

SOUTH AFRICA / JUDGMENT

S.L v A.C (Reasons) (2024/143281) [2025] ZAWCHC 212 (21 May 2025)

[2025] ZAWCHC 212

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

2024/143281

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no.: 2024-143281

In the matter between:

S[...] L[...]

Applicant

and

A[...] C[...]

Respondent

REASONS DELIVERED ON 21 MAY 2025

VAN ZYL AJ:

1. The parties to these proceedings were married on 27 April 2009 under Shariah law. They have two minor children. Their civil marriage still subsists, albeit on a ruined foundation.
2. On 17 January 2025 I granted the following orders in the urgent

court:

- 2.1. The applicant's non-compliance with the rules of this Court relating to forms and service is condoned, and the application to hold the respondent in contempt of court is heard as one of urgency in terms of Rule 6(12).
- 2.2. The respondent is declared to be in contempt of the order granted on 31 May 2021 under case number 5440/2021 (per the Honourable Justice Allie) pursuant to the provisions of Rule 43.
- 2.3. The respondent is sentenced to 240 (two hundred and forty) hours of periodical imprisonment over weekends from 18:00 on Friday until 06:00 on Monday until such time as the stipulated number of hours has been reached.
- 2.4. The sentence set out in paragraph [2.3] is suspended on condition that the respondent:
 - 2.4.1. Comply with the Rule 43 order by paying the arrear amount owing to the applicant in the sum of R16 000,00 on or before 17:00 on Monday, 20 January 2025; and
 - 2.4.2. Comply with terms of the Rule 43 order in the future.
- 2.5. In the event of the respondent failing to comply with the provisions of paragraph [2.4], the applicant shall be entitled to apply on the same papers, duly amplified if necessary and on notice to the respondent, for an order uplifting the suspension of the sentence and for a warrant of arrest to be issued for the respondent's committal.
- 2.6. The respondent's counter-application is dismissed.
- 2.7. The respondent shall pay the costs of the contempt application and the counter-application on the scale as between attorney and client.
3. These are, briefly, the reasons for the grant of these orders.

The contempt application

4. The applicant launched a contempt application against the respondent after the latter had failed to pay certain expenses arising from an order granted on 31 May 2021 pursuant to the provisions of Rule 43.[1] The orders relevant to these proceedings were that the respondent was to pay the applicant's and children's monthly rental to a maximum of R26 000 per month. He was also directed to pay the applicant's and children's monthly DSTV/Multichoice, Netflix, internet/Wi-Fi subscription fee, yearly TV license costs, and the applicant's monthly cell phone costs.
5. The unpaid expenses giving rise to the contempt application consisted of two months' rental in respect of the applicants' and the minor children's residence (being the rental owing for November 2024 and December 2024 in the total sum of R16 000,00) as well as various additional expenses payable in terms of the order for the period July to October 2024 (in the total sum of R27 129,13). The applicant accordingly claimed maintenance arrears in the sum of R43 129,13.

6. On the day of the hearing, I was informed that the respondent had made payment of the additional expenses the previous day, albeit clearly grudgingly if regard is had to the content of his answering affidavit. The amounts owing in respect of rental remained unpaid.
7. In terms of Rule 43 order, the respondent was to pay R52 860,00 per month for cash maintenance, which was reduced to R39 360.00 from 1 August 2021 provided that the respondent paid the applicant's rental up to a maximum of R26 000,00 per month.
8. The applicant resided in her deceased sister's home. Although she was her sister's heir, the applicant did not yet own this property, and had to pay R8 000,00 per month towards the rental of the property directly to the deceased estate.
9. The respondent denied that any rental was payable, arguing that the applicant could reside there for free because the property would eventually be hers anyway. He accused the applicant of trying to extract more money from him under the pretence of having to pay rental. He therefore refused to contribute towards this rental, despite being obliged to do so in terms of the Rule 43 order.
10. I did not regard the respondent's argument as having merit. The executrix of the deceased estate confirmed on affidavit that the rental of R8 000,00 was payable. The attorneys representing the estate also confirmed what the situation was. The applicant, despite being her sister's heir, was not entitled simply to treat the property as her own before the estate had been wound up. The estate had to pay expenses in respect of the property, and there was nothing underhand in it requiring rental from the applicant for the latter and the children to have the use of the house.
11. I do not have to dwell extensively on the applicable legal principles. Contempt of court, in the present context, has been defined as "the deliberate, intentional (i e wilful), disobedience of an order granted by a court of competent jurisdiction".[2] Wilfulness is an essential element of the act or omission alleged to constitute contempt.[3] In addition to the element of wilfulness, there must be an element of mala fides.[4] Once it is shown that the order was granted (and served on or otherwise came to the notice of the respondent) and that the respondent disobeyed or neglected to comply with it, both wilfulness and mala fides will be inferred.[5] Thus, once the applicant has proved the order, service or notice, and non-compliance, an evidentiary burden rests upon the respondent in relation to wilfulness and mala fides, to advance evidence that establishes a reasonable doubt as to whether non-compliance with the order was wilful and mala fide.[6]

12. Even though the respondent's conduct may have been wilful, he may still escape liability if he can show that he was bona fide in his disobedience. Where he has genuinely tried to carry out the order and has failed through no fault of his own, or has been unable but not unwilling (for example, by reason of poverty), to carry out the order, proceedings for committal will fail.[7]
13. Maintenance arrears payable under an order of court may also be recovered either by way of contempt proceedings.[8] In relation to the applicant's claim, the following is relevant in relation to what the parties should place before the court:

"A claim for arrear maintenance under a Court's order is exigable without any averment or proof that the plaintiff had, in order to maintain herself, incurred debts during the period in question and notwithstanding the fact that she earned, or could have earned, an income from employment ... Therefore where there has been a failure to pay maintenance and such payments have fallen into

arrears, the aggrieved party is fully entitled to obtain a writ and have it executed and, because failure to pay a maintenance instalment is also prima facie tantamount to a contempt of court, the onus would rest squarely on the defaulter to establish circumstances warranting the exercise of the Court's discretion to stay the writ

Execution should therefore generally be allowed unless the applicant for a stay shows that real and substantial justice requires that such a stay should be granted ...".[9]

14. In the present matter there was no issue as regards the grant of the order and the fact that it had come to the respondent's attention. It was common cause that he had failed to comply with its terms. The question was whether such failure was wilful and mala fide.
15. The respondent made no secret of the fact that he was dissatisfied with the terms of the Rule 43 order. From the papers it seemed that this has been the case since the grant of the order. He had faced a previous contempt application for non-payment of the Rule 43 order, in which an order was granted against him on 25 October 2024.[10]
16. In *HG v AG*[11] it was held:

"Non-compliance with a court order by a person who has knowledge of it is prima facie contemptuous. It is not open to a person to whom a court order is directed to decide the degree to which compliance will be made. If a time for compliance forms part of the order, it must be respected faithfully, not on a 'more or less' basis. Non-compliance of any degree is never a 'triviality'. If it cannot be respectably explained, it is an act of contempt, and liable to be punished as such. Wilful or reckless late payment does not purge contempt; at most it may be mitigatory."

17. The respondent was entitled to apply for a variation of the maintenance order in the event of material change in his circumstances. He had not done so. Until the order was varied, he remained liable in terms thereof. On the evidence before me there was no suggestion that he was unable to afford the rental payments; the contrary appears from the papers.

18. This Court is enjoined to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their maintenance obligations. Attempts to evade maintenance orders relating to minor children are particularly egregious as it undermines the best interests of the child principle:[12]

“Compliance with court orders is always important. There is a particular scourge in this country of spouses, particularly husbands, failing to pay judicially ordered maintenance.”

19. The explanation for the respondent’s non-compliance is not satisfactory; they merely serve to convey the impression that he is so angry at the applicant that he would take every possible opportunity of thwarting her. The respondent deliberately did not pay, seeking to justify his conduct with a strained argument. On the facts before me there is no reasonable doubt that the respondent is in contempt of the Rule 43 order.
20. I regarded a short period of periodical imprisonment in the event of the respondent not paying the arrears as appropriate, suspended in order to give the respondent the opportunity to make payment of the arrears still owing.

The counter-application for the appointment of a curator ad litem

21. The respondent launched a counter-application for the appointment of a curator ad litem to the parties’ two minor children. The counter-application was delivered together with his answering papers in the contempt application. It was brought on an urgent basis, to be heard together with the contempt application.
22. There was a paucity of information on the papers as to why such an appointment was necessary, and what the powers and role of the curator ad litem would be in the context of the parties’ ongoing litigation. At the time, there was an arrangement in place in relation to the children’s care and contact. The children were primarily in the applicant’s care. The respondent’s contention that the children were being neglected and exposed to dubious influences was speculative, and not supported by any evidence that would raise a red flag in relation to the children’s well-being. He cast aspersions on the applicant’s lifestyle, which he clearly disapproved of, but there was no evidence that the children were being harmed by the applicant’s lifestyle choices. Notably, the relief the respondent sought in his urgent application did not include a request for the variation of the parties’ arrangements in respect of the minor children’s care.
23. The parties are very much at loggerheads, and the affidavits in these proceedings were brimful of invective. The aggression was palpable at the hearing. This is an unfortunate situation, because it bodes ill for any possibility of resolving the disputes in a civil manner. The state of affairs cannot be a happy one for the children. The relief sought in the counter-application would not, without proper substantiation, investigation and consideration, ameliorate the situation.
24. The respondent faced another hurdle. This Court stated as follows in CN v TN:[13]:

“... Ordinarily, courts should not allow respondents such as the present one to be heard until such time that their/his contempt has been purged. It comes as no surprise at all that the applicant invites me not to allow the respondent to be heard until such time that he purges his contempt. ... It has been held authoritatively that this approach is especially of importance in matters involving the best interests of the minor children. ... Indeed the respondent’s failure to pay in terms of the court order has clearly left the minor children of the parties without maintenance support. I view the failure to pay maintenance in a very serious light. In Kotze v Kotze supra the judge cited the following dicta of Romer, L. J. in Hadkinson v Hadkinson 1952

(2) A.E.R. at page 571:

‘Disregard of an order of the court is a matter of sufficient gravity, whatever the order might be. Where, however, the order relates to a child, the court is, or should be, adamant on its due observance. Such an order is made in the interests of the welfare of the child and the court will not tolerate any interference with or disregard of its decisions on these matters.’”

25. In the light of my finding that the respondent was in contempt of the Rule 43 order, the counter-application should thus not have been entertained.
26. Be that as it may, I did consider the relief sought by the respondent. Counsel for the applicant argued that the counter-application had been born out of the respondent’s need to control the funds paid to the applicant: if he could gain control over the children, he could control their financial care and would not have to pay anything to the applicant in that regard. This contention was vehemently disputed by the respondent’s counsel. Whatever the case, it was not necessary to speculate. The respondent’s counter-application simply did not, in my view, make out a proper case for the relief sought, and certainly not on an urgent basis.

Costs

27. The applicant was the successful party, and there was no reason to depart from the general rule that costs follow the event. The failure to comply with the terms of the Rule 43 order constitutes blameworthy conduct that justifies a punitive costs order. That is the usual order granted in matters concerning contempt.

Order

28. For these reasons, I granted the order referred to at the outset.

P. S. VAN ZYL

Acting Judge of the High Court

Appearances:

For the applicant: Ms L. Bezuidenhout, instructed by Herold Gie Attorneys

For the respondent: Mr M. Holland, instructed by Parkar Attorneys Inc.

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- [1] Under case number 5440/2021.
- [2] Consolidated Fish Distributors (Pty) Ltd v Zive 1968
- (2) SA 517 (C) at 522B–D.
- [3] Culverwell v Beira 1992
- (4) SA 490 (W) at 493D–E.
- [4] Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004
- (2) SA 611 (SCA) at 621E.
- [5]
- Townsend-Turner v Morrow 2004
- (2) SA 32 (C) at 49C–D.
- [6] Fakie N.O. v CCII Systems (Pty) Ltd and another 2006 (SCA) paras 42-43.
- [7] Matjhabeng Local Municipality v Eskom Holdings Ltd and others; Mkhonto and others v Compensation Solutions (Pty) Ltd 2018
- (1) SA 1 (CC) at paras 85-88.
- [8] Strime v Strime 1983
- (4) SA 850 (C) at 852C.
- [9] Strime supra at 852D-G.
- [10] The order was granted by the Honourable Justice Nuku under case number 20788/2024. It seems that the respondent is also contemptuous of an order granted under case number 8030/2021 by the Honourable Ms Justice Baartman who directed the respondent on 17 October 2024 to deliver his reply to the applicant's Rule 35(3) notice in the divorce action – a directive which he has ignored.
- [11] [2020] ZAWCHC 7 (10 February 2020) para 12. Emphasis supplied.
- [12] KPT and others v APT [2020] ZAWCHC 110 (2 October 2020) para 95; and see Samuels v Salie-Hlophe 2023 JDR 1119 (SCA) para 18.
- [13] [2017] ZAWCHC 63 (31 May 2017) para 3. Emphasis supplied.

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