

SOUTH AFRICA / JUDGMENT

W[....] v W[....] (17217/2019) [2020] ZAGPJHC 364 (10 December 2020) [2020] ZAGPJHC 364

COURT

South Gauteng High Court, Johannesburg

BEFORE

ML Senyatsi

CASE / FILE NUMBER

17217/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO:17217/2019

REPORTABLE:NO

OF INTEREST TO

OTHER JUDGES: NO

REVISED

DATE:

10/12/2020

In

matter between:

W[....] H[....]

E[....]

Applicant

And

W[....] C[....]

R[....]

Respondent

JUDGMENT**(URGENT CONTEMPT OF COURT APPLICATION)**

Delivered: This judgment was prepared and authored by Judge ML Senyatsi and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it electronic file of this matter on Case Lines. The date for hand-down is deemed to be 10 December 2020.

SENYATSI J:

- [1] This is the third urgent civil contempt of Court application brought on an urgent basis. The application is opposed by the respondent. The first application which was brought on an urgent basis, was before Mdalana - Mayisela J on 25 June 2020 and was granted. The second urgent application was brought before Fisher J on 3 August 2020 and judgment was granted in favour of the applicant.
- [2] Both contempt applications were related to the Rule 43 order granted by Carelse J on 21 February 2020 in terms of which the respondent was ordered to pay maintenance of R40 000 per month plus other related expenses and costs including a directive that the applicant and the parties two sons, T[...] and R[...] W[...] be permitted to continue residing at [...] The order is provisional pending the final determination of the divorce between the parties and I may add that the order is not appealable.
- [3] At the hearing of this application, the respondent had not paid maintenance for October 2020 and related expenses. The November 2020 payment has at the time of this judgment become due and payable together with the related expenses.
- [4] The previous civil contempt orders directed that the respondent be committed to imprisonment if he failed to make payments as ordered. The respondent issued a counter-application also on an urgent basis. He contends that he is not in wilful default to fulfil his obligations in terms of the existing Rule 43 Order. He slates that since June 2020, and following the order by Mdalana - Mayisela J, has been ordered not to dissipate his assets. This he argues, makes it difficult for him to sell the assets to raise the required amount to fulfil his maintenance obligations. Furthermore, he argues that he has been provisionally sequestrated, the consequence of which is that his must be handed to the trustee who must then deal with the assets. It should be mentioned at this stage that Counsel for the applicant submitted that the applicant is Interviewing In the provisional sequestration as she was not served with the papers.

- [5] The respondent furthermore argues in his counter-application that this contempt of court application should be postponed and the oral evidence should be led as he believes there is a material conflict of facts which cannot be dealt with on papers. The applicant, in opposing the counter-application, states that the applications not urgent and that In any event, the defence raised in the main application is not sustainable as the respondent has not applied for variation of the existing Rule 43 order.
- [6] There is no doubt that the main application Is urgent. The very purpose of a Rule 43 process is to speed up and ensure that the needs of those dependants on the support provider and catered for pending the final determination of the divorce.
- [7] The parties were married to each other on 23 February 1991 and their marriage still subsists. Their marriage regime is out of community of property which excludes accrual system as contained in their ante-nuptial contract. They enjoyed a high standard of living prior to the breakdown of the marriage.
- [8] The applicant filed for divorce during May
2019. The divorce proceedings have not been finalised and are defended by the respondent who filed a counter-action in terms of which he prays for the decree of divorce without a tender for maintenance for the respondent and their two major sons who have a medical condition known Interstitial Cystitis. The applicant contends that the medical condition makes It impossible for their two sons to function normally and therefore they cannot be gainfully employed.
- [9] The respondent applied for an interim maintenance order which was granted during February 2020 in terms of Rule 43. The order arose as a result of the respondent's failure to tender maintenance of the applicant and the two sons.
- [10] The interim maintenance order was not complied with forcing the applicant to obtain a contempt order on 25 June 2020 before, Mdalana-Mayisela J. It should be mentioned that Mdalana- Mayisela J's order also included an anti- dissipation order as the respondent was intent on dissipating some of his assets before the final determination of the divorce. He contended in those proceedings that he wanted to raise money to meet his maintenance obligations.
- [11] The second order not having been complied with, the applicant approached this court for a second contempt order. Fisher J granted the order on 3 August 2020 and ordered the respondents to comply and imposed an imprisonment term in the event of failure to comply. The respondent brought all arrear maintenance up to date, ending September 2020 .
- [12] When he failed to continue with the monthly maintenance payments , this resulted in this third civil contempt application before me.

[13] Before the 3 August 2020 order was complied with or immediately thereafter, the respondent was provisionally sequestered by one of his co-directors who claims that he is owed money. I will show later that the related company that brought the sequestration application is controlled by one person with the interest in the divorce proceedings of the parties.

[14] It should also be remembered that one of the claims the applicant makes in the divorce proceedings, is an order declaring

that a universal partnership exists between the parties and an order that the partnership be dissolved on divorce and that the benefit arising therefrom be shared between the parties.

[15] In the face of the divorce proceedings, the respondent gave a special power of attorney to one Mr Van Zyl ("Van Zyl") his business associate and presumably a friend to draft all papers related to the divorce on behalf of the respondent. This is common course between the parties. It should be stated that Van Zyl is a lay person, over 70 years of age and is knowledgeable in law. The respondent states that his attorney Mr Bruyns ("Bruyns") was "post box" as all papers were drafted by Van Zyl. Fisher J asked for a written explanation from Mr Bruyns about the role of Mr Van Zyl in the divorce. This directive was given on the 11th November 2020 following a divorce judicial case management. It is not surprising that the counter-application is voluminous as it was presumably drafted by Van Zyl. It should also be stated that Van Zyl claims to have stopped drafting the papers during August 2020.

[17] The applicant contends that the respondent is engaged in a stratagem to frustrate the Rule 43 compliance order. I agree with this contention. If regard is had to the use of Van Zyl as the drafter of all divorce papers as well as the various Rule 43 contempt

applications, it is clear to me that Van Zyl has a vested interest in the outcome of the divorce and the efforts of the respondent to frustrate the enforcement of the rights of the applicant. This is borne out by the email exchanges between the respondent, Van Zyl and the other directors in terms of which Van Zyl is praised for frustrating and driving the applicant and her legal team to the wall. The emails are quite revealing to this stratagem.

[18] The respondent has submitted that he is not in wilful default of the court order as he cannot genuinely comply therewith due to the

change in his financial circumstances owing to his unemployment as well as his provisional sequestration. This contention is without

merit as it is not new and has been raised in all the previous contempt applications. The change is financial circumstances is

simply a facade used to avoid making payment.

[19] The so-called unemployment of the respondent is in my view, contrived. The author of the letter that is dated January 2020 is Mr

Van Zyl, who has a vested interest in the divorce proceedings and all contempt applications brought by the applicant. The letter, in any event, was disclosed for the first time in this third contempt application and no the explanation is provided by the respondent, why it was not disclosed in all the previous applications. The so-called unemployment by the respondent Is therefore rejected as a stratagem to avoid fulfilling his maintenance obligations to the applicant and their two major sons.

[20] The respondent furthermore contends that because of his provisional sequestration, he was not

able to deal with his as the trustee was now in charge. During the hearing of the application, I was informed that the applicant had Intervened in the provisional sequestration and that the return date thereof was 26 November 2020.

[21] The provisional sequestration order was argued before Papier J in the Western Cape High Court

sitting in Thembaletu and the applicant was granted leave to intervene and the provisional sequestration order was discharged

extempore on 26 November 2020. As a consequence, I am of the view that the provisional sequestration order was part of the stratagem to frustrate the applicants' attempts to enforce her rights in terms of Rule 43.

[22] It is common cause that the provisional sequestration was only disclosed to the applicant for the first time at the maintenance Court on 24 August 2020. I am of the view that when the respondent brought the maintenance complaint as he did in Gauteng, he was under the impression that once he disclosed the provisional sequestration order to the maintenance officer, the Rule 43 order would be varied. The complaint was only withdrawn once the maintenance officer became aware of Fisher J's judgment. It has not been denied that the respondent did not co-operate with the applicant about the details of his creditors in the provisional sequestration order. What is interesting from the reading of the papers is that the creditor, RBK Batebestuur (Pty) Ltd is a related entity to Mr Pretorius one of the respondents' friends with a keen interest in the divorce proceedings. This so-called provisional sequestration was a veiled attempt by the respondent to avoid complying with the maintenance obligation in terms of Rule 43.

[23] The respondent contends in his papers that there is a material dispute of fact which must be referred to oral evidence. I do not agree with the contention. The purpose of Rule 43 Is to expeditiously and quickly decide the application on the papers. This is to ensure that redress is afforded to the party in need of maintenance pending the determination of the divorce. Referring this application for oral evidence will frustrate the chief purpose of Rule 43.

- [24] The respondent also contends that he has been subjected to the gross injustice by the courts. The contention is without any legal and factual basis. In my respective view, the respondent is engaging in abuse of court process by simply ignoring the order to pay maintenance based on unfounded reasons. He is using every the proverbial trick in the book to avoid payment and this must be stopped.
- [25] When regard is had to the various communications intercepted by the applicant between the respondent and Van Zyl, Reddell and Pretorius and in particular where all four state how Van Zyl: “ ..has driven them (the applicant and her legal representatives) to the extent that they have lost focus and had dropped the ball many times and that you are driving them crazy. Well done. H[....] will be paying for each one of those emails,” it is hard not to see through the veil that these are various strategies to frustrate the applicant and ensure that she does not receive her maintenance in terms of the Rules 43 order.
- [26] I do not doubt that the respondent has embarked on finding every possible excuse to avoid meeting his obligations. In my view, the discharged provisional sequestration order was one of those means considered and orchestrated by the respondent to justify his refusal to comply with the court order to pay maintenance pending the final determination of the divorce proceedings.
- [27] The applicant has clearly set out the manner in which the respondent has sought to diminish and terminate his income stream. This is by getting himself “fired” from the company he controls and even selling his shares for a nominal amount to a company associated with his friends. These steps are in my view contrived and a sham. The decline of the respondent’s Income started since the divorce proceedings and It Is not surprising that this Is now the third contempt of order application.
- [28] Although in his defence the respondent alleges material disputes of facts, he simply either refuses or avoids dealing with the serious allegations against him by the applicant. He has not been able to deal with the uncontested facts on his income but simply denies the averment without offering any explanation. The ever-declining income of the respondent since the commencement of the divorce proceedings is nothing but a scam to avoid paying maintenance.
- [29] The letter by Van Zyl to the respondent and Reddell where Van Zyl accuses them of gross abuse of their positions as directors is nothing but contrived. I say so because from the papers it is clear that Riddell continues to be employed by Spineco as its bookkeeper while only the respondent is relieved of his position as a director and the only one who lost his employment. There is still a good relationship between Van Zyl and the respondent.
- [30] With regards to the report by Ms Ancer (“Ancer”) which is dated 30 August 2020, I find the report not helpful to this court. The report simply suggests that “there was no evidence of malingering and no reason to doubt Mr W[....]’s credibility” . This is of course a repetition of what the respondent has submitted, not only before this court but to all previous courts where the contempt applications were heard. The expert that Ancer is, has had only one

consultation with the respondent and I doubt that she has had ample time to consult with the respondent. As a consequence, it is doubtful how she could have determined that the respondent was remorseful, fearful, suffered hand tremors, depression, discomfort and irritability after one consultation. Ancer did not make any contact with the applicant to at least assess both parties. The respondent offers no explanation as to how he paid the shortfall for the assessment provided by Ancer and how he will afford the recommended treatment.

- [31] The respondent has not addressed his relinquishing his majority 51% shareholding in [...]. It is undisputed that he offloaded 29% of his equity to a Van Zyl for R1.00 each and ceded the balance of his equity to Pretorius. These are the two individuals with an interest in the divorce proceedings between the respondent and the applicant. It is not difficult to see that the disposals are nothing but a sham. They are not arm's length business transactions and cannot in my respectful view, offer refuge to the alleged change in financial circumstances of the respondent.
- [32] When regard is had to the manner that the respondent is litigating, it is clear to me that he has the means and the ability to afford to pay the maintenance as ordered by Carelse J. His failure to adhere to the order is nothing but a complete disdain of the court's authority and respect.
- [33] Therefore I am of the view that the respondent is acting mala fides in failing to meet his maintenance obligations.
- [34] In *Mthimkulu & Others v Mohamed and Others*[1], Classen J stated the requirements of a civil contempt as follows:
- "Civil contempt requires proof beyond a reasonable doubt of*
- (i) the existence of the court order;
 - (ii) service of the order upon the respondent or that the respondent had knowledge thereof;
 - (iii) That non-compliance was wilful and mala fide. The rationale for this requirement is to prevent committal (loss of liberty) to be established preponderously rather than conclusively."
- [35] It is a crime to unlawfully and intentionally disobey a court order.[2] A contempt of court may be adequately defined as an injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated.[3]
- [36] The civil contempt procedure is therefore a valuable and important mechanism for securing compliance with court orders and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

- [37] Once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden concerning wilfulness and mala fides. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt would have been established beyond reasonable doubt.
- [38] I have no doubts, on a full consideration of the evidence before me that the applicant has proven that the respondent's failure to comply with the Rule 43 order for the months of October and November 2020 was wilful and mala fide.
- [39] The reasons advanced by the respondent such as the alleged unemployment, lack of ability to deal with his assets owing to the existing anti-dissipation order, and the discharged provisional are sequestration order are a stratagem to ensure non-compliance with the existing court order. As a consequence, the respondent has failed to adduce evidence that his non-compliance with the order was not wilful or mala fide.
- [40] In regards to the counter-application brought by the respondent, I make the determination that the respondents' counter-application is not urgent. I say so because all that the respondent in the main prays for is a declaratory order that there is a material conflict of facts and that the current contempt order should be postponed sine die pending the determination of the counter-application and that the contempt of court proceedings be stayed until the final

determination

of the dispute and the divorce proceedings. Therefore there is no urgency in the counter-application and consequently, it is struck from the roll with costs on the scale as between attorney and client. The punitive cost order is imposed on the grounds that the respondent is abusing the court process.

- [41] In regards to the costs de bonis propriis against Mr Bruyns, I am of the view that Mr Bruyns has not been given sufficient notice to address this court on why the cost de bonis propriis should not be imposed against him. I am mindful of the fact that there is still a pending explanation to be made to Fisher J on the role of Van Zyl in drafting the necessary papers for the respondent. There has not been evidence led on what his response is on the directive. Consequently, no order will be made against him to pay the costs de bonis propriis.
- [42] The respondent in this instant is engaged in a serious abuse of court process by not complying and honouring the dignity of this court. As a consequence, this court has an adverse view of his behaviour as he is clearly a man of means. An appropriate punitive cost order is therefore justified to be imposed on the main application before this court.

ORDER:

- [43] The following order is made:

[43.1] The application is deemed as urgent and the Rules relating to the forms, notice and time periods are dispensed with, to the extent necessary in terms of Rule 6 (12) of the Rules of this court;

[43.2] The respondent, C[...] R[...] A[...] W[...] Is held in contempt of the court order granted by Carelse J on 21 February 2020 under case number 17217/2019;

[43.3] The respondent Is to pay the following within seven (7) days of the granting of this order;

43.3.1 arrear maintenance pendente lite for the month of October 20 in the sum of R40 000 to the applicant;

43.3.2. The outstanding direct expenses including:

43.3.2.1 the mortgage bond in respect of the [...] matrimonial home for September and October 2020;

43.3.2.2. the [...] levy including security for September and October 2020;

43.3.2.3. the [...] rates, taxes, electricity, refuse and all other municipal levies for September and October 2020, including the amount of R6 071.10 in respect of arrear electricity paid for by the applicant to be reimbursed to the applicant together with the sum of R1300.00 for the pre-paid water charges;

43.3.2.4. maintenance of the swimming pool currently in the sum of R5 704 as per the Lex Pools quotation dated 13 October 2020;

43.3.2.5 the levy including security Landsdowne property management fees in respect of [...] property for October 2020 in the sum of R 2 860.00 plus any interest due and R6132.49;

43.3.2.6 the rates, taxes, water, electricity, refuse and all other municipal levies in respect of the [...] for September and October 2020;

43.3.2.7 maintenance for the [...] property in the sum of R 3 187.44;

43.3.2.8. the DSTV premium bouquet re-installed and the monthly premiums be paid and proof thereof be furnished to the applicant.

43.3.2.9. Telkom, including telephone, ADSL and internet for September and October 2020;

43.3.2.10. the Momentum Health Medical Aid premiums for the applicant and the two major children for October 2020 and excess aid fees due to the applicant in the sum of R2 710.05;

43.3.2.11. household contents insurance and homeowners insurance for September and October 2020;

43.3.2.12. payment of the salary of the domestic helper, Maria Riphinga, that was due on 30 September 2020 to be reimbursed to the applicant

43.3.2.13. refund the applicant the salary of the gardener Collen Mutorinho in the sum of R1 200.00;

43.3.2.14. veterinary expenses in the sum of R 1 454.50 such sum is to be reimbursed to the applicant;

43.3.2.15. Robert W[....]'s outstanding university fees in the sum of R14 905.00 and

43.3.2.16. Robert W[....]'s arrear student accommodation for the months of September and October 2020 amounting to R11 928.00.

[43.4.] To the extent that at the hearing of this application, the respondent has breached the Rule 43 court order and failed to pay the

maintenance due and direct expenses for November 2020, the respondent is ordered to pay maintenance and the expenses as set out in paragraph 43.1 for November 2020 to include Maria Riphinga and Collen Mutorinho's October and November 2020 salaries;

[43.5.] A warrant of arrest is to be issued forthwith committing the respondent to imprisonment for contempt of court for a period of six (6) months. The said warrant shall only be executed if payments as set out above are not made within seven (7)

days from the date of this order.

[43.6.] Costs on the scale as between attorney and client.

ML SENYATSI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Appearances :

Date of Hearing: 16 November 2020

Date of Judgment: 10 December 2020

Attorneys for the Applicant: Kim Meikle Attorneys

Counsel for the Applicant: Adv. T Ternent

Attorneys for the Respondent: Couzyn Hertzorg & Horak Inc.

Counsel for the Respondent: Adv. C Woodrow

[1] 2011 (6) SA 147 (GSJ)

[2] See *S v Beyers* 1968 (3) SA 70 (A)

[3] See *Fakie NO v CCII Systems Ltd* 2006 (A) SA 326 (SCA) at para 6

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