IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:53105/2021

(I} REPORTABLE: YES/1,1O
(2) OF INTEREST TO OTHER JUDGES: YES/1•1O
(3) REVISED: YES/1··1O

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DATE SIGMATURE

In the matter between:

E K Applicant

And

P K & OTHERS Respondents

JUDGMENT

This judgement is handed down electronically by uploading it to the electronic file of this matter on Caselines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date of the judgement will be presumed to be 09 February 2023,

MOJAPELOAJ

INTRODUCTION:

1. *"Jail for me. Nothing for you".* These are the words that were communicated to the applicant who had just obtained a maintenance order in terms of Rule 43 against the author of those words, the first respondent in this matter. From then on it became an uphill battle for the applicant to get the first respondent to comply with the said Rule 43 maintenance order. When the first respondent uttered those words, he must have expected that these words will find their way to Court as the applicant would soon be compelled to report to Court about the first respondent's non-compliance with the said Rule 43 maintenance order.

2. This is an application for contempt of an order of this Court of 11 May 2022 granted by Molefe J while adjudicating a Rule 43 application in a pending divorce proceedings between the applicant and the first respondent. It is not in dispute that the first respondent has failed to comply with the said Court order, it is however, the first respondent's case that he is not in wilful default as he alleges that his circumstances has changed.

BACKGROUND:

3. At the outset it is important to set out the litigation history between the parties. The parties are currently married to each other and are undergoing divorce proceedings and such proceedings are still pending in this Honourable Court.

The plea and the counterclaim to the divorce proceedings was filed on 30 November 2021.

4. The applicant then launched an application in terms of Rule 43 of the Rules of this Court for the payment of maintenance and other ancillary orders pending the divorce litigation. On 11 May 2022, Molefe J granted an order in terms of Rule 43 in favour of the applicant. The said order reads as follows:

> *"1. Both parties remain co-holders of the parental rights and responsibilities in respect of the children as contemplated in Section 18(2), 18(3), 18(4) and 18(5) of the Children's Act 38 of* 2005;
>
> 2. *The parties act as co-guardians of the children as provided for in Section 18(2)(c), 18(3)(m), 18(4) and 18(5) of the Children's Act 38 of* 2005;
>
> *3. The parties are co-holders of the parental responsibilities and rights of care and contact in respect of the children as referred to in Section 18(2)(a) and 18(2)(b) of the Children's Act 38 of* 2005, *subject to:*
>
> *3.1 The children shall primarily reside with the Applicant who shall be their primary caregiver; and*
>
> *3.2 The Respondent shall be entitled to reasonable contact with the children at all reasonable times.*
>
> *4. Specific parental rights and responsibilities in respect of contact be awarded to the Respondent, to be exercised at all reasonable times, inclusive of the following:*
>
> *4.1 Rights of removal on eve,y alternative Friday from 14H00 until Sunday at 18H00;*
>
> *4.2 Rights of removal on eve,y Wednesday from 14H00 until Thursday morning when the Respondent shall take the children to school;*
>
> *4.3 Rights of removal on Father's day from 09H00 until 17H00;*

4.4 Rights of removal for half the available time on each children's birthday;

4.5 Rights of removal on the Respondent's birthday for 3 (three) hours if the day falls within the week, and from 09H00 - 17H00 if the day falls on a Saturday or Sunday.

4.6 Rights of removal on evety alternate public holiday and evety alternative long weekend. A public holiday that falls on a Friday or a Monday shall be regarded as part of a long weekend;

4.7 Rights of removal for evety alternate short school holiday;

4.8 Rights of removal for half of evety long school holiday with Christmas to rotate between the parties;

4.9 The right to contact the children daily between 17H00 - 19H00 via telephone, botim, video call or any virtual platform.

5. *The Respondent pays the following maintenance in respect of the Applicant and minor children.*

5.1 By making payment to the Applicant of a sum of R75 000.00 (seventy-five thousand rand) per month, each such payment to be made to the Applicant without deduction or set-off on or before the first day of each month, by debit order into such account as she may from time to time determine in writing.

5.2 By making payment of all reasonable expenses incurred in respect of the children's education, such costs to include, without limiting the generally of the aforegoing, all private school fees, holiday-care fees, additional tuition fees, as well the costs of any extra-curricular school and sporting activities (including school tours and outings) in which they may participate, as well as the costs of all books, stationaty, school uniforms, equipment and attire relating to their education and/or the sporting and/or extra-mural activities engaged in by them. The Respondent shall reimburse the Applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 5 (five) days of the Applicant providing the Respondent with proof of payment and/or the relevant invoice.

5.3 *To retain the Applicant and the children on discovety medical health fund (classic comprehensive plan) and pay the children's reasonable medical expenses which are not covered by the medical plan, including costs of therapy.*

6. *To pay the Applicant's short-term insurance.*

7. *That the Respondent make available to the Applicant for collection by her.*

7.1 *the Applicant's passports at the erstwhile matrimonial home;*
7.2 *the Applicant's clothing and personal effects, outstanding jewellery and Hermes purse.*

8. *That the Respondent in addition be ordered to make payment of the following expenses:*

[redacted]*the bond instalments, rates and taxes and levies and insurance premiums payable in respect of the immovable property situated at* [redacted]

9. *The Respondent make* a *contribution of R150 000.00 (one hundred and fifty thousand rand) towards the Applicant's legal costs, payable in monthly instalments of R25 000.00 (twenty-five thousand rand).*

10. *The costs of this application are costs in the divorce action."*

5. I am told by the first respondent that the effect of the order by Molefe J on 11 May 2022 renders him liable for maintenance in the amount of R430 758-80 per month. The large portion of the said amount is, according to the first respondent, a R280 192-23 bond instalment on an immovable property situated in [redacted]. The first respondent stays in that [redacted] property.

6. Immediately, after the Court order was granted, the applicant communicated the existence of the Rule 43 Court order to the first respondent. She then states that on 17 May 2022 which was within a week of the grant of the order she received a message from the first respondent which stated that; *"Jail for me, nothing for you, I do not have that kind of money anymore".* She further state

that on the same day she received an e-mail from the first respondent which simply stated; *"Keep dreaming".*

7. The Court order was not complied with, and the applicant immediately launched proceedings in this Court for contempt. On 17 June 2022 this Court per Ndlokovane AJ found the applicant to be in contempt of the Court order of Molefe J and issued a conditional committal of the first respondent. The relevant part of the Court order reads as follows:

> "2. *The Respondent is declared to be in contempt of the order made by the Honourable Madam Justice Molefe J dated 11 May 2022;*
>
> 3. *The Respondent be committed to imprisonment for contempt of Court for* a *period of 30 (thirty) days, which committal is suspended in its entirety for* a *period of 2 (two) years, on condition that the Respondent complies with this order and the order granted by Madam Justice Molefe J dated 11 May 2022, within 24 (twenty- four) hours after the granting and service of the order on the Respondent.*
>
> *4. The Respondent to retain the Applicant and the children on Discovery Medical Health Fund (Classic Comprehensive Plan) and pay the children's reasonable medical expenses which are not covered by the medical plan, including costs of therapy on or before 24 June 2022.*
>
> 5. *The Respondent to pay the Applicant's outstanding short-term insurance on or before 24 June 2022.*
>
> *6. The Respondent to make available to the Applicant for collection by her, on or before 24 June 2022:*
>
> *6.1 The Applicant's passport at the erstwhile matrimonial home;*
>
> *6.2 The Applicant's clothing and personal effects, outstanding jewellery and Hermes purse.*
>
> 7. *The Respondent to make payment of the bond instalments, rates and taxes and levies and levies and insurance premiums payable in respect of the immovable property situated* [redacted]*, on or before 24 June 2022.*

8. *The order dated 11 May 2022 remains in full force and effect.*

9. *The Respondent to comply with the order dated 11 May 2022.*

10. *Should the Respondent fail to comply with this order, the Applicant is granted leave to approach this Court, on an urgent basis, for an order that the Respondent be committed to prison on the same papers, duly supplemented, if necessary.*

11. *Respondent to pay the costs of the application on an attorney and client scale."*

8. II is quite clear from the abovementioned Court order by Ndlokovane AJ, that although the first respondent was ordered to comply with certain parts of the orders by Molefe J of 11 May 2022, the order of Molefe J remains in full force and effect. The first respondent has been committed to prison for a period of 30 (thirty) days provided he complied with the order of Molefe J within 24 (twenty-four) hours of the service of the order.

9. In the meantime, the first respondent made an application in terms of Rule 43(6) of the Rules of this Court. Rule 43(6) provides for the variation of the Rule 43 maintenance order in the event of a material change taking place in the circumstances of either party or a child or the contribution towards the costs proving inadequate. That matter served before Da Silva AJ, who on 20 November 2022 dismissed the Rule 43(6) application with costs.

10. In that Rule 43(6) application, the first respondent argued that the Court should vary the maintenance order granted by Molefe J on the basis of a material change in his circumstances. The first respondent effectively argued that there was a drastic change in his income as his companies are no longer generating

income. This is a similar argument that the first respondent is bringing in this matter to defend the contempt of Court application.

11. When the attempted variation of Molefe J's order did not succeed as it was dismissed with costs, the first respondent then on 09 November 2022 launched another "variation" application of Molefe J's order, this lime in the Magistrate Court. In the Magistrate Court, the first respondent states that; *"I cannot afford to make payment in terms of Rule 43 order dated 11 May 2022 - which is still the order in place today. I also cannot afford the property I reside in at present - I am going to move in with my parents in order to be able to afford to make some contribution towards maintenance - I have obtained employment that will allow me steady income, but not as much as I previously made from other business, which is no longer the case".* ***SIC.*** In other words, the applicant pleads a case of change of circumstances which case was rejected by the High Court less than 3 (three) weeks prior to him launching a similar application in the Magistrate Court.

12. It is not in dispute that the first respondent has to date failed to comply with the Court order of Molefe J. The applicant puts the total amount of indebtedness of the first respondent towards the minor children and herself as a result of failure to comply with Molefe J's order at over R2 000 000-00 (Two Million Rands}. The applicant has attached to the papers a table of various amounts showing the payment schedule of the first respondent in relations to the various obligations arising from the Court order. It is not in dispute that the first

respondent has paid amounts which are substantially less than what the Court order requires.

13. It is the applicant's case that the first respondent is in wilful default as the first respondent, according to the applicant, is able to afford the maintenance as per Court order but chooses otherwise. The applicant states that:

> "30. *Notwithstanding the aforementioned, the First Respondent persisted with his recalcitrant attitude and refused to honour his maintenance obligations whilst living his life as a multi-millionaire.*
>
> *31. The First Respondent enjoyed various extended holidays where he spent time in Greece, Cyprus and France (Paris and Euro-Disney) over the period June until September* 2022. *The First Respondent also spent time in Mykonos and Santorini which are jet-set holiday destinations.*
>
> 32. *Moreover, the First Respondent has been travelling back and forth between Pretoria and different Towns in the Western Cape during a large part of this year for holiday purposes - all this whilst allegedly unable to pay his maintenance obligations.*
>
> *33. As is evident from the Honourable Judge Da Silva's order supra, the First Respondent paid his attorney in excess of R2* 500 000-00 *in legal fees - whist refusing to pay his maintenance obligations.*
>
> *34. Judge Da Silva also found that the First Respondent, on his own statements which served before the court had an average monthly income of R1144 427.38.*
>
> 35. *Furthermore, the First Respondent recently sold two properties for approximately 13 million Rand - yet he continues with his refusal to comply with the orders of this Honourable Court.*
>
> *36. Accordingly, it is patently clear that the First Respondent was able and capable to pay his maintenance obligations.*
>
> *37. Subsequent to the order being granted by the Honourable Justice Da Silva AJ, the First Respondent, <u>in</u> <u>lieu</u> of paying his maintenance, once again rather elected to go on an extended holiday overseas."*

14. Other than a general denial, the first respondent does not advances any facts to dispute the above allegations by the applicant.

15. On the other hand, the first respondent submits that he is not in willful default of the order of Molefe J because of the following. Firstly, the first respondent states that his case was not properly presented during the Rule 43 hearing and puts the blame on his previous attorneys. That similar contention was also raised in front of Da Silva AJ and was rejected. The Court noted that both parties were represented by eminent Senior Counsel at the Rule 43 hearing.

16. Secondly, the first respondent submitted a 1 (one) page document from Mareu Accountants and Auditors which he states it's a confirmation that each and every company that he used to control and own is now dormant or under business rescue. The said letter although is on the letter head of [redacted] and signed, it does not identify the author. The said letter states that; *"We are aware of* a *86 companies that is owned by Mr. K, 84 of the companies are dormant and* [redacted] *and* [redacted] *are under business rescue".* There is no identified author of this letter and most importantly, there is no supporting affidavit from the said auditors.

17. Thirdly the first respondent submitted a pay slip. The first respondent states that since losing control of the companies that he once successfully operated he has now found an employment and currently earns on average R50 000-00 (Fifty Thousand Rand) a month after making statutory deductions from his

earnings. He then attached what he states is his payslip. The payslip has the first respondent's name and his designation as an International Business Developer. The payslip reflects his net income of R50 000-00 per month. The name of the company which is allegedly employing the first respondent is redacted from the payslip. The first respondent states that he has instructed his legal representatives not to disclose his employer's details out of a real fear and anticipation of the prejudice that the applicant will cause by contacting and interfering with his employer directly and defaming him or attempting to interfere with his employment relationship.

18. The issue of the first respondent's income is a highly contested issue in this application for contempt. Once again, there are no supplementary affidavits to confirm the first respondent's employment. One would have expected that the first respondent would have put in more effort in order to advance his case that he is not in willful default of the Court order. Such evidence cannot be accepted.

19. The first respondent has also failed to attach bank statements to show his income. Based on the previous judgment of Da Silva AJ it appears that the first respondent has no less than 6 (six) banking accounts. In this application, the first respondent states that he attaches a bank statement for at least 6 (six) months as annexure "AA15.1". Annexure "AA15.1" is not a bank statement but an unbridged birth certificate of a minor. There is therefore no banking statements to support the first respondent's contention in this matter.

20. The case that the first respondent has presented in an effort to demonstrate that he is not in willful default of Molefe J's order is not different from the case that was presented before Da Silva AJ. This Court is not in a different position than when the contention of changed circumstances was rejected.

THE LAW ON CONTEMPT OF COURT:

21. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.[1]

22. In ***Pheko*** *II* above, with reference to s 165 of the Constitution, Nkabinde J held that:

> *"The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.*
>
> *Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.* •>2

Pheko v Ekurhuleni City 2015 (5) SA 600 (CC) (Pheko II) para 28.
Pheko II (Supra) para 1 & 2.

23. In the matter of ***Victoria Park Ratepayers Association v Greyvenouw CC and Others 2004 JDR 0498 (SE)*** it was held as follows:

> *"Contempt of court is not merely* a *means by which* a *frustrated successful litigant is able to force his or her opponent to obey* a *court order. Whenever* a *litigant fails or refuses to obey* a *court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such* a *litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.* "[3]

24. Contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary.[4] Contempt of court is not an issue between the parties, but rather an issue between the court and the party who has not complied with a mandatory order of court.[5]

25. Contempt of court proceedings are a recognised method of putting pressure on a maintenance defaulter to comply with his/her obligation.[6]

26. The Constitutional Court in ***Bannatyne v Bannatyne*** *(supra)* held as follows:

> *"Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in* a *special category in which such relief is competent. What is less clear is whether it is competent for* a *High Court to make an order for contempt of court for the failure to comply with an order made by* a *magistrate's court. This question was left open by the SCA in this case. While it was willing to assume that the High Court had such jurisdiction, it concluded on the evidence that the applicant had not pursued her remedies under*

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s At paragraph 23.
4 SJCI v Zuma para 27.
' SJCI v Zuma para 61.
6 Bannatyne v Bannatyne (Commission of Gender Equality, as Amicus) 2003 (2) SA 363 at para 20.

the Act "fully and diligently" and that there were accordingly insufficient grounds for the High Court to have made the order that it did."[7]

27. In determining whether the first respondent is guilty of contempt of court the following requirements as set in ***Compensation Solutions (Pty) Ltd v Compensation Commissioner [2016] ZASCA 59; (2016) 37 ILJ 1625 (SCA)*** should be proved:

> *"The question which then arises is whether the appellant proved that the Commissioner's failure to comply with the [consent order] amounted to civil contempt of court, beyond* a *reasonable doubt to secure his committal to prison. An applicant for this type of relief must prove (a) the existence of* a *court order; (b) service or notice thereof,· (c) non-compliance with the terms of/he order; and (d) willfulness and* ma/a *tides beyond reasonable doubt. But the respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that his non-compliance* was *not wilful and* ma/a *fide. Here, requisites (a) to (c) were always common cause. The only question was whether the Commissioner rebutted the evidentiary burden resting on him."*

28. Counsel for the first respondent has referred the Court to the matter of ***Strime v Strime***[8] for the proposition that a party cannot execute or enforce a maintenance order while there is application pending for the variation of the said maintenance order. In ***Strime*** the maintenance defaulter failed to pay the maintenance amount of R800 (Eight Hundred Rand), and the applicant obtained a writ of execution, and the Deputy Sheriff attached the maintenance defaulter's household items in satisfaction of the writ. That prompted application by the maintenance defaulter for a stay of execution of the writ pending the

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Bannatyne (supra) at para 18.

8 1983(4) SA 850 (C).

outcome of the application for a variation of the maintenance order. In interpreting section 5 and 6 of the Maintenance Act, the Court stated as follows:

> *"It may be argued that a substitution is not similar or akin to a variation and that a discharge is not the same as the rescission or suspension of an order. However, section 6 of the Act provides that whenever a maintenance Court makes an order under section 5 in substitution or discharging a maintenance order, the maintenance order shall cease to be of force and effect. This provision therefore makes the discharge of an order tantamount to a cancellation thereof and the reasons set out by Trollip AJ, with which I respectfully agree with appear to have retrospective effect.* '[9]

29. The Court then concluded that the maintenance defaulter was entitled to a stay of execution pending the finalization of the application for substitution, alternatively, variation. The first respondent makes this submission based on the pending application for substitution or discharge of an existing maintenance order that the first respondent has made in the Pretoria Maintenance Court on 09 November 2022.

30. I am however, of the view that the dictum in ***Strime*** is not applicable in the current matter as this matter is strictly dealing with an order that was granted in terms of Rule 43 of the provision of the High Court. Rule 43 has its own internal mechanism of effecting a variation of the original order. The applicant has already attempted such and his application was dismissed. Again, Rule 43 order does not only comprise of maintenance for the minor children and the applicant, but the rule provides for other ancillary matters that may be granted, including a contribution towards the costs of the pending matrimonial action. In addition to those in this particular matter the Court ordered for the continuous payment of a short-term insurance, for the return of the applicant's passports,

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• Strime (supra) page 854.

clothing and personal effects and jewellery. It is doubtful whether those ancillary orders will fall within the purview of the Maintenance Act as it was analysed in the ***Strime's*** case.

31. Most importantly is that the Rule 43 maintenance order is not permanent and can be discharged as soon as the divorce proceedings are concluded.

32. The Constitutional Court has also warned against recalcitrant maintenance defaulters who use legal processes to sidestep their obligations towards their children. The Constitutional Court stated as follows:

> *"Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children. The respondent was entitled to apply for a variation of the maintenance order. But whatever excuse he might have had for failing to comply with the existing order, there was not excuse for his failure to pay even the reduced amount that he contended should be substituted for it. The respondent appears to have utilized the system to stall his maintenance obligations through the machinery of the Act. It appears from the evidence of the CGE that this happens frequently in the maintenance courts. The hardships experienced by maintenance complainants need to be addressed and the proper implementation of the provisions of the Act is a matter that calls for the urgent attention of the Department of Justice.*[10]

33. Such warning is apposite in this matter as the first respondent has already attempted to vary the Molefe J order which attempt was dismissed with costs.

CONCLUSION:

10 Bannatyne (supra) paragraph 32.

34. In my view, the first respondent has failed to rebut the inference that his non--compliance was not willful and *ma/a fide.* In the circumstances I find that the first respondent is in contempt of the Court order of Molefe J of 11 May 2022. What makes the first respondent's position more untenable is the fact that this Court has already found him to be in contempt of the order by Molefe J, that is, the order by Ndlokovane AJ of 17 June 2022. There is no attempt to purge that order. In that order, the first respondent was already committed to prison. I still do not understand why the committal part of the order was not carried out. That however, explains the general frustration that the applicant and most people in her position that are armed with maintenance orders in their favour are suffering on daily basis.[11]

35. Under the circumstances, make the following order.

1. The non-compliance with the Unform Rules of Court is hereby condoned and this matter is heard as one of urgency as contemplated in terms of Rule 6(12) of the Uniform Rules of Court.

2. The first respondent is found to be in contempt of the Court order issued out of this Honorable Court on 11 May 2022 by Molefe J.

3. The first respondent be committed to imprisonment for a contempt of Court for a period of 90 (ninety) days which committal is suspended in its entirety for a period of 2 (two) years, on condition that the first respondent complies

[11] Bannatyne *(supra)* at paragraph 32.

with the order granted on 11 May 2022 within 72 (seventy-two) hours of the granting of this order.

4. Should the first respondent fail to comply with paragraph 3 of this order,

   4.1 The performance and the execution of the Writ of Committal for contempt of Court is hereby authorized.

   4.2 The first respondent should submit himself to the South African Police Services at Boschkop Precinct, failing which the South African Police Service should take all necessary steps to ensure that the first respondent is delivered to the keeper of prisons in order to be committed in terms of this order.

5. The first respondent to pay the costs of this application on an attorney and client's scale which cost should include the costs of Counsel.

MM MOJAPELO AJ
ACTING JUDGE
HIGH COURT GAUTENG DIVISION, PRETORIA

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Attorneys for the Applicants : Waldick Inc

Counsel for the Respondents : Adv. E Malherbe

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