43 Order is binding and must be honoured until it is varied or discharged.

[14] Accordingly, I am satisfied that the matter is urgent and I have to deal with it as such.

Contempt

[15] Tritely, in contempt proceedings, the Applicant bears the onus to prove, beyond reasonable doubt, the rudiments of contempt which are: i) existence of an order; ii) service or notice of the order; iii) non-compliance with the order; and iv) wilfulness and mala fides.[5] However, the Respondent bears an evidential burden in relation to wilfulness and mala fides.[6]

[16] In the present instance, the Respondent concedes the existence of the order and in fact he is seeking to vary it in terms of the Rule 43(6). The main issue for determination is, therefore, whether his conduct is wilful and mala fide.

[17] As mentioned above, the Respondent is a frequent contemnor. The committal in terms of the first contempt order was suspended on the condition that he purges the contempt, which he did. Even so, the Respondent persists with his blatant disdain for the Rule 43 Order.

[18] The Respondent has made bald averments in respect of his ability to honour the Rule 43 Order. Despite his allegation that he is employed by his businesses, he has failed to open up to this Court about the details of his employment, proof of his earning, tax deduction, etc. He also expects this court to accept his mere say so that he previously used loans from his companies to meet his

obligations per the Rule 43 Order as he failed to provide proof in a form of loan agreements or loan account or bank statements.

Curiously, even the amount of R20 000 which he continues to pay is cash deposited into the Applicants Absa bank account.

[19] Since it is the Respondent that seeks to excuse his contempt, he ought to have provided this court with comprehensive information of his financial position but dismally failed.

[20] The applicant contends that the snail pace in which the Respondent prosecuting the Rule 43(6) and lull in attending to his opposition of the Applicant's writ of execution is a stratagem to outlitigate her as she cannot afford to litigate at each and every turn. I agree. The applicant seems to hold a fallacious view that he can litigate at his leisure, be in court as and when he has money or at the convenience of his attorney.

[21] It is well accepted that all court orders, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside.[7] It is a constitutional imperative for effectiveness and legitimacy of the judicial system.[8] In *Bannatyne v Bannatyne* (Commission for Gender Equality, as Amicus Curiae)[9], the Constitution Court considered the importance of maintenance obligations and the duty of courts to ensure that there is compliance

and made the following observations:

"Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law." (Own emphasis)

Conclusion

[22] In all the circumstances, the Respondent has failed to discharge the evidentiary burden in showing that his default was not wilful and mala fide. Moreover, the wilfulness and male fides have been shown to be beyond reasonable doubt. Since the Respondent is a repeated contemnor, there is no reason why he should not be committed to imprisonment.

Order

[23] I accordingly make the following order:

1. The application is heard as a matter of urgency and that the Rules relating to time periods be dispensed with in terms of Rule 6(12) of the Rules of the above Honourable Court;
2. The Respondent, A[...] J[...] S[...] is declared in contempt of the Court orders granted on 29 June 2018 by Mokose AJ and on 15 October 2021 by Windell J, under case number 11676 / 2018;
3. The Respondent is hereby committed to imprisonment for a period of 6 months which shall be suspended for a period of one (1) year on the following conditions:
 - 3.1 The respondent pays to the Applicant arrear maintenance and related expenses totalling the sum of R274 639.00 within three (3) days from date of this order.
 - 3.2 The respondent complies with his obligations set out in the Court Orders granted by Mokose AJ and on 15 October 2021 by Windell J, under case number 11676 / 2018.
4. The Respondent is ordered to pay the costs of this application on the attorney and client scale.

P Nkutha-Nkontwana J

JUDGE OF THE HIGH COURT

JOHANNESBURG

Heard: 05 October 2023

Judgment

handed down: 11 October 2023

Appearances:

For the applicant: Adv P Ternet

Instructed by: Kim Meikle Attorneys

For the first respondent: Mr Vardakos

Instructed by: Vardakos Attorneys

[1] See Notice of Motion, second urgent application pp 010-1 and 010-2.

[2] See: annexure "SEQ2".

[3] See annexure "SEQ3".

[4] Se: annexure "SEQ1".

[5] Fakie NO v CCII Systems (Pty) Ltd

[2006] ZASCA 52; 2006

- (4) SA 326 (SCA) at 22; Pheko and Others v Ekurhuleni City 2015
- (5) SA 600 (CC).
- [6] Matjhabeng Local Municipality v Eskom Holdings Limited and Others 2018
- (1) SA 1 (CC).
- [7] Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others 2021
- (5) SA 327 (CC) at 59.
- [8] Id at para 60.
- [9]
- [2002] ZACC 31; 2003
- (2) SA 363 (CC) at 27.
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