

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-119659

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED. YES

.....  
SIGNATURE

DATE 8 December 2023

In the matter between:

DT

First Applicant

SCT

Second Applicant

and

MAMF

Respondent

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JUDGMENT

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T VAN DER WALT AJ:

- [1] The motion proceedings underlying this judgment appeared on the urgent roll during the last week of November 2023 at the time of year when this division is

at its busiest. The factual and chronological matrix of the matter did not strictly speaking justify a hearing in the urgent court. However, the outcome would affect a minor. Striking the matter from the roll for lack of urgency would have prolonged clearly apparent anxiety for the minor and others over the festive season and well into the new 2024 school year. The matter was thus heard as enrolled, and judgment was briefly reserved.

- [2] The applicants essentially seek an order declaring the respondent to be in contempt of a court order and they seek a sanction to the effect that she shall serve a 3 month jail sentence or pay a R100 000 fine, both conditionally suspended (the Contempt Application).
- [3] To provide some provisional context, the applicants are the two older brothers of a minor's recently deceased father. The respondent is the minor's mother and the former wife of the deceased.
- [4] The essential facts of the matter include the following.
- [5] The first and second applicants, Uncle D and Uncle S (jointly, the Uncles) are brothers. Uncle D is a retired businessman, close to 70 years old. Uncle S is part-time consultant, close to 80 years old. They cohabitate in Hyde Park. Uncle S is also Minor S's godfather.
- [6] The respondent, Mom T, is a real estate agent in her 50s. She resides in Fourways. Mom T was married to Dad T, the younger brother of the Uncles.
- [7] Mom T and Dad T divorced some 8 years ago in 2015.

- [8] Minor S was born from the marriage between Mom T and Dad T in 2008. Minor S is now a young man who will turn 14 on 21 December 2023.
- [9] Since the divorce of Mom T and Dad T in 2015, Dad T lived with the Uncles in Hyde Park.
- [10] For the duration of the 8-year period between 2015 and 2023 Mom T and Dad T had an affable co-parenting relationship in respect of Minor S. The co-parenting relationship was governed by a court-ordered divorce settlement agreement in terms of which Minor S stayed with Dad T and the Uncles in Hyde Park from Sunday morning until Thursday morning, 4 nights per week. He lived with Mom T in Fourways from Thursday afternoon until Sunday morning, 3 nights per week. This remained the position until February 2023.
- [11] Dad T passed away in February 2023 whilst collecting Minor S at Pridwin Preparatory School where Minor S was a grade 7 learner at the time.
- [12] The death of Dad T changed everything.
- [13] During May 2023, Mom T removed Minor S from Pridwin in Melrose and enrolled him at HeronBridge College in Fourways. The Uncles say this was done '*deviously*' to dilute the relationship between them and Minor S. Mom T says that the reasons were that Pridwin became a sad place for Minor S given that Dad T passed away on the school premises and HeronBridge offered Minor S a 5-year academic scholarship. Minor S in any event had no desire to have contact with the Uncles. Also, HeronBridge is in Fourways where Mom T resides with Minor S. Fourways is situated approximately 25km from Melrose.

[14] When Minor S informed the Uncles via WhatsApp of his enrolment at HeronBridge, their reaction was:

*'Your poor Dad will be crying his heart out. Truly tragic.'*

To this, Minor S responded:

*'The school actually has really good sportsgrounds. Big rugby fields, nice hockey astros, nice cricket pitches, they also do basketball, and I've made many friends and everyone's really kind. And I really like it here.'*

When the Uncles enquired via WhatsApp from Minor S why they were not included in the decision regarding Minor S's enrolment at HeronBridge, his response was:

*'Because of this whole court case.'*

Minor S's reference to *'this whole court'* case was to the Assignment Application which the Uncles had by then launched against Mom T in which they seek *inter alia* contact with and care and guardianship of Minor S. The Assignment Application will be returned to later in this judgment.

Having learnt that Minor S was enrolled at HeronBridge, the Uncles posted the following message on the Pridwin Grade 7 WhatsApp group page:

*Dear Parents and Pridwin children, it is with great shock and a heavy heart that we have just found out that [Mom T] has **deviously** removed [Minor S] from Pridwin **without our permission** or knowledge. [Uncle S] and I, especially on behalf of our late beloved brother, [Dad T], would*



*like to thank you for the friendship and support that you have given to [Minor S and Dad T] over the past seven years. We thank you for the friendship and respect towards [Uncle S] and I and the support over this traumatic period.*

(Emphasis added.)

All things considered, little value can be attached to the version of the Uncles that the change of schools was done deviously and without permission to dilute their relationship with Minor S. Objectively and on a balance of probabilities based on the facts available to this court, it was *prima facie* nothing more than a practical parenting arrangement by Mom T for which the permission of the Uncles was not required.

[15] Since the death of Dad T in February 2023, Minor S stayed permanently with Mom T in Fourways. Minor S has had no in-person contact with the Uncles since May 2023. This did and evidently still does not sit well with the Uncles. They want Minor S to stay with them and they want to have contact with and exercise care and guardianship over him.

[16] Subsequent to the events described above, the Uncles have instituted proceedings in this division under case number 2023-032929 seeking relief against Mom T in two parts (the Assignment Application).

[17] In Part A of the Assignment Application the Uncles sought an order in the following terms:

- a. *an appointment with a clinical psychologist, Dr Robyn Fasser ("Dr Fasser"), to conduct an investigation into the **best interest of S** and to make written recommendations **as to S's best interests** in respect of the relief sought by the applicants in terms of Part B of the notice of motion;*
- b. *a reasonable defined contact with S pending the final determination of the relief sought in Part B;*
- c. *that the office of the Family Advocate convenes an enquiry and provide the Court and the parties with their recommendations in relation to the relief sought in Part B of the notice of motion;*
- d. *leave to both parties to supplement their affidavits after the receipt of the report of Dr Fasser; and*
- e. *the costs of Part A be reserved for determination by the Court hearing Part B.*

[18] In the pending Part B of the Assignment Application, the Uncles seek to be assigned rights of contact and care of Minor S in terms of section 23 of the Children's Act 38 of 2005, and Uncle D seeks guardianship of Minor S in terms of section 24 of the said Act.

[19] Only Part A of the Assignment Application served before Nkutha-Nkontwana J. Part B remains pending. Nkutha-Nkontwana J made an order (the Order) in respect of Part A of the Assignment Application on 24 October 2023. The relevant parts of the Order read as follows:

a. ...

b. ...

c. *Dr Robyn Fasser ("Dr Fasser"), a clinical psychologist in private practice, is appointed to conduct an investigation into the best interests of [Minor S], and to provide the parties and the Court with her written report **which is to include a report which sets out the views and wishes of [Minor S]** and whether it is in the best interests of [Minor S] that [the Uncles], or either one of them, be granted rights of contact and care in respect of [Minor S] in terms of section 23 of the Children's Act, 38 of 2005 ("the Children's Act"), and if yes, what contact arrangements between [the Uncles] or either one of them and [Minor S] is in the best interest of [Minor S] and whether [the Uncles] or either one of them should be granted rights of guardianship in respect of [Minor S] in terms of section 24 of the Children's Act.*

d. *Dr Fasser is further to address in her report **the relationship between [Minor S] and [the Uncles]**, the attitude of [Mom T] towards the exercise of care, contact and guardianship rights by [the Uncles] or either one of them, the capacity of [the Uncles] or either one of them to provide for the needs of [Minor S] including emotional and intellectual needs, the effect of the changes brought about to the life of [Minor S] by the death of his father, and the **views and wishes of [Minor S]** and the parties regarding an appropriate secondary school for [Minor S] to attend in 2024.*

e. ...

f. ...

g. ...

***h. Pending the final determination of Part B of the application [the Uncles] shall be entitled to reasonable contact with [Minor S] which shall include***

***i. reasonable telephonic contact and contact by electronic and virtual on Monday, Wednesday and Friday between 17h00 and 19h00, commencing on Monday 29 October 2023;***

***ii. every alternate Saturday from 08h00 to 17h00, commencing on Saturday 4 November 2023, [the Uncles], or either one of them, shall collect and return [Minor S] from the Hobart Shopping Centre, Bryanston or such other place as agreed by the parties;***

***iii. on [Minor S's] birthday from 12h00 until 18h00 the collection and return arrangements set out in paragraph h.ii shall apply.***

***i. ...***

***j. ...***

***k. ...***

***l. Part B of the application is postponed sine die.***



*m. ...*

(Emphasis added)

[20] Paragraph h.ii of the Order in the Assignment Application forms the genesis of the Contempt Application now under consideration.

[21] The events subsequent to the Order dated 24 October 2023 can be summarised as follows:

[21.1] The Uncles, Mom T and Minor S were notified of the Order.

[21.2] The Uncles had telephonic contact with Minor S in terms of paragraphs h.i of the Order on Monday 30 October 2023 and Wednesday 1 November 2023.

[21.3] On Saturday 4 November 2023 at 08h00 the Uncles arrived at the Hobart Shopping Centre in Bryanston to collect Minor S for in-person contact in terms of paragraph h.ii of the Order.

[21.4] At the Hobart Shopping Centre the Uncles encountered Mom T, her attorney and Minor S.

[21.5] Uncle S had a conversation with Minor S who advised Uncle S that:

*'I don't want to go with you.'*

[21.6] Uncle S asked Minor S for the reason behind his refusal, to which Minor S responded that:

*'I only stayed there for my Dad.'*

This being reference to Minor S previously staying with Dad T at the Uncles' Hyde Park residence four nights per week.

[21.7] Uncle S then continued the conversation and attempted to convince Minor S to accompany him and Uncle D.

[21.8] Minor S steadfastly refused to accompany the Uncles.

[21.9] Subsequently, on 17 November 2023, prior to their scheduled in-person contact arrangement on 18 November 2023, Minor S telephonically informed Uncle D that

*'I don't want to come, I don't want to be with you, I was only there for my Dad, but you don't believe me.'*

[21.10] On 18 November 2023 at the Hobart Shopping Centre the events of 4 November 2023 essentially repeated themselves. Minor S again refused to accompany the Uncles.

[21.11] Save for driving Minor S to the Hobart Shopping Centre on both occasions, Mom T had no active involvement in the events described above.

[22] These events prompted the Uncles to launch the Contempt Application against Mom T.

[23] The Uncles formed certain views based on the events at the Hobart Shopping Centre. The papers reveal their views *inter alia* as follows:

- [23.1] They perceived Minor S's refusal to accompany them for in-person contact, and his reasons, as '*robotically*' repeated.
- [23.2] They perceived the presence of Mom T's attorney and the fact that Minor S climbed out of Mom T's vehicle into the attorney's vehicle as '*extremely strange*' and that '*something very strange was happening*'.
- [23.3] They were '*dismayed and shocked*' by what had transpired.
- [23.4] Their conclusion was that '*the entire encounter had been carefully planned and stage-managed*' by Mom T with the consent of her attorney who, according to the Uncles, '*played a central role*'.
- [23.5] The Uncles are of the firm view that the '*entire charade*' was intended to and did prevent the Uncles' in-person contact with Minor S as envisaged by paragraph h.ii of the Order and that it was a '*wilful and mala fide*' non-compliance the Order, deliberately intended to ensure that the Order and in particular paragraph h.ii thereof was breached.
- [23.6] The Uncles are of the view that the actions on the part of Mom T were deliberate, malicious and in contempt of the Order and its provisions.
- [24] Mom T's version of the situation is different.
- [24.1] Minor S was traumatised by the death of his father. His trauma is compounded, and his anxiety is heightened, by the fact that the Uncles persistently attempt to force him to have in-person contact with them.

- [24.2] Minor S's last voluntary in-person contact with the Uncles was in May 2023.
- [24.3] Since May 2023 Minor S refused to have in-person contact with the Uncles, something which he has conveyed to them, together with his reasons, repeatedly. Minor S never wanted in-person contact with the Uncles in the first place. The only reason why he previously had any contact with them at all was to be with Dad T who then lived with the Uncles.
- [24.4] Minor S has experienced considerable anxiety since the handing down of the Order. He experiences severe headaches, tummy ache and inability to sleep and he also started stuttering occasionally. These symptoms are worse on Mondays, Wednesdays and Fridays being the days scheduled for telephonic contact as per paragraph h.i of the Order.
- [24.5] The encounters at the Hobart Shopping Centre on 4 and 18 November 2023 occurred solely as a result of Minor S's refusal to have in-person contact with the Uncles, not because of anything done or omitted by Mom T.
- [24.6] Due to the hostility and acrimony between the Uncles and Mom T – something that is apparent from *inter alia* the correspondence exchanged between the parties' attorneys – Mom T requested her attorney to be present at the Hobart Shopping Centre drop-offs.
- [24.7] On both drop-off occasions, Minor S refused to leave with the Uncles.



- [24.8] The reason for Minor S climbing into the vehicle of Mom T's attorney was that Minor S was concerned that the Uncles would forcibly remove him from Mom T's vehicle. He felt more comfortable being in a third party's vehicle and he wanted to ensure that the Uncles understood clearly that he alone was expressing his own wish not to go with them.
- [24.9] Mom T denies the existence of a '*staged charade*'. Minor S is aware of the provisions of the Order. Mom T has explained the provisions thereof to him and he understands all of it.
- [24.10] Mom T is of the view that the perceptions of the Uncles indicate that they have no concern for Minor S's wishes and well-being or his best interest. They have been informed on numerous occasions by Minor S that he does not want to have in-person contact with them, but they persist with their demands. This causes Minor S severe distress and recurrence of the symptoms referred to above.
- [24.11] Mom T is not prepared to go to the extreme of exerting physical force on Minor S to facilitate in-person contact between him and the Uncles.
- [25] Minor S also expressed his views. The papers in the Contempt Application include a handwritten note by him. It was addressed to '*Dear sir/madam*' and it is dated 20 November 2023. The date indicates that Minor S probably intended his note to be read by the court hearing this application. It reads as follows:

*I do not want to visit my uncles. I dont want to call them and I do not want to see them. I dont want to be forced to do this. My uncles do not and*

*have not asked me what I want, they have not asked me where I want to stay. If I want to stay at Heronbridge and whenever I tell them what I want, they don't believe me and put the blame on my mum. I only stayed there 4 times a week so that I could see my father. And they are not treating my mum nicely.*

[26] The function of this court is not to determine what the wishes of the Uncles, Mom T or Minor S are, or what best serves the interests of Minor S or to prefer one version over the other. That is a process to be completed in due course by the court hearing the pending Assignment Application.

[27] The function of this court is to determine whether Mom T was in contempt of the Order and, if so, to determine an appropriate sanction. It is only for purposes of the proper contextual exercise of this function that the background to the Contempt Application is set out in detail above.

[28] The law relating to contempt of court is clear. The Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) held *inter alia* as follows:

*[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a*

*refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*

*[10] These requirements ... show that the offence is committed not by mere disregard of the court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.*

*[19] ... the Eastern Cape decisions that the criminal standard of proof (beyond reasonable doubt, as opposed to a balance of probability) applies whenever committal to prison for contempt is sought, are correct.*

*[25] ... the criminal standard of proof (beyond reasonable doubt) is appropriate also here.*

*[29] Since the applicant in punitive committal proceedings must prove contempt beyond reasonable doubt, why should a lesser standard be warranted when committal is sought or coercion alone? In my view, there can be no reason ...*

*[42] To sum up:*

*(a) ...*

*(b) ...*

- (c) *In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*
- (d) *But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond a reasonable doubt.*

- [29] As stated in paragraph 5 of the judgment in *Fakie NO*, the question whether a respondent acted in contempt of a court order depends on the circumstances.
- [30] But, in this matter, before the circumstances can be considered, it must first be established what the Order requires of Mom T and whether she was in non-compliance of the Order.
- [31] Paragraph h of the Order places no obligation on Mom T to do or to refrain from doing anything. It merely states that, pending the final determination of Part B of the Assignment Application, the Uncles shall be entitled to reasonable contact with Minor S. This includes paragraph h.ii which determines that they or either one of them shall be entitled to collect Minor S from and return him to the Hobart Shopping Centre or any other agreed place on specific days at specific times.



- [32] Paragraph h of the Order is a judicial declaration of the rights of the Uncles. The Order does not purport to place any obligation on Mom T to do or to refrain from doing anything in this regard. Minor S could, for example, himself take an Uber to the Hobart Shopping Centre or any other agreed place, he could be dropped off there by a friend of Mom T or the parents of one of his own friends.
- [33] Counsel for the Uncles submitted that Mom T is the respondent in the Assignment Application and therefore it is implicit in the Order that the declaration of rights in favour of the Uncles places converse obligations on Mom T. For the reasons stated in paragraph 32, the reasoning behind the submission is not sustainable and requires no further analysis.
- [34] This court accordingly finds that Mom T was not in breach or non-compliance of the Order either on 4 or 18 November 2023 at the Hobart Shopping Centre or at all.
- [35] The absence of non-compliance with the Order renders an enquiry into the presence or otherwise of wilfulness and *mala fides* superfluous.
- [36] However, should this court's reading of the Order and its finding in respect of the absence of non-compliance be wrong, a proper interpretation of the common cause facts in any event precludes a finding beyond reasonable that Mom T acted *mala fide*.
- [37] Counsel for the Uncles submitted that the judgment of Nkutha-Nkontwana J should be understood to mean that, pending final determination of Part B of the Assignment Application, Mom T is required to temporarily disregarded the wishes of Minor S and that Mom T cannot adopt what he described as a lax and

supine approach by deferring to Minor S's wishes. That is not correct. Nkutha-Nkontwana J merely stated that Minor S's wishes are not paramount, not that they are to be temporarily disregarded. She was throughout her judgment in the Assignment Application acutely aware of the importance of Minor S's wishes. In paragraph c of the Order, she expressly directed Dr Fasser to investigate and report on the views and wishes of Minor S. In paragraph d of the Order she expressly directed Dr Fasser to investigate and report on the relationship between Minor S and his Uncles. If, under these circumstances, Nkutha-Nkontwana J nevertheless intended to declare the Uncles' *interim* contact rights in disregard of Minor S's views and wishes, she could and would have done so, for example by an express order against Mom T as opposed to a declaration of rights in favour of the Uncles. This court is not prepared to interpret the Order or its underlying judgment callously to mean that, for the time being, Minor S's wishes are to be ignored and that the Uncles' wishes shall prevail, come what may.

[38] Such an interpretation would, in this matter, operate contrary to the child-orientated spirit of this court being the upper guardian of minors. This court is of the view that, if anything, the Order should be interpreted to imply the voluntary co-operation of Minor S and that, in absence of his voluntary co-operation, one would expect of the Uncles to act lovingly and caringly by desisting from forcing themselves on Minor S against his clearly expressed will.

[39] Counsel for the Uncles submitted that Mom T's *mala fides* should be inferred from her persistent reliance, both in the Assignment Application and in the Contempt Application, on the fact that she is not prepared to apply physical

force to Minor S to have in-person contact with the Uncles, and the fact that she has not to their satisfaction demonstrated a willingness to do anything else to force Minor S into submission to change his mind. The mere fact that such reasoning requires an inference is sufficient to identify it as contrary to the requirement that *mala fides* must be proved beyond reasonable doubt.

[40] The Uncles' interpretation that the Order requires of Mom T to coerce Minor S to have in-person contact with them, whether by force, threat or otherwise, constitutes in this court's mind a repulsive notion under the circumstances. Minor S is not a piece of furniture or a pet. He is a human being, one who has already endured considerable trauma since February. The young man deserves to be treated accordingly.

[41] In support of the Uncles' case, their counsel *inter alia* relied on an unreported judgment by Crutchfield AJ in the matter of *ND v PT* in this division under case number 2020-25792 in which, similarly, the applicant sought a contempt order against the respondent pursuant to the respondent's alleged failure to comply with an order regulating in-person and electronic contact with a minor. Reliance was placed on this judgment to support the Uncles' case that Mom T's conduct constitutes wilfulness and *mala fides*. However, a careful comparison of the facts and issues in *ND v PT* with the ones in this matter reveals that, although there are superficial similarities, they differ materially and are clearly distinguishable.

[42] There is in any event, at the very least, sufficient common cause evidence to support this court's finding that Mom T as biological mother and primary



caregiver of Minor S was at all material times acting in good faith – in other words, not acting *mala fide* – by putting first what she *bona fide* believes to be in the best interest of Minor S namely to acknowledge his repeatedly expressed and motivated wish to avoid in-person contact with the Uncles. Her sin – in the eyes of the Uncles – is that she has stopped short of forcibly, threateningly or otherwise coercing an already traumatised Minor S to have in-person contact with the Uncles against his express will. Apart from the fact that the Order does not require this of her, there simply is no *mala fide* element to it.

[43] For these reasons the application is dismissed with costs.

*This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date of hand-down is deemed to be Friday 8 December 2023.*



**T VAN DER WALT AJ**  
Acting Judge of the High Court  
Johannesburg

Application heard on Thursday 30 November 2023.

Judgment handed down electronically on Friday 8 December 2023.

Appearances:

For the applicants: Adv N Konstantinides SC  
Instructed by: Van Hulsteyns Attorneys

For the respondent: Adv ST Subroyen  
Instructed by: KG Tserkezis Incorporated