



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 1385/2015

In the matter between:

M. M. H. O.

Applicant

and

J. D. O.

Respondent

HEARD ON: 22 SEPTEMBER 2016

JUDGMENT BY: C. REINDERS, J

DELIVERED ON: 29 SEPTEMBER 2016

- [1] Ms O. filed for divorce against Mr O. under civil case number 4631/2014. On 23 April 2015 Williams, AJ granted an order in terms whereof Mr O. was ordered, amongst others, to pay

maintenance *pendente lite* to Ms O. in the amount of R 4 000,00 per month as well as R 2 500,00 per child per month in respect of the two minor children (“the Rule 43 application”), thus totalling R 9 000,00 per month.

- [2] Mr O. issued an application in terms of Rule 43(6) on 31 May 2016 (“the first Rule 43 application”). On 28 July 2016 Mathebula, AJ varied the order of Williams, AJ and ordered Mr O. , amongst others, to pay maintenance *pendente lite* to Mrs O. in the amount of R 1 000,00 per month and R 2 500,00 per child per month, thus totalling R 6 000,00 per month. Mr O. issued a second Rule 43(6) application on 24 August 2016 (“the second Rule 43(6) application”).
- [3] Ms O. issued this application for contempt of court on 17 August 2016. She seeks the committal of Mr O. for his non-compliance in respect of both the orders granted by Williams, AJ and Mathebula, AJ. This application as well as the second Rule 43(6) application was issued under the same case number and enrolled for the same date. These two applications contains cross-references to each other regarding the facts and allegations contained therein, and it was requested by the attorneys for the parties that this application and the second Rule 43(6) application be dealt with simultaneously. The order granted in terms of the latter is contained in a separate order under the same application number but indicating Mr O. as the applicant and Mrs O. as the respondent.

[4] It is common cause that Mr O. fell in arrears with his obligations in terms of the order granted by Williams, AJ when he made payment of only R 5 000,00 (in stead of R 9 000,00) at the end of April 2016 and R 2 000,00 at the end of May and June 2016 respectively. A total amount of R 18 000,00 is still in arrears in respect of the order granted by Williams, AJ. It is also common cause that Mr O. paid, in stead of R 6 000,00 only R 2 000,00 on 7 August 2016 and R 2 000,00 on 6 September 2016 in terms of the order granted by Mathebula, AJ.

[5] It is trite that, before a person can be found guilty of contempt of court, the following elements must be established:

There must be an existing court order; the order must have been duly served on the respondent and/or brought to his/her notice; there must have been non-compliance with the order; the non-compliance must have been wilful and mala fide.

See: Fakie NO v CCII Systems (Pty)Ltd 2006(4) SA 326 (SCA)

[6] Existence of the order made by Mathebula, AJ on 28 July 2016 is common cause. It is furthermore common cause that Mr O. does not comply with the said order. It is therefore incumbent upon Mr O. to show that such default is not wilful and mala fide. In his opposing affidavit it is stated by him that it is “impossible” for him to abide by the court order and further that he has done his “utmost best” to abide by the court order. In the second Rule 43(6) application Mr O. states his nett monthly salary to be R12 723,27, and lists his expenses which include expenses such as his monthly rent in the amount of R 5 000,00 and the like.

- [7] Mr O. attempts to convince me that he cannot afford to comply with the court order in view of the other expenses that he has. This does not impress me. The court order is clear. He objectively at all times has earned a bigger nett salary than his liability in terms of the court order. Objectively he can comply with the order. He cannot be heard to say that he prefers to settle expenses of his choice and thereafter has insufficient funds to comply with the court order. He should first comply with the court order *ad factum praestandum* and thereafter choose how to allocate the remainder. He deliberately chooses to pay other expenses in stead of complying with the court order. In my view his version is not tantamount to a good defence in law although I understand that from his point of view he probably thinks to himself that he needs to pay those expenses as they are important expenses for himself. To my mind same only constitutes mitigating factors in considering an appropriate sanction on conviction.
- [8] Mr O. must realize that he is seriously at risk when he fails to comply with a court order. Bearing in mind the particular circumstances herein I recon it will suffice to caution him in future to comply with court orders. He needs to realize that on failure to comply another court in future will take cognisance of this court's reprimand.
- [9] I am accordingly satisfied that Mr O. is guilty of contempt of the court order dated 28 July 2016.

[10] The notice of motion sought an order convicting Mr O. of contempt of the court order dated 23 April 2015 as well. As nuntius Ms O. reported this alleged transgression more than a year after the order was issued. Mr O. has defaulted on that order according to her as far back as April 2016. That order has been rescinded on 28 July 2016 and at the time hereof does not exist. I do not intend to investigate and/or convict Mr O. of an order which does not exist anymore.

[11] In the premises I make the following orders:

1. The respondent is convicted of contempt of the court order dated 28 July 2016.
2. The respondent is cautioned and discharged.
3. The respondent to pay the costs.

C. REINDERS, J

On behalf of Applicant:

Adv. J. Olivier
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of Respondent :

Adv. J.C. Coetzer
Instructed by:
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