

SOUTH AFRICA / JUDGMENT

T.A.M-W v C.M.M (2025/030666)

[2025] ZAWCHC 217 (23 May 2025)

[2025] ZAWCHC 217**COURT**

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

2025/030666

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****Case No: 2025-030666****In**

the matter between:

T[...] A[...]

M[...] -W[...]

Applicant

and

C[...] M[...]

M[...]

Respondent

Court: Justice J

Cloete

Heard: 22 May 2025

Delivered

electronically : 23 May 2025

JUDGMENT**CLOETE J:**

- [1] The applicant, who is engaged in divorce proceedings against the respondent in this court, applies to have the respondent held in contempt of certain terms of an order granted by agreement between the parties on 14 March 2025 in respect of the main application referred to hereunder ('the order') and related relief. The respondent has filed a notice of opposition, but no answering affidavit.
- [2] On the morning of the hearing (22 May 2025) the respondent applied for a postponement for a short period for the purpose of delivering an answering affidavit. The affidavit to which he deposed in support thereof mostly contained what purports to be an explanation for the delay in delivering his answering affidavit. In short, he asserted that he did not understand what was required of him, and mostly blamed his attorney of record in the main application as well as that attorney's assistant for allegedly failing to advise him properly about what he was required to do. Although that attorney still represents him in the main application (but not in these contempt proceedings) the respondent did not annex confirmatory affidavits by that attorney or his assistant confirming his allegations. They thus constitute impermissible hearsay evidence.
- [3] Tellingly however, and contrary to clear Constitutional Court authority^[1] (the highest court in South Africa), and despite the respondent having devoted 21 paragraphs to his reasons for requesting a postponement, nowhere did he provide even a brief outline of his defence to the contempt application itself, save for a bare denial. What is more, his allegation at paragraph 7 of his affidavit, namely that he has "filed a counter application under the Hague Convention in the Swiss courts" was demonstrated to be palpably false, as was confirmed in writing by the applicant's Swiss attorney in an email transmitted at 11h04 on 22 May 2025 (thus less than 30 minutes before the hearing commenced).
- [4] The respondent also submitted there would be no prejudice to the applicant and the children should a postponement be granted. In my view the prejudice to them is manifest as will be shown later in this judgment. The respondent did not even make a tender for the wasted costs should a postponement be granted. Having considered the postponement application and the submissions of counsel, I was persuaded that it had no merit and was nothing short of a delaying tactic on the part of the respondent. That application was thus refused with costs to follow the result in the contempt application.
- [5] The contempt application is brought as one of urgency, given its nature^[2] and that it impacts directly on the best interests of the two minor children born of the marriage, a son who is four years old and a daughter who is two years old.
- [6] The paragraphs of the order relevant for present purposes are as follows:

6.1 Paragraph 7, in which it was recorded that the applicant has appointed Mr Bernard Altman, a clinical psychologist (“Altman”) to conduct a care and contact assessment of the children, including making a report with recommendations to this court as to whether it better serves the interests of the children to reside in either of South Africa or Switzerland;

6.2 Paragraph 8, in which the respondent agreed to participate in the assessment by Altman, and the parties were accordingly directed to cooperate with Altman’s assessment (despite the respondent reserving his rights and placing on record that he did not agree that such assessment was appropriate);

6.3 Paragraph 9, which spelt out the steps Altman was authorized to take for purposes of his assessment and completion of his report, and which importantly included conducting interviews, psychological assessments and clinical observations of the children on reasonable notice, and observing the children interacting with the applicant and the respondent in such environment as he may determine (Altman resides in Cape Town, South Africa and conducts his practice in Cape Town); and

6.4 Paragraph 11, in which the respondent, amongst other things, consented to sign all documentation required to facilitate the children travelling between South Africa and Switzerland pending finalization of the main application launched by the applicant simultaneously with the divorce action for, inter alia, virtually the same relief as that contained in the order (Part A) and subsequently for the court to make an order incorporating the recommendations made by Altman and the Family Advocate (Part B). The Family Advocate is also the Central Authority for the Republic of South Africa for purposes of the Hague Convention on the Civil Aspects of International Child Abduction. In this regard, the respondent also launched a counter application in South Africa on 4 April 2025 (thus subsequent to the granting of the order) in terms of article 12 of the Hague Convention, for the return of the children to Switzerland on the alleged basis they had been unlawfully retained by the applicant in this country (which is disputed by the applicant).

[7] On Friday, 18 April 2025, after the order was granted, the applicant and the children travelled to Switzerland at the request of the respondent for the children to spend the Easter holidays with him. Prior thereto, and on 15 April 2025, the

respondent gave a written undertaking that he granted permission for the children to travel back to South Africa on 28 April 2025. Also prior thereto, the respondent provided the applicant with a “Declaration of Consent for Travel with Minors” in

respect of both children which confirms that they could depart from Switzerland to South Africa on 26 April 2025.

[8] The applicant’s evidence is that on Friday, 25 April 2025, she noticed the children’s passports were missing from her handbag where she had stored them for safekeeping, although her own passport was still there. The respondent denied having removed them from her possession. The applicant requested the respondent to assist her in obtaining emergency

passports for the children at the airport on the following morning, Saturday, 26 April 2025. He refused, informing her that he had decided the children would remain in Switzerland. When the applicant attended at the airport in Zürich to try to obtain emergency passports for the children (which the applicant states would have taken 30 minutes with the consent of the respondent) she discovered that he had already informed the police he would not furnish consent. In fact the respondent telephoned the applicant to check that the authorities had refused to furnish her with emergency passports for the children.

- [9] The respondent has since refused to permit the children to return to South Africa and has also refused to cooperate with the applicant to procure their required travel documents, even after demands were made by both the applicant's Swiss and South African attorneys. Indeed, and through his Swiss attorney, he has adopted the startling attitude that because he is of the view that the children are habitually resident in Switzerland, he is therefore entitled to simply ignore the pending proceedings in South Africa (including his own Hague application) and the clear terms of a court order to which he agreed a month earlier. Altman has confirmed in writing that without the children being present in South Africa he is unable to conduct his assessment and complete his court ordered report. The respondent's conduct has also caused the determination of the main application and indeed his own counter application, which were to be heard yesterday, 22 May 2025, to be delayed and frustrated, and the irresistible inference in light of the undisputed facts is that he has done so wilfully.
- [10] At present the applicant and the children are effectively being held to ransom by the respondent in Switzerland. It matters not to this court, as the respondent suggests, that because the children are currently staying with the applicant in Switzerland, there is no prejudice to them. As previously indicated, the prejudice to them is manifest: the children cannot return to South Africa and the applicant will not return without them. These are very young children and their best interests must be respected and protected. During the hearing I was informed by senior counsel for the applicant that she is now being compelled to launch a Hague application in Switzerland as well, no doubt with the attendant emotional toll and additional legal costs.
- [11] It is settled law in South Africa that this court has jurisdiction to hold the respondent in contempt of the order and thus of the court, and that the applicant, if successful, is entitled to an order to the extent to which it can be made effective, even though it may not be possible to do so immediately. This is because at the time the main application was instituted this court had the necessary jurisdiction to make orders in respect of the children, and contempt proceedings are not new proceedings but merely a continuation of proceedings previously instituted: *JC v DC*[3]. In the aforementioned case the court also referred to *Cats v Cats*[4] and *Re D (A Minor)*[5]. In the latter decision the English court found it was empowered to issue an order for the return of a child to its jurisdiction

notwithstanding the fact that the child was no longer in its jurisdiction. The English court further concluded that it was not

pointless to make such an order, given that it would assist the father in foreign proceedings for the return of the child, and that the court would not refuse to assist a parent when the other had acted in defiance of an undertaking voluntarily given to the court.[6] I acknowledge however that an order made by me in the present proceedings for the immediate return of the children to South Africa is not binding on the courts of Switzerland.

[12] It is also settled law in South Africa that for a contempt of court application to succeed, the applicant must demonstrate the following three requirements. First, an order was granted obliging the respondent to do certain things. Second, the respondent received notice of the order. Third, the respondent failed to comply with it. Once the applicant has established these three requirements,

wilfulness and mala fides (bad faith) are presumed and the respondent bears the evidentiary burden to establish reasonable doubt that his non-compliance was not wilful and/or mala fide. Should the respondent fail to discharge that burden, contempt will have been established: Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others[7].

[13] In the present case the applicant has self – evidently met all three requirements and the respondent has not even attempted to discharge the evidentiary burden resting upon him. It follows that the applicant is entitled to the relief sought. As far as costs are concerned, the respondent's behaviour is particularly egregious when regard is had to the fact that he agreed to the terms of the very order which he decided to frustrate and/or ignore, As a mark of the court's displeasure, the applicant is also entitled to the punitive costs order sought, as well as the costs of two counsel (since the respondent himself briefed two counsel for the purpose of the postponement application only).

[14] The following order is made :

1. The matter is declared urgent;
2. The respondent is declared to be unlawfully retaining the parties' two minor children, namely M[...] T[...] M[...] (born on 6 March 2021) and A[...] N[...] M[...] (born on 3 August 2022) in Switzerland in contempt of the order of this court granted by

agreement between the parties under the above case number on 14 March 2025 ("the Order");

3. The respondent is also declared to be in contempt of paragraphs 8, 9 and 11 of the Order;
4. Subject to the jurisdiction of the courts of Switzerland, the children are to be returned to South Africa forthwith, and the respondent is ordered to do all things and sign all documentation necessary to facilitate their return ;
5. In the event of the respondent returning to South Africa, he is sentenced to 30 (thirty) days direct imprisonment, suspended until

finalisation of the main application and counter application pending under the above case number, on the condition that he complies in full with the terms of paragraphs 8, 9 and 11 of the Order;

6. Given that the respondent's contempt of the Order has resulted in the main application and counter application referred to

in paragraph 5 hereof not being able to be determined on the agreed and court ordered hearing date, i.e. 22 May 2025, the main

application and counter application are postponed sine die, with the parties (or either of them upon notice to the other) being given leave to approach the Judge President for permission for the allocation of a special date for hearing. The wasted costs of the postponement referred to in this paragraph shall stand over for later determination as agreed between the parties; and

7. The respondent shall pay the costs of this application and his unsuccessful application for a postponement thereof, on the scale as between attorney and client (and if required by the taxing master, the costs of both senior and junior counsel on scale C).

JUSTICE J CLOETE

For Applicant: Adv L Buikman SC

Adv L Liebenberg

Instructed by: Mr J Loubser of Oosthuizen & Co Inc

For Respondent: Adv R McClarty SC

Adv E Smit

Instructed by: Norman Wink & Stephens

[1] Shilubana and Others v Nwamitwa [2007] ZACC 14; 2007 (5) SA 620 (CC) at para 11

[2] Contempt proceedings are inherently urgent because the vindication of the court's authority is at stake : MDN v SDN (10540/16)

[2020] ZAWCHC] 157 (13 November 2020) at para 6

[3] 2014

(2) SA 138 (C)

[4] 1959

(4) SA 375 (C)

[5] [1992] 1 ALL ER 892

[6] JC v DC at para 30

[7] 2021 (5) SA 327 (CC) at para 37

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