



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

CASE NUMBER: 8953/2020

RULE 43 CASE NUMBER: 19120/2020

In the matter between

RAZIA ALLI

APPLICANT

and

IQBAL EALIAS KARBANEE

RESPONDENT

JUDGMENT

Date of hearing: 24 February 2025

Date of judgment: 19 March 2025

BHOOPCHAND AJ:

1. The Respondent was held to be in contempt of a Rule 43 order and of a wilful contempt of an attachment order, and sentenced to periodic imprisonment, which was suspended for three years, provided he complied with certain conditions. This is the

second application to hold him in contempt, and the application is made during the period of suspension of sentence arising from the first contempt order. The Court must determine whether the Respondent is again in contempt of the Rule 43 order and, if so, whether the contempt is wilful and in bad faith. If the Respondent has again violated the dignity and authority of the Court, the Court must then consider the appropriate sanction.

2. The application's urgency is no longer an issue. All the required materials, including additional affidavits to support the application, are before the Court.¹ The Respondent's invitation to consider the papers in his upcoming Rule 43(6) application to reduce his payment obligations was declined. The Court shall confine the adjudication of this application to the papers properly before it.

3. The existence of the Rule 43 order and service on the Respondent is not in dispute. To succeed in establishing the Respondent's contempt of the Rule 43 order, the Applicant must prove non-compliance, wilfulness and *mala fides* on his part. The Respondent bears an evidential burden to raise a reasonable doubt as to whether his non-compliance was wilful and in bad faith. If the Applicant discharges her obligation and the Respondent fails, then contempt will have been established beyond reasonable doubt.² The *Plascon-Evans* rule applies as the Applicant seeks final relief in application proceedings.³ With the preliminary considerations out of the way, the Court can examine the facts underlying this application.

¹ Both parties

² *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) ('Fakie') at para 42 et seq

³ *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 - 5

BACKGROUND FACTS

4. The Applicant and Respondent were married by Muslim rites on 3 November 2012 and subsequently concluded a civil marriage on 31 August 2013 through an antenuptial contract, excluding the accrual system. Both are Paediatricians, although the Respondent is currently engaged in business activities. Two daughters, Sara, aged 10 and Hannah, aged 9, were born of the marriage. The Applicant instituted a divorce action on 13 July 2020, and those proceedings are ongoing.

5. On 26 May 2021, the Applicant obtained interim relief under Rule 43 for maintenance, among other things, *pendente lite* ("the Rule 43 order"). The relevant parts of the order are that the Respondent was ordered to pay the Applicant R25 000 per month for accommodation expenses and R13 000 per month for the children's expenses. The latter amounts were payable by the 7th day of each month and were to increase annually in line with the Consumer Price Index. The current value of the accommodation expenses is R29,046.39, and R15,104.12 for the children. The Respondent was required to maintain the children on his medical aid and cover their additional medical expenses not included by the medical aid. The Respondent was required to pay 75% of the children's private school fees and all their educational expenses. If the Applicant incurred costs related to the children's medical and educational expenses, the Respondent was required to reimburse those costs within five days of receiving the relevant invoice or receipt from her. The Respondent had to contribute R5000 per month towards the costs of an *au pair*.

6. The Applicant alleged she had to issue numerous writs of execution against the Respondent to obtain arrear payments on the Rule 43 order. The writs proved unsuccessful as the Respondent had minimal funds in his account after the 7th of each month, having been paid on the 25th of the previous month and prioritising his needs above those of his Rule 43 obligations. Consequently, the Applicant attached the Respondent's retirement annuity with the Professional Provident Society on 18 November 2021 ('the PPS order'). The order enabled the Applicant to obtain payment on the Respondent's Rule 43 obligations "to the extent that the (First) Respondent does not comply with the Rule 43 order."⁴ The PPS order made provision for the payment of any arrear amounts due in terms of the Rule 43 order within 5 days of the date upon which the Registrar of this Court certified them after considering the supporting affidavit filed by the Applicant. The PPS order also made provision for the payment of an arrears amount, which is not relevant to this application.

7. The PPS order interdicted the PPS and another entity from making any payments to the Respondent. The Respondent continued to breach the Rule 43 order, causing the Applicant to obtain the shortfall in payments from the PPS by issuing three certificates in January, February, and April 2022. In May 2022, the Respondent informed the Applicant that he had secured a loan, would make his payments, and that the Applicant did not need to issue certificates against his retirement annuity. In January 2023, the Respondent defaulted by making a short payment. The Applicant duly issued a certificate to recoup the shortfall but was informed by the PPS that they could not honour the certificate as the

⁴ The PPS Personal Pension Retirement Annuity Fund and Intembeko Investment Administrators (Pty) Ltd were the Second and Third Respondents in the PPS Order.

Respondent had retired from the fund in August 2022. Both the PPS and the Respondent had breached the PPS order. The Respondent had withdrawn one-third of the funds, and the remainder was transferred to a living annuity with an insurance and banking group for the Respondent's benefit.

8. The Respondent answered the allegations about the PPS annuity. The PPS broker contacted him in June 2022, a month after he celebrated his 55th birthday, to inform him that he was eligible for retirement from the fund and could earn a better return by investing elsewhere. He claimed that he was unaware that his subsequent investment in Old Mutual would be locked in and inaccessible. He used the amount he withdrew to purchase an apartment. He sidestepped his breach of the PPS order, claiming instead that he had not intentionally breached the Rule 43 order by transferring the funds. He says he was unaware that funds could not be withdrawn from his retirement annuity. These allegations are so improbable that they can be rejected outright.

9. In April 2023, the Applicant applied to hold the Respondent in contempt of the Rule 43 and PPS orders. On 23 June 2023, the Respondent was held to be in contempt of the Rule 43 order and wilful contempt of the PPS order ('the contempt order'). The Respondent was sentenced to periodic imprisonment for one year, every alternate weekend, when he did not exercise contact with the children. The sentence was suspended for three years, provided the Respondent paid the arrears of R64 149.89 and deposited R557 807 within ten days of the order into the trust account of the applicant's attorney ('the trust fund'). The latter amount was to be used in the place and stead of paragraph 2 of the PPS order to the extent that the Respondent did not comply with the

Rule 43 order. No judgment is available to inform this Court about the reasoning that led to the grant of the contempt order. The Respondent avoided imprisonment by making the arrear and trust fund payments.

10. The proper approach to interpreting legal documents is to read the words used in the context of the document as a whole and in light of all relevant circumstances surrounding its creation.⁵ The principles of interpretation in *Endumeni* apply equally to the interpretation of judgments and orders.⁶ As alluded to, no judgment places the contempt order in the proper perspective or the context within which it was given.⁷ The context must be gleaned from the circumstances leading to the issuance of the three orders.

11. Paragraph 3 of the contempt order specified that the trust fund was to be held by the Plaintiff's attorneys:

"...solely for the purposes of compliance by them, *mutatis mutandis*, in the place and stead of the Second and Third Respondents in the PPS order, in accordance with paragraph 2 of the PPS order, and that he (the Respondent) does not breach the terms of the Rule 43 order, or any amendment thereto as contemplated in terms of Rule 43(6), for a period of 3 years."

⁵ Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) at para 24

⁶ HLB International (South Africa) v MWRK Accountants and Consultants (113/2021) [2022] ZASCA 52; 2022 (5) SA 373 (SCA) (12 April 2022)

⁷ Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 14; Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others [2010] 4 All SA 398 (SCA); 2011 (4) SA 149 (SCA) para 43 et seq, *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A), HLB supra

12. The preceding excerpt of the contempt order refers to compliance with paragraph 2 of the PPS order, which pertains to the extent to which the Respondent fails to comply with the Rule 43 order. The text and purpose of the two orders are clear in their intent, i.e., to effect compliance with the Rule 43 order. The context and circumstances relate to the Respondent, who defaulted on his Rule 43 payments soon after the order was granted. The Applicant sought and obtained the PPS order and drew on the Respondent's annuity on three occasions when there was a shortfall in his payments. The contempt order found the Respondent in wilful contempt of the PPS order. It reinstated that source in the guise of the trust fund to serve the same purpose, i.e., compliance with the Rule 43 order.

13. The PPS and contempt orders effectively established a mechanism to protect the Respondent from being in wilful contempt of the Rule 43 order. What is unclear about the formulation of the contempt order, without the benefit of the Court's reasoning, is how the Respondent can breach the Rule 43 order in circumstances where the trust fund has money, albeit in dwindling amounts, which has been funding the Respondent's payment shortfalls. Let's see what the parties say.

EVENTS AFTER THE CONTEMPT ORDER

14. The Applicant demonstrated that, since August 2023, one and a half months after the contempt order was issued, the Respondent has failed or refused to comply with the Rule 43 order. The Applicant provided a table detailing the payments made by the Respondent between August 2023 and September 2024. The table of payments did not

include the costs of medical and educational refunds to which she was entitled.⁸ Over fourteen months, the Respondent made timely payments by the 7th day of the month on four occasions. The Respondent did not make the exact payment due on any occasion over the fourteen months. He paid just R14 500 on five occasions and split two payments on two occasions.

15. The Applicant was required to instruct her attorneys to issue nine certificates, enabling her to draw on the trust funds. Of the amount of R557 807, only R116 298.01 remained when this application was instituted. The Respondent was in arrears for R34 319.59 when the Applicant completed her founding affidavit. She was concerned that the trust fund would be depleted quickly. The Respondent had structured his finances since the inception of the divorce proceedings to ensure that he owned nothing in his name.

16. The Respondent attributed his failure to pay fully and promptly to a shortage of funds. He alleged that there was an understanding between him and the Applicant that she could access the trust fund to cover any shortfall. He alleged that he informed the Applicant whenever he could not pay fully and tried to make up the shortfall as soon as possible. The Applicant denied in reply that the Respondent had a shortage of funds and asserted that he paid his expenses before attending to the Rule 43 obligations.

17. The Respondent expressed surprise that, since June 2023, the Applicant had issued nine certificates to draw on the trust fund and had used R441,509 of the amount.

⁸ What is apparent is that the Applicant included the shortfalls in medical, educational, and *au pair* payments she was entitled to in the amounts she withdrew from the trust fund.

He alleged he paid most of the amounts due under the Rule 43 order. He had made some monthly payments and denied any shortfall in paying maintenance. He bemoaned the Applicant's failure to attach to her founding affidavit any certificate to support her withdrawals. The Applicant had not provided the basis for the arrear amount of R34 319.59.

18. Over the fourteen months for which the Applicant provided a breakdown, the Respondent calculated he had paid the Applicant, on average, R31 536.36 per month⁹. The Applicant had drawn an average of R31 492.94 per month for the corresponding period. Since the application was instituted, the Respondent alleged that he paid the Applicant R40 000 on 28 September 2024. He calculated that the Applicant received R882 410.13 or an average of R63 029.03 from him and the trust fund.

19. In reply, the Applicant stated that the arrear amount reflected in her application was due on 27 September 2024, the date she deposed to her founding affidavit. She stated that she had made arrangements to recoup this amount by issuing a certificate on 17 September 2024. She did not claim it in her notice of motion. The certificates attached to the Respondent's supplementary affidavit indicate that the certificate was approved for payment on the same day it was issued, i.e., 17 September 2024. It is then apparent that there were no arrears when the application was instituted. The Applicant confirmed that the Respondent had paid her the R40 000 he mentioned in his answering affidavit. The Applicant then proceeded to calculate the Respondent's outstanding arrears for the period after the institution of the application. The Court would have been reluctant to

⁹ The correct average is R31 494.36

allow this new material in reply; however, the Respondent addressed his indebtedness in his supplementary affidavit, denying any arrears.

20. The Applicant denied that there was an understanding between her and the Respondent that allowed her to draw on the trust fund when he failed to pay. She explained that issuing a certificate took about a week or longer, which meant her debit orders could not be met. She stated elsewhere in her replying affidavit that she has to wait until the 8th of each month to apply to the Registrar for the approval of the certificate. The Registrar can take days; she sometimes had to wait a week before it was issued. The Respondent did not pay the costs of issuing a certificate, and she had to incur exorbitant legal costs to obtain payment. No interest is levied on the arrear amounts, and the exercise leaves her out of pocket. The trust fund was part of the marriage's assets, and she could have never agreed to allow the Respondent to use it to pay his maintenance obligations. The Applicant stated that the trust fund is security for her to use when the Respondent defaults on his Rule 43 obligations. The Court notes that this is exactly what the Applicant did on multiple occasions. The Applicant noted the criticism levelled at her for drawing on the trust fund, notwithstanding the shortfall the Respondent admitted to paying on average each month. The Court notes the Respondent's protestations that he paid most of the amounts under the Rule 43 order but considers that the statement beggars belief in circumstances where he made payments well short of his obligations, e.g. when he paid just R14 500 or lesser per month on five occasions.

21. The Applicant alleged that the Respondent admitted his contempt and had been given ample time to cure it, which he had not done. The amounts reflected in the table

she prepared differed each month because she did not hold the Respondent liable for the full amount when she paid either a lesser amount or none under the expenses for an *au pair*. The increase in the Consumer Price Index took effect in May 2024 but was only implemented in September 2024.

22. The Applicant denied claiming any historic indebtedness from the trust fund. In addition to the amount the Respondent had to deposit in the trust fund, he had to pay her R64 149.89, which were his arrears as of 7 June 2023. She had to pay the outstanding school fees of over R150 000 from the trust fund. She denies that she overreached or irregularly accessed the trust fund. The Applicant accused the Respondent of failing to provide details supporting his sweeping accusations. She accounted for the arrear amount owed to her when she deposed to her affidavit supporting this application and alleged that the Respondent was aware of the breakdown.

23. The Applicant alleged that the Respondent's conduct had wreaked havoc on her financial affairs, causing her immense financial stress and hardship. Stemming from the Respondent's late payments, her bond repayments were seldom met, and she had to change her bond repayment dates repeatedly. Her credit score is negatively impacted. In August 2024, she warned the Respondent of his non-compliance and her intention to apply to hold him in contempt of the Rule 43 order. The Respondent responded with a payment of R25 000 on 2 August and stated that he was under the impression that the trust funds would cover his non-payment.

24. The Applicant contended that the Respondent's inability to pay was a blatant lie. The Applicant utilised the information from the Respondent's bank accounts to challenge

his alleged impecuniosity. The Respondent received a payment of R1 129 652.96 on 29 February 2024. The Applicant surmised that this amount was from the sale of shares in his current business. He had not paid her attorneys the outstanding allocatur, although he had paid his own attorneys. He prioritised payments to friends and family over his obligations under the Rule 43 order. He has paid various attorneys, his adult son, and his first wife for his son's car.

25. The bank statements for the period June 2023 to May 2024 indicate that the Respondent incurred costs of flights to and from Pretoria, karate, yoga and gymnasium fees, DSTV and Netflix subscriptions, purchases from Toy Kingdom and Crazy Store, clothing purchases of R1000 per month and more than R7000 per month eating out and buying takeaways. His grocery bills increased, notwithstanding his separation from his partner. The Respondent had received additional funds from his business. He had paid money to his ex-girlfriend's business. The Applicant contended that the Respondent does not owe his ex-girlfriend money or that he should pay her in preference for his children's maintenance. The Respondent has paid R10 000 per month in respect of his Telkom account and over R7000 per month to Vodacom for his cellphone. He spent R13000 at Toyota, probably for vehicle service. He spends R1000-R2000 per month at Woolworths.

26. The Applicant contended that the Respondent has not applied to reduce his Rule 43 obligations as his financial situation has not changed materially or worsened. The Applicant detailed payments from the Respondent's business over his salary, averaging R36 000 monthly over four months. The Respondent's business bore the expenses on his behalf.

27. The Respondent denied that his actions disrupted the Applicant's financial affairs. The Applicant had not substantiated her assertions that her bond, medical aid and other debit orders were affected. He had no idea of her earnings or what her salary covered every month. Since the Rule 43 order was granted, the Applicant has purchased a property worth R4 200 000 in a luxury estate where she resides with the children. The Applicant alleges that she cannot survive financially despite being a highly qualified medical specialist in private practice. She receives over R60,000 monthly from him, in addition to his contributions to the children's medical aid, school fees, and extracurricular expenses. He could not accept that the Applicant was experiencing immense financial stress and hardship or that she had suffered any financial prejudice, especially as the Applicant had not provided sufficient proof to this Court. The Applicant earned far more than she disclosed during the Rule 43 proceedings in 2021. His attorney inquired about the trust fund, but they were ignored.

28. The Respondent alleged that he had done his utmost to comply fully with the Rule 43 order. He maximised his loans, sold assets, and restructured his life and career to ensure the children and the Applicant were comfortable. He could not afford to bring an application to reduce his obligations. He admitted to receiving the proceeds from the sale of his shares. He used the proceeds to satisfy his Rule 43 obligations and repay loans accumulated over the course and duration of this matter. He had to pay his previous wife, his older children and his sister, who had assisted him. He admitted paying his attorney partly for overdue amounts. He still owes his attorney over R250 000.

29. The Respondent began his business, Paed-IQ, in 2013. It has shown growth over the past six years. His shareholding has, however, fallen below 50%. He receives a fixed salary and has an employment contract. He owes the company over R3 million. Although he has attempted to reduce his expenses on takeaways and coffee shops, most of his daily business meetings occur in those venues. He does not consider that R7000 per month is excessive in this regard.

30. The Respondent alleged that he defaulted on his bond and other financial commitments due to payments to the Applicant. He has no choice but to pay for a mobile phone to remain in contact with the children and to conduct his business. The Applicant has incurred legal costs due to the malicious, ongoing, and aggressive manner in which she litigates. The Applicant challenged the reports from child experts that recommended reasonable contact with him. The Applicant demanded further investigations when experts suggested that she had alienated the children and threatened urgent litigation if he did not agree.

31. The Respondent argued that his karate fees of R450 monthly are justified, as he has practised the discipline for thirty years. His medical aid subsidises his gym fees. He did yoga for a few months, believing that the R1200 cost for unlimited classes would be cheaper than attending psychological therapy. He has been under immense mental strain due to the arduous conditions of the Rule 43 order, the constant legal onslaught from the Applicant's attorneys, parental alienation, and the pressure of building a business to meet financial commitments.

32. The Respondent alleged that he cancelled the DSTV subscription but retained the Netflix account for the children's entertainment. He admitted to occasionally treating the children with gifts. He also buys clothes for the children, as the Applicant does not send their clothing.

33. The Respondent explained the situation with his ex-Bronwyn. The Applicant's attorney contacted Bronwyn. With the attorney's assistance, a protection order was taken against him. This incident caused further financial strain as he had to defend the proceedings. He plans on renting out his home to obtain additional income and enable him to fulfil his Rule 43 obligations.

34. The Respondent denied receiving additional expenses from Paed-IQ for his own use. The funds he received were added to his loan account and taken during emergencies when urgent payments had to be made to the Applicant or for legal expenses.

35. The amount paid to Bronwyn's company was a historic loan as an investment to acquire a business. Bronwyn's business has shut down. The Respondent hopes that his business may get some return on the loan from the liquidation process. The amounts attributed to Telkom were failed debit orders. The service charges on the vehicle were required as repairs were needed before he could sell it. The amounts spent on groceries are for when he is in Pretoria with the children. His purchases indicate that he buys necessities and spends little on luxuries.

36. The Respondent received R87,624.08 from Paed-IQ, R21 339.80 from Care Works, and R4,512.74 from Old Mutual. He sources an additional R10,000 monthly to meet his

Rule 43 obligations. He accuses the Applicant of exaggerating his income to promote a narrative that he deliberately seeks to avoid paying when, in fact, the opposite is true. He says that he can only pay when he has the funds. He continually seeks additional funds, which must be repaid, resulting in a spiralling debt burden. His basic expenses far exceed his income, and he has had to sell assets to reduce or defer monthly payments.

37. As part of the business growth he is involved in, the Respondent sees new and existing clients in Gauteng. The company covers his flights, car rental, and other expenses. He tried to persuade the Applicant to change the children's school to a more affordable one, but his assumption that the children would move school at the beginning of this year was incorrect. He has upgraded his medical aid to include medication and dental benefits, thereby preventing unnecessary disputes between him and the Applicant. He had sought *ad hoc* locum work as a relief paediatrician over the previous festive season. He attempted to settle the divorce through a mutual friend, but since the Applicant instructed an attorney, progress through this dispute resolution avenue stalled.

38. The Respondent submitted that his actions demonstrate his best efforts to fulfil his obligations and ensure he remains a fully present father by maintaining contact with the children in Pretoria while growing and developing his business. The Applicant immediately issues certificates against the trust fund, even if he is a day late with his payments. He suggests that because the Applicant does not inform him of her drawings against the trust fund, he makes late payments, and the Applicant benefits from the double income.

39. In reply, the Applicant stated that her means are irrelevant to the Respondent's contempt. She did not receive more than R60,000 from the Respondent, and her income had not increased since the Rule 43 order was made. The Respondent is obliged to comply with the Rule 43 order until such time he approaches the Court to vary the order under Rule 43(6). Despite the Respondent's protestations, the Applicant does not believe that the income declared is truthful. She says that the Respondent admitted his income is almost double his obligations, and accordingly, his failure to pay is wilful and *mala fide*.

40. The Applicant denied stating that she could not use the trust fund for maintenance. She stated that her being forced to use those funds does not excuse the Respondent's obligations nor cure his contempt. The fact that she told him she would settle the outstanding school fees from the funds recovered demonstrates that she has always been upfront and honest and has not sought to recover any amounts not owed nor to duplicate monies recovered. Her attorneys have had to send letters since the Rule 43 order was granted, as the Respondent seldom complies. She sent WhatsApp messages, copies of invoices, proof of payment, and requests for additional payments. The Respondent cannot feign ignorance of his obligations every month, as she has submitted the details to him timeously and in advance each month.

41. The Respondent's admitted income exceeds R110,000, and his expenses under the Rule 43 order, according to his version, amount to R75,000. He can afford the obligations. He elects not to pay them. The Respondent bought his adult son a car and repaid loans rather than complying with the court order, despite knowing he faced imprisonment if he did not comply. The Respondent did not provide proof of his payslips

or his employment contract. In circumstances where the Respondent is required to pay maintenance, he should not eat out at all, and if this is a business expense, the business should cover it. The children have told her that they are sick of takeaways. The Respondent can go away on holiday only if he has met all his obligations. The Respondent flew to Pretoria and then travelled to Pietermaritzburg, using thousands of rands when he was in wilful contempt of the order.

42. The Applicant denies that the Respondent is an employee of Paed-IQ. If he were, then the company would pay his company expenses and exorbitant cell phone costs. The Applicant states that she incurs legal fees as the Respondent fails to make payments in full or on time. The issues relating to the children are completely irrelevant to this application. She denies that the Respondent should practise karate, go to the gym, or do boxing or yoga when he is not paying for the children's maintenance. They should be prioritised above all else. If he had opted for psychotherapy, the medical aid might have covered the cost. They each have their wardrobes for the children.

43. The Applicant admitted that her attorney met and spoke to Bronwyn, but that occurred because Bronwyn approached the attorney. The Respondent has not included a confirmatory affidavit from Bronwyn. She sees no benefit in the Respondent renting out his home as he will have to secure alternate accommodation in Cape Town. He has reserved accommodation at the Protea Hotel as a contingency in case he receives bookings on Airbnb. This solution does not seem beneficial for her and the children. The Respondent's bank statements show that he paid R6500 in March and April to the company associated with Bronwyn, and by denying this, he is not being honest with the

Court. The Applicant admitted that she erred insofar as the Telkom payments were concerned. The Respondent continues to lead a high standard of living. She disputes the Respondent's allegations regarding the securing of loans without him providing proof. As the Respondent admits his income exceeds his obligations, his contempt is wilful. The Respondent portrays himself as someone selling everything to meet his obligations. He sold one house and bought a more expensive, larger, and more extravagant house in a luxury apartment building, which features, among other amenities, 24-hour security, a fitness centre, a sauna, and a heated pool. He bought a second car and then sold the old one. The Respondent can afford the order but chooses to pay at his convenience.

44. The Applicant concludes by stating that the Respondent has the means to make payment and that his non-compliance is wilful. It is also clear that the Respondent is purposefully seeking to decimate the funds held in trust as security for his maintenance obligations, thereby rendering the orders against him unenforceable. She contends that he does so intentionally to cause her financial strain and to incur legal costs that she cannot afford. All these are intended to put pressure on her to settle the divorce favourably to him, on his terms. She has had to incur legal costs repeatedly to draft and send letters through her attorneys, issue certificates to secure payment, and now bring this application. The Respondent is fully informed every month of his commitments and can ascertain what should be paid.

45. The Respondent is playing a manipulative game as he can make payments on time when under pressure and has money available to pay for unnecessary and luxury expenses for himself.

46. As the Respondent has breached the terms of the Rule 43 order and has done so within three years of the contempt order, she seeks that the suspended sentence imposed on him be put into operation. The contempt order was intended to prevent the Respondent from disregarding the Rule 43 order and to pay strictly by its terms; he has shown no regard for it. He has not rehabilitated himself. She submits that an order of imprisonment is appropriate. The Respondent can attend all work commitments and see the children every second weekend if he is periodically imprisoned every alternate weekend for one year. She believes imprisonment is the only sanction the Respondent will respect and finally take to heart. It is also the only remedy available to her to stop the Respondent's conduct.

47. The Respondent denied his non-compliance or late compliance was wilful or *mala fide*. The Applicant knows he has limited financial income and is severely indebted. He alleged that he informed the Applicant when payments would be late to enable her to restructure her finances for short periods. He has attempted to make partial payments when he has been unable to pay in full. He has not only attempted to make good on any partial payment, but the Applicant has received exorbitant sums from the trust fund. The Applicant wants to settle the divorce on exorbitant figures beyond the value of his entire estate. She has chosen to bring urgent litigation through the High Court when far less costly remedies are available. The Applicant does not want to settle the divorce mainly due to her exorbitant legal costs, which exceed R4.4 million.

48. The Respondent states that he made a late or missed payment, not in bad faith, but due to a lack of affordability. The Applicant concealed from the Court that he had disputed certain amounts and communicated with her when payments were made late.

49. The Respondent contended that he would not earn an income if he were imprisoned for contempt of Court. His inability to earn an income would severely impact his ability to fulfil his parental duties to the children. His contact with them would be jeopardised, and the Applicant and the children would be severely financially prejudiced. The Applicant states that she heavily relies on the money she receives from him. Alternative weekend imprisonment would mean he would have to give up the Board positions he holds at CareWorks and Paed-IQ. The institutional investor in PAED-IQ would terminate his employment in the company. He could not practice as a doctor with a criminal sentence or record. The Health Professions Council of South Africa ('HPCSA') requires all doctors to maintain a criminal-free record throughout their careers. The HPCSA views criminal records as a potential barrier to entry into the profession and a risk to public safety. The Respondent concludes by stating that talk of imprisonment is merely hypothetical as he is not in wilful and *mala fide* contempt of the Rule 43 order.

50. In reply, the Applicant stated that the Respondent informing her of his late payments does not cure his contempt. He had to comply in full and on time. He has not done so. The Respondent's conduct is not of a man in financial distress. She denies receiving exorbitant sums from the monies held in the trust fund. She has received the amounts owed to her. She has also secured money from the trust fund to settle their daughters school fees, thereby avoiding their expulsion from school.

51. The Respondent alleges that there are less costly remedies available to the Applicant to achieve her goal but mentions none. The Respondent took the PPS funds notwithstanding a Court order in which he agreed that the funds would be preserved. Her only remedy is to find him in contempt once again for his ongoing non-compliance and to seek to uplift the suspension of imprisonment so that he may finally and hopefully comply. She is equally suffering a great deal of emotional and financial stress, but the Respondent only considers himself. She denies that she has concealed anything from the Court. The Respondent does not aver that the payments are incorrect; he merely criticises her for not including the *ad hoc* expenses in the table she compiled, which she made clear are not included. He provides no proof to counter what she has said. She does not ask for imprisonment lightly. She wants the father of her children to prioritise their well-being and needs above his own and to favour his obligations. He has created the situation and must bear the consequences thereof.

52. The Applicant denies that the Respondent could not serve on the board of his businesses or earn an income. She refers to the Companies Act, which states that this would only be the case if the Respondent were found guilty of fraud, theft, forgery, or an offence involving fraud, misrepresentation or dishonesty. The Respondent believes that he is above the law and can choose to pay when and how much he wants, with no sanction against him. She was advised that maintenance defaulters are blacklisted as such conduct is viewed adversely. The Respondent has been aware since June 2023 of the ramifications of his ongoing wilful and *mala fide* contempt, yet he continues unabated. They did not reach an agreement on the children's alleged change of schools.

53. The Applicant outlined her complaint regarding the amounts owed for employing an *au pair*. She informed the Respondent when she employed the *au pair* part-time or when she did not employ one at all. She accordingly reduced the amounts payable by the Respondent; however, despite her efforts, the Respondent still refused to pay any of the amounts claimed. The Respondent contended that he repeatedly asked the Applicant to provide him with the *au pair*'s name, curriculum vitae, employment contract, timesheet, and proof of payment. He asserted that he never refused to pay, but he required evidence that the Applicant had employed and paid an *au pair*. He did not believe the request to be unreasonable as the Applicant had been erratic in employing one but added the amount without providing proof of the costs. The Applicant denied that the Respondent was entitled to the information as no documentation of the type he required existed.

54. The Respondent also defaulted on his payments to the school the children attended. The Rule 43 order states that the Respondent must bear 75% of the children's school fees in private education. The order does not state that the amount is payable to the Applicant. The Respondent answered the allegation by stating that he has been doing his utmost to pay his share of the school fees. He obtained a loan in October 2024 to settle the outstanding amount owed to the children's school, and he undertook to settle his portion as soon as he was able to arrange the funds. The Applicant replied that the school fees were still in arrears.

55. The Rule 43 order states that the Respondent shall pay R5000 per month as a contribution towards an *au pair* once the Applicant has appointed one for the minor children. Thus, the amount was payable once an *au pair* was appointed. The order

entitled the Respondent to know when the *au pair* was appointed and nothing more. The Applicant asserted that she provided him with information about what the order required. She told him about when she had paid a reduced amount and when she had not employed one.

56. The parties dealt with the certificates issued by the Applicant in their supplementary affidavits. The Respondent persisted with his allegations that the Applicant had overreached and received more than what was due to her. The Applicant denied the accusations.

ARGUMENTS

57. The Applicant argued that the only question the Court had to determine was whether the Respondent's default was wilful and *mala fide*. The Respondent had to present evidence that raised a reasonable doubt as to whether his non-compliance was wilful and *mala fide*, failing which the Applicant established contempt beyond a reasonable doubt. The Applicant alleges that the Respondent evaded the specific averments in the founding affidavit, instead making sweeping statements and proceeding to wantonly and untruthfully attack her. She asserts that her conduct is not under scrutiny in this application. As the Respondent has not specifically denied the Applicant's allegations, the Court should accept her version as correct. As the Respondent has repeatedly violated his Rule 43 obligations, a suitable and harsher punishment ought to be imposed to ensure that the Respondent complies. The children and the Applicant suffer extreme hardship through the Respondent's continuous breach.

The Respondent has conceded that he is in arrears with his maintenance obligations under the Rule 43 order, which he never pays on time. His opposition to the application was unwarranted and only served to exacerbate his contempt.

58. The Respondent focussed his argument on three bases, namely, compliance, wilfulness and affordability. He referred to the wording of the PPS and contempt orders to support his contention that, regardless of whether the funds came directly from him or the trust fund, the Applicant has been paid her Rule 43 dues. The arrear amount reflected in the founding affidavit had also been retrieved from the trust fund. At worst for the Respondent, the payments may not have been timeous, but there was compliance, if not fully, then substantially.¹⁰

59. The Respondent submitted that if the Court found the Applicant had discharged her onus of proving non-compliance with the Rule 43 order, then that non-compliance on his part had not been wilful or *mala fide*. The Respondent had but an evidential burden to raise a reasonable doubt and refute wilfulness and mala fides. Any dispute of fact had to be determined on his version. The Respondent relied on the understanding between him and the Applicant that she could access the trust fund for any urgent shortfall as a means of negating contempt. The Applicant paid the children's school fees in November 2023 after informing the Respondent that she would access the trust fund to cover his outstanding amount. He informed the Applicant in August 2024 that he understood the purpose of the trust fund was to recoup the shortfalls in payment of his Rule 43 obligations. The Applicant did not dispute this at the time. The Applicant's conduct in

¹⁰ *Consolidated Fish (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C) at 522 D-E, *Victoria Park* supra

drawing on the trust fund on at least nine occasions since the contempt order meant that she interpreted the arrangement in the same manner as the Respondent did. The Respondent submitted that his version on this aspect had to be accepted. His version could not be rejected under the *Fakie* test.¹¹ He had raised a reasonable doubt as to wilfulness and *mala fides*, and the Applicant had failed to discharge the onus placed upon her.

60. Elaborating on his submission regarding substantial compliance, the Respondent submitted that substantial compliance also detracted from wilfulness and *mala fides*. He explained that he had been stretched to his absolute financial limits and had paid as much as possible towards the full amount due each month. He had defaulted on a host of his expenses, including his bond, credit cards, vehicle instalments and loan payments. The material disputes related to his payment of school fees and the expenses of an *au pair*. The Respondent asserts that his indebtedness is to the school, not the Applicant. He had arranged directly with the school to settle any arrears and future payments. He submitted that he had substantially complied with the payment of school fees.

61. The Respondent was reluctant to pay the expenses related to the *au pair* without proof of employment. In this respect, the Court notes that the *au pair's* expenses were deducted from the trust fund regardless of the Respondent's position on paying this obligation. The Respondent submitted that, in respect of the *au pair* and the school fees, his version must be accepted. It cannot be rejected under the *Fakie* test. He had raised a

¹¹ *Fakie* supra at para 58

reasonable doubt as to wilfulness and *mala fides*, and the Applicant had failed to discharge her onus beyond a reasonable doubt.

62. The third leg of the Respondent's submissions related to affordability. He submitted by presenting cogent evidence of his inability to meet his obligations he has overcome the requirement of wilfulness and *mala fides*, and the Applicant could not prove contempt beyond reasonable doubt. He indicated in his answering affidavit that his total earnings amount to R121 027.62 and his basic expenses R157 129.03, leaving a monthly shortfall over R36 000. He said that he had no further capacity to meet the shortfall. The Court has already covered the Respondent's earnings and his alleged shortfall. The Court notes that the Respondent had instituted a Rule 43(6) application to reduce his obligations. The Respondent relied on the reasoning in cases that conveyed there could be no finding of wilfulness and *mala fides* when a spouse provided sufficient evidence of unaffordability.¹² The Respondent reiterated that his version should be accepted and that the Applicant has failed to discharge her burden beyond a reasonable doubt.

63. The Respondent alleged that the application was premature, even on the Applicant's version. She complained of future conduct that had not occurred and may never eventuate. It was argued on behalf of the Respondent that he may have misconstrued the order, thus negating wilfulness. He had complied substantially with the order. He understood that the Applicant could access the trust fund if he fell short of his

¹² *KPT and Others v APT* (1215/2019) [2020] ZAWCHC 110 (2 October 2020) at para 76, *HG V AG* (2331/2017, 3487/2019) [2019] ZAWCHC 125 (20 September 2019) at paras 11 and 12

payments. In an application procedure, any dispute of fact had to be determined on the allegations he made, unless it was so untenable that it could be rejected outright.

64. The exercise of the power of committal, even where an apparently strong *prima facie* case has arisen, is entirely within the discretion of the Court; for the party in default may show that they were unable to comply with the order.¹³ The Applicant, noting this is a repeat offence, requests a fair sentence if the Court finds the Respondent in contempt of the Rule 43 order. The Applicant also seeks reinstatement of the previously suspended sentence. The Court noted the applicant's ambivalence in the orders sought. It would have appeared logical to uplift the suspended sentence if a repeat offence occurred during its tenure. Counsel were invited to address whether the Court could impose an alternative sentence if it found the Respondent in wilful contempt. The Respondent's skills could be employed more constructively in a healthcare environment rather than letting him languish in prison every second weekend for one year. The Court appreciates Counsels' responses.

65. The Applicant emphasised the purpose of a contempt finding.¹⁴ At the core of judicial authority is the Constitution and the rule of law. No person, regardless of their social or professional stature, is above the law. The apex Court has held that contempt proceedings are neither criminal nor civil but a *sui generis* amalgamation of the two.¹⁵ The Applicant argued that the Court should consider the sentence when imposing a punitive

¹³ *Slade v Slade* (1884) 4 EDC 243

¹⁴ *Victoria Park Ratepayers Association v Greyvenouw CC and others* (511/03) [2003] ZAECHC 19 (11 April 2003)

¹⁵ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021)

sanction. Coercive and punitive sanctions serve different purposes. A coercive sanction aims to ensure compliance with the original order, allowing the Respondent to avoid imprisonment by adhering to the order. Its primary goal is effectiveness, not punishment. It incidentally vindicates the Court's authority. Conversely, a punitive sanction cannot avoid imprisonment. It imposes an unsuspended sentence reflecting the seriousness of the default and the Respondent's contumacy. It asserts the Court's authority and sets an example to warn other defaulters.¹⁶

66. As alluded to, the Court formed the impression that it had to uplift the sentence imposed in the first contempt order. The Applicant correctly frames the question as being whether this Court can amend the sentence imposed in the contempt order. In *R K v IK*, Andrews AJ considered whether a Court can reconsider a sanction and substitute it for a different sentence.¹⁷ The Respondent's circumstances had changed. His estate was sequestered, and his health had deteriorated. Wilful disobedience of a Court order in civil proceedings is a criminal offence.¹⁸ The cornerstone of sentencing is the triad of factors that a Court considers before imposing a sentence, i.e., the crime, the criminal, and the interests of society.¹⁹ The Court considered imposing a sentence of house arrest in place of the suspended one-month imprisonment sentence but required a correctional supervision report to determine whether house arrest, as per section 276(1) of the CPA, was suitable.

¹⁶ *Id supra*

¹⁷ *R.K v I.K* (17760/2019) [2024] ZAWCHC 306 (20 June 2024)

¹⁸ *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No 2) [2015] ZACC 10 at para 28

¹⁹ *S v Zinn* 1969 (2) SA 537 (A)

67. Section 276 (1) of the Criminal Procedure Act 51 of 1977 ('the CPA') sets out the types of sentences a Court can impose. Section 276A allows for converting prison sentences not exceeding five years to a form of correctional supervision. Courts are permitted to impose correctional supervision as an alternative to imprisonment, either as a stand-alone sentence or as part of a suspended sentence. Correctional supervision involves the strict monitoring of offenders, often including house arrest, community service, and regular reporting to a correctional officer. The services of a social worker are required to determine whether a convicted person is suitable for community service and to identify the appropriate programme for the offender.

68. Courts have considered and imposed sentences of community service. In *Tholo*, the Court ordering contempt imposed a sentence of 250 hours of community service.²⁰ The subsequent Court, dealing with a repeat offence of contempt, ordered the unrepresented Respondent to deal with specific allegations by affidavit as a precursor to determining whether it should uplift the community service sentence. The Applicant submitted that a Court imposing such a sentence should consider the duration of the community service, where it will be performed, how it will be monitored, whether it is an appropriate sanction for the Respondent's non-compliance and the Respondent's prior conduct concerning the first contempt order and the link of the rationality of the sentence with the Respondent's non-compliance. Each of the factors required evidence.

69. The Applicant contended, without substantiation, that a community service sentence cannot be rationally linked with a failure to pay maintenance. The Court

²⁰ *Tholo v Tholo* 2024 JDR 3172 (GP)

disagrees, as community service may well be the appropriate sentence in certain instances. The Applicant does not believe that a fine is any more appropriate as it would erode the Respondent's estate and the Applicant's accrual claim.

70. The enforcement of Rule 43 orders and maintenance orders falls under different statutes: the Rule 43 order under the Superior Courts Act 10 of 2013 and the Uniform Rules of Court, and maintenance obligations under the Maintenance Act 99 of 1998. Whilst the Maintenance Act allows for criminal proceedings in cases of non-compliance, Rule 43 does not. Contempt proceedings under Rule 43, which attract sentences of imprisonment, require the applicant to prove contempt to be wilful and *mala fide* on a criminal standard, i.e., beyond a reasonable doubt. However, whilst the legal basis differs, the outcomes, such as imprisonment, can converge in cases of wilful non-compliance.

71. The Applicant argued that the Respondent's circumstances had not changed and were distinguishable from the facts of the *R K v IK* case. This submission is not entirely correct. The circumstances relating to both parties had changed. Those affecting the Respondent include the reduction in his income resulting from the loss of his rooms at the medical centre where he practised. The Applicant had relocated with the children to Pretoria and had to establish an income-generating practice there.

72. The Applicant accepts that the facts which led to the contempt order being granted were the Respondent's cancellation of his annuity and his failure to make payment of his Rule 43 obligations. The Applicant accordingly sought that the suspended sentence imposed in the contempt order be uplifted, meaning that the Respondent

should be imprisoned every alternate weekend when he is not exercising parental contact with the children.

73. The Applicant did not consider the effect of imprisonment on the children. There is no indication in her papers that she sought their view on this aspect. Apart from pleading the effect of his incarceration on the financial well-being of the Applicant and the Children, the Respondent did not address the effect that his imprisonment may have on them emotionally or psychologically. The Applicant argued that the Respondent's non-compliance is felt by the children daily and hurts the girls. In a situation akin to the one at hand, a Court contemplating imprisonment for contempt should consider referring the matter to the family advocate for a report in the absence of one from any other suitably qualified expert being submitted by the parties.

74. Relying on the triad of factors involved in criminal sentencing, the Respondent argued that the failure to make timeous interim maintenance payments is not equivalent to serious and violent crimes such as murder, armed robbery, and rape and does not deserve the equivalent punishment of incarceration. The Respondent did not acknowledge that contempt of court undermines the fundamental principles of the law and the authority of the Court. The Respondent provided facts relating to the offender, including, among others, his age, profession, impact on the children, and his ability to pay maintenance. The interests of society and the Courts' authority were dealt with in oral argument.

75. The Respondent further argued that by upholding a suspended sentence of imprisonment, the Court assumes the position of a criminal Court and imposes

punishment.²¹ Section 297(7) of the CPA permits a further suspension of the suspended sentence under certain conditions.²² An upliftment of a suspended sentence is not a mere formality but entails a fully-fledged exercise of judicial discretion.²³ It requires as much consideration and judicial discretion as the imposition of a sentence. In certain instances, the analysis requires even more thought and scrutiny. If the condition was unreasonable from the outset, then it should not be put into operation. A trivial or technical breach does not deserve the upliftment of the sentence. If the imposition will no longer serve any deterrent or reformatory purpose, it should not be ordered. The Court has to judicially consider the provisions of sections 297(7) and (9) of the CPA at all times.²⁴

76. However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief, a mandamus demanding the contemnor to behave in a particular manner, a fine, and any further order that would have the effect of coercing compliance.²⁵

77. The Respondent submitted that correctional supervision or community service is a competent sentence for contempt of Court, even where a second instance of contempt

²¹ *Stow v Regional Magistrate, Port Elizabeth NO and Others* 2019 (1) SACR 487 (SCA) at para 45

²² S297(7) of the CPA allows for a further postponement of the passing of a sentence or further suspend the operation of a suspended sentence in circumstances where a Court has postponed the passing of a sentence, suspended the operation of a sentence, or suspended the payment of a fine and may if it is satisfied that the person concerned has through circumstances beyond their control, be unable to comply with any relevant condition or for any other good and sufficient reason.

²³ *Moroe v Director of Public Prosecutions, Free State and Another* 2022 (1) SACR 264 (FB) (10 March 2021)

²⁴ *Moroe* supra at para 16 quoting Hiemstra's Criminal Procedure at pages 28-85

²⁵ *Pheko* supra at para 37

is found and a suspended sentence imposed. One of the objectives of correctional supervision is to promote the social responsibility and human development of all prisoners and persons subject to community corrections. The imposition of correctional supervision resides under the Department of Correctional Services. The imposition of correctional supervision, however, falls under section 276A of the CPA. It requires the Court to consider a report of a probation officer or a correctional official. Sections 50, 52, and 60 of the Correctional Services Act 111 of 1998 outline the objectives, set out the types, and stipulate the conditions when imposing correctional supervision, respectively.

78. The Respondent obtained a letter from a shelter for abused women and children. The Respondent served the shelter in different capacities. The shelter volunteered to assist the Court in ensuring that the Respondent fulfilled his obligations if the Court were inclined to order that the Respondent be sentenced to community service.

79. The Respondent asserted that, when compared to other cases of contempt for failure to pay maintenance or comply with Rule 43 orders, the facts of this case do not warrant a sanction of imprisonment. In *AR v MN*²⁶, the Respondent was in arrears for R742 000, had not made truthful disclosure about his earnings, was addicted to online gambling, and did not pay anything at all. That Court endorsed the reasoning in *JD v DD*,²⁷ which states that if the father were truly not acting *mala fide*, he would have at least paid the amounts he stated he could afford in his application to reduce his maintenance obligations. Despite the Court finding that the father's position was extraordinarily

²⁶ *AR v MN* (26583/2014) [2020] ZAGPJHC 215 (21 September 2020)

²⁷ *JD v DD* 2016 0933 (GP)

brazen, he received a suspended sentence of thirty days imprisonment. In *EK v PK*,²⁸ the Respondent's indebtedness exceeded R2 million. His Rule 43(6) application had been dismissed. The Respondent jet-setted around Europe, sold properties for approximately R13 million, and failed to present any facts to dispute the Applicant's allegations. The Court found the Respondent to be in contempt for the second time and sentenced him to ninety days' imprisonment, which was wholly suspended for two years, subject to certain conditions. In *Bannatyne*,²⁹ the Court stated that there was no excuse for the Respondent not to pay even the reduced amount he contended he should pay in his application for a variation of the maintenance order. The lower Court had sentenced the Respondent to ninety days imprisonment wholly suspended for five years. The matter was referred back to the Maintenance Court as the Respondent had subsequently made payments

80. In summary, the Court is not bound to uplift and apply the suspended sentence on a repeat contempt offence. It is obliged to reconsider the factors applicable to sentencing. A Court may impose any of the appropriate sentences prescribed in the CPA, including community service. The imposition of the latter sentence should be informed by the necessary reports prescribed in the Correctional Services Act. However, the Court notes that correctional supervision is an adjunct to a sentence of imprisonment that has already been imposed. The question of whether a Court can impose community service as a competent alternative to imprisonment in the context of civil contempt cases has been answered affirmatively in one instance; however, even then, the Court may need to

²⁸ *EK v PK and Others* [2023] ZAGPPHC 69, 53105/2021 (9 February 2023)

²⁹ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC)

satisfy itself about the appropriateness of the sentence for the particular offender as well as where the sentence will be served and other factors before imposing it.

81. The Applicant sought costs on an attorney-client scale. The Applicant submitted that failure to comply timeously with a Court order may result in an order to pay the Applicant's costs between attorney and client.³⁰ To impose any other order of costs would mean that the Applicant would be out of pocket. The Respondent submitted that the application should be dismissed with costs.

EVALUATION

82. The law relating to contempt proceedings is settled.³¹ The Applicant must prove the requisites of contempt, including order, service, or notice, non-compliance, wilfulness, and *mala fides*. The Respondent bears an evidential burden concerning wilfulness and *mala fides*. The Respondent must establish a reasonable doubt as to whether the non-compliance was wilful and *mala fide*. If the Respondent fails, contempt will have been established beyond a reasonable doubt.

83. The Applicant sought to hold the Respondent in contempt of the Rule 43 order. Viewed clinically, it is evident that the Respondent has consistently failed to meet his obligations, either fully or on time. Late payments may mitigate but do not excuse contempt.³² However, these submissions do not take into account the foundational

³⁰ *York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 (4) SA 477 (T) at 507

³¹ *Fakie, Pheko v Ekurhuleni City II* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko*), and *Zuma supra*

³² *HG v AG supra*

context and circumstances underlying this application. Those facts, along with the Court's interpretation of the Rule 43 order, the PPS order, and the contempt order, were covered in the opening paragraphs of this judgment.

84. The Respondent admitted to some non-compliance, in that not all payments were made promptly, but denied that this amounted to contempt. The Applicant had thrice drawn the Respondent's payment shortfall from his annuity following the PPS order and on nine occasions, including the arrears, when this application was instituted following the contempt order. The Respondent initially complied with his Rule 43 obligations through direct payments and subsequent payments sourced from the annuity and the trust fund. The Applicant belatedly realised that her recourse to the annuity at first and then the trust fund was reducing her accrual from the marriage. The Court notes that the parties' marital regime is one of out-of-community of property, excluding accrual. The Applicant has not explained how she is entitled to the Respondent's assets.

85. The Applicant's reliance on the trust fund to make up the Respondent's payment shortfalls does not avoid his contempt of the Rule 43 order. The Applicant relied upon *HG v AG*, where it is stated that there is a duty on a judgment debtor to discharge his maintenance obligations proactively. She should not have to seek payment from the trust fund as if it were a commercial debt.³³ The analogy is not entirely appropriate in this case. Maintenance-related attachment orders prioritize the well-being of dependents, whereas commercial attachment orders focus on debt recovery. The PPS and contempt orders were made for purpose orders, i.e., to obtain the arrear amounts to the extent that

³³ *HG v AG* supra at para 39

the Respondent does not comply.³⁴ Retirement annuities are generally shielded from attachment for commercial debt.

86. The Applicant accused the Respondent of placing his interests above those of his Rule 43 obligations. The late payments inconvenienced her and created hardships for herself and the children. She speaks of hardships but declines to reveal what she earns or offer any other basis for her alleged impecuniosity. Those facts are irrelevant to the determination of this application, she says. Why then allege hardships when she cannot take the Court into her confidence? The Applicant contended that Contempt applications are urgent as the vindication of the Court's authority is at stake. The application was instituted on an urgent basis. The Applicant does not say why she waited fifteen months before instituting this application after the Respondent first paid short in the aftermath of the contempt order. The Applicant's claim about vindicating the Court's authority rings hollow in the circumstances.

87. The Applicant has alleged that the Respondent has prioritised his own expenses and those of his other families and companions above that of his Rule 43 obligations. He has indulged in non-essential activities. The details are noted, but do not disturb the finding that the Respondent has complied with the quantum of his Rule 43 obligations.

88. Any order of the Court is to be obeyed. It is a crime to disobey a court order unlawfully and intentionally.³⁵ If the Rule 43 order explicitly required the Respondent to

³⁴ See *M.O v R.O and Another* (15617/2022) [2024] ZAWCHC 8; - (5 January 2024) for the principles applicable in attaching annuities for the payment of maintenance obligations

³⁵ *Fakie supra* at para 6

make full payments by a specific date, and the annuity and subsequent trust fund was only intended as a backup for arrears, the Respondent's failure to pay the full amount can still be considered to be non-compliant. The fact that the Applicant has been drawing from the annuity and trust fund to cover shortfalls does not necessarily absolve the Respondent of his primary obligation to comply with the Rule 43 order. The object of contempt proceedings is to obtain the imposition of a sanction that will vindicate the court's honour consequent upon disregarding its previous order and compel performance under the previous order.³⁶ There is no performance that the Court can compel once it finds no arrears owing in the Respondent's Rule 43 obligations.

89. However, the PPS order is specifically worded to address the Respondent's non-compliance with the Rule 43 order, and the contempt order reaffirms the purpose of the PPS order regarding non-compliance. As employed in this case, an attachment order can be an effective remedy, and recourse to seeking punitive sanctions can be avoided to ensure compliance.³⁷ In these circumstances, the Court is not persuaded that the Respondent is in contempt of the Rule 43 order.

90. None of the three orders relevant to this application are supported by judgments. The principles of interpretation in *Endumeni* apply equally to the interpretation of court orders.³⁸ The interpretation of these orders cannot be ascertained from the language of the judgment. It has to be ascertained from the language of the orders themselves. As in

³⁶ *Pheko* supra at para 28

³⁷ *Dezius v Dezius* (37655/05) [2006] ZAGPHC 77; [2007] 1 All SA 483 (T); 2006 (6) SA 395 (T) (21 August 2006), at para 29

³⁸ *HLB International (South Africa) v MWRK Accountants and Consultants* (113/2021) [2022] ZASCA 52; 2022 (5) SA 373 (SCA) (12 April 2022)

the case of interpreting a document, the wording of the orders must be scrutinised to determine their intention.³⁹ The starting point is to determine the manifest purpose of the order. It is necessary to place the order in proper perspective and to consider the context in which it was made.⁴⁰

91. The contempt order is unclear in one respect, specifically regarding the conditions that must be fulfilled to avoid imprisonment. Although it allows for the Applicant to draw upon the trust fund when the Respondent fails to comply, it also requires the Respondent to avoid breaching the terms of the Rule 43 order. Without a judgment to support this order, this Court is unable to second guess the Court on how this part of the order was crafted.

92. If the Court is incorrect in its finding that the Respondent is not in contempt of the Rule 43 order, then, after considering the evidence presented in the affidavits, the Court concludes that the Respondent is not wilfully or *mala fide* in non-compliance and thus not in contempt of the Rule 43 order. There are compelling reasons that favour this finding. The Respondent understood that the purpose of the trust fund, reinforced by the Applicant's conduct in making numerous drawings against the fund and her recourse to it to pay the children's school fees, was to cater for the shortfalls in his payments. A purposeful disregard is insufficient, as the non-complier may genuinely, albeit mistakenly, believe they are entitled to behave in the manner claimed to constitute

³⁹ *HLB* at para 26

⁴⁰ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 14; *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* [2010] 4 All SA 398 (SCA); 2011 (4) SA 149 (SCA) para 43 et seq, *HLB* supra

contempt. In such a scenario, good faith mitigates the infraction.⁴¹ In *HG v AG*, the Court found that in circumstances where the Respondent believed that a shortfall in payments would be secured from his share options, did not constitute contemptuous conduct.⁴²

93. The Applicant did not dispute the Respondent's understanding of the trust fund's purpose when he communicated that to her in writing. The Court declines to accept that the Respondent has substantially complied with the Rule 43 order. He has not, and it is only by the grace of the trust fund that he can claim that there has been full compliance with the quantum of the Rule 43 order. As for the shortfalls in payment, they were neither wilful, nor in bad faith.

94. The Respondent has demonstrated that he cannot afford his payment obligations. He has declared his salary under oath, which the Court accepts. His salary has substantially reduced. He lost his medical rooms due to his inability to shoulder the burden of after-hours duties at the medical centre where he practised, after he was obliged to spend weekends in Pretoria to ensure contact with the children. He is indebted to the company he formed and has a substantial monthly shortfall in paying his expenses and complying with his Rule 43 obligations.

95. The Respondent submitted that his version on the defences he raised had to be accepted under the *Plascon Evans* rule. His version could not be rejected in accordance with the *Fakie* test. He has raised a reasonable doubt as to wilfulness and *mala fides*, and the Applicant has failed to discharge the onus of proving wilfulness and *mala fides* on his

⁴¹ *Fakie* at para 9

⁴² *Hg v Ag* supra at para 15

part beyond reasonable doubt. The Court agrees. The Respondent cannot be subjected to criminal sanctions for contempt.⁴³

96. The parties have put out their washing for the public to view. They have engaged each other in interim and expensive litigation. Rushing to court in respect of issues that should have been objectively resolved before the institution of this proceeding, at the very least, is to be deprecated. The Applicant should have realised that this application was misconceived. It was instituted urgently, despite her version being that the Respondent had been in contempt of the Rule 43 order since August 2023, one and a half months after the first contempt order. The parties should rather expend their efforts on finalising their divorce.

97. Contempt of Court is not a finding lightly made, nor is it any easier if twice displayed. Context is the thread, the core of this tale. The peculiar facts and Court orders required scrutiny for justice to prevail. Two hearts once united now clash in spite; hang not your linen for the crowd to pry in the courtroom's glare, where tempers ignite. Resolve your differences; let the discord die. Why drift along a torrent of strife, engulfed in bitterness as incisive as a knife? Settle the storm, escape the gloom, grab the chance to heal, and reclaim your purpose in this life. Judgment seeks not vengeance or ire but the truth alone; it does require.

98. In the premises, the Court makes the following order.

⁴³ *Fakie supra* at para 14, *Matjhabeng Local Municipality v Eskom Holdings Ltd & others; Mkhonto & others v Compensation Solutions (Pty) Ltd* [2017] ZACC 35; 2018 (1) SA 1 (CC) paras 67 and 85-88)

ORDER

The application is dismissed with costs. The costs are to include the costs of the postponement of 1 November 2024.



Bhoopchand AJ
Acting Judge of the High Court
Western Cape Division
Cape Town

Judgment was handed down and delivered to the parties by e-mail on 19 March 2025

Applicant's Counsel: L Buikman SC

Instructed by Catto Neethling Wiid Inc

Respondent's Counsel: S B Van Embden

Instructed by Maurice Phillips Wisenberg