



THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)
JUDGMENT

Case No: 1215/2019

In the matter between

[KPT]

FIRST APPLICANT

[NEM]

SECOND APPLICANT

[TC]

THIRD APPLICANT

and

[APT]

RESPONDENT

Coram: Rogers J

Heard: 7 September 2020

Delivered: 2 October 2020 (by email to the parties and same-day release to SAFLII)

JUDGMENT

Rogers J

[1] The first applicant ('the wife') and the respondent ('the husband') are the plaintiff and defendant in an acrimonious divorce action. The second and third applicants (Ms [NM] and Mr [TC]) are domestic workers who are also employed part-time in the husband's company, [...] ('ASC'). The wife applies for enforcement of the maintenance provisions of a rule 43 order granted by Goliath DJP on 7 February 2020 and for a finding of contempt against the husband. He counter-applies in terms of rule 43(6) for an amelioration of his obligations under the rule 43 order.

[2] The wife's application is for final relief, and the *Plascon-Evans* rule applies. The husband's counter-application requires a robust assessment of the affidavits. I shall refer to the wife's attorneys as FMA and the husband's attorneys as KMA.

[3] This judgment deals only with Part A of the wife's notice of motion. Part B, which the wife does not pursue, sought a variation of Goliath DJP's order by increasing the amount of monthly cash maintenance.

Points in limine

[4] The husband raised various preliminary objections to the wife's application: lack of urgency; that she herself was in contempt of another order and was thus coming to court with unclean hands; and that her application was an abuse of process. In argument, these points were not pressed as objections to the hearing of the merits of the case, but the husband's counsel asked me to bear them in mind on costs.

Goliath DJP's order

[5] In broad summary, para 3 of Goliath DJP's order requires the husband to maintain the wife *pendente lite* by paying *inter alia*:

- (a) cash maintenance of R10,000 per month;
- (b) the repair and maintenance costs of a Pajero vehicle used by the wife;
- (c) various costs relating to the former matrimonial home in [UR], Milnerton, where the wife still lives;
- (d) the monthly expenses in respect of a sectional title unit, [RL], which the parties co-own;
- (e) the premiums to keep the wife on the husband's Discovery medical scheme;
- (f) all reasonable medical expenses not covered by the medical scheme, including one session per week with a psychologist;
- (g) payment of the monthly salaries of Ms [NM] and Mr [TC] in the amounts of R5000 and R4400 respectively.

[6] There is a dispute about the interpretation of three provisions in para 3 of the order.

Swimming pool maintenance

[7] In regard to the [UR] expenses, para 3.3.4 requires the husband to pay

‘reasonable and necessary repair and maintenance costs (including for the swimming pool at the [UR] property) save that his prior written consent ought first to be obtained and which consent shall not be unreasonably withheld.’

[8] The dispute is whether the cost of swimming pool chemicals is a ‘maintenance cost’. Goliath DJP did not give reasons for her order. The references in the rule 43 affidavits to swimming pool maintenance and to chemicals indicate,

I think, that the parties did not conceive of chemicals as part of the swimming pool ‘maintenance’. In para 135 of her founding rule 43 statement, in a section dealing with her ‘reasonable maintenance needs’ (ie those covered by her claim for monthly cash maintenance), the wife mentioned variable monthly costs such as ‘food, cellphone, petrol, pool chemicals and personal toiletries’. In a separate part of her affidavit, under the heading ‘swimming pool maintenance and repairs’, she alleged that the pool needed regular maintenance at a monthly cost of about R500 and that it sometimes also needed a sand and filter change and repairs. She did not particularise the cost of R500, but did not allege that it was the cost of chemicals. (In relation to her monthly cash needs, the husband had tendered R250 per month for chemicals.)

[9] To ‘maintain’ something is to keep it in a fit and serviceable state. It may be said that a swimming pool requires chemicals to keep it in such a state. However, the same might be said of ordinary household detergents but one would not usually describe them as part of the cost of maintaining the house. Also relevant is that para 3.3.4 states that the wife may not incur maintenance costs without the husband’s prior written consent which may not be unreasonably withheld. This militates against including, as ‘maintenance’, routine monthly purchases to keep the house and the pool clean and serviceable.

[10] I thus hold that swimming pool chemicals are not covered by para 3.3.4.

Dog expenses

[11] The second contentious item, also listed as part of the [UR] property expenses, is para 3.3.7, which requires the husband to pay

‘the veterinary, medical, pharmaceutical expenses in respect of the parties’ dogs Ollie and Sadie as well as the costs of dog food (to a maximum of R1500 per month) and the costs of a dog walker (to a maximum of R1000 per month)’.

[12] The issue is whether the limit of R1500 is a limit only for dog food or whether it also includes veterinary, medical and pharmaceutical expenses. In her rule 43(2) notice of application, the wife sought an order that the husband pay R5600 per month in respect of the dogs, made up as to R1500 for food, R2500 for medical costs, R1000 for a dog walker, and R600 for pet care/toiletries. Additionally, she sought an order that the husband be liable to pay ‘all out of pocket veterinary charges ..., as well as medical, dental and related costs and charges not covered by the above sums’. All of this was over and above her claim for monthly cash maintenance.

[13] In advance of the rule 43 application, the husband tendered R1000 for the dog walker, R1105 for dog food and R704 for Ollie’s medication. Thus even at that early stage the husband was offering more than R1800 per month for dog food and medication. It is clear from the affidavits, in my view, that the wife always intended expenses for the dogs to be covered as an item apart from her monthly cash maintenance claim. This is the way Goliath DJP would have understood the matter.

[14] In his rule 43 answering affidavit, the husband complained that he used to buy dog food at a cost R596 per month but that more recently the wife was insisting on food costing R1100 per month. He was also no longer willing to pay for the dog walker. He did not take issue with responsibility for Ollie’s medication, simply saying that hitherto the wife had paid for this using his credit card. He did not express an unwillingness to meet the dogs’ reasonable veterinary and medical costs.

[15] In a replying rule 43 affidavit which the wife was permitted to file, she denied the husband’s allegation about the cost of the dog food. According to her, they had changed to their current brand four years previously, and the cost of that

dog food was R1499 per month, a cost which the husband had continued to bear for a while after they separated.

[16] In argument before Goliath DJP, the wife's counsel submitted a draft order in which her claim in respect of the dogs was modified to the exact form Goliath DJP subsequently incorporated in her order. The effect was that the wife abandoned her claim to a predetermined monthly amount for the dogs' veterinary, medical and pharmaceutical expenses, but she still sought to hold the husband liable for such expenses as and when they were incurred. The latter indeterminate claim already formed part of her rule 43(2) notice. The draft order continued to reflect an amount of R1500 immediately after the reference to dog food and an amount of R1000 for the dog walker.

[17] The most natural interpretation of para 3.3.7 of Goliath DJP's order is that the R1500 cap is applicable to the words introduced by the conjunctive phrase 'as well as'. If the limit of R1500 had been intended to apply to the other expenses, one would have expected the first part of para 3.3.7 to read 'the veterinary, medical, pharmaceutical and dog food expenses...'. When one has regard to the formulation of the rule 43(2) notice and the affidavits, this must have been the meaning the wife's counsel had in mind when submitting the draft order, and it must also have been the judge's intention in adopting it.

[18] I thus find that on a proper interpretation of para 3.3.7 the husband must meet the cost of dog food up to a maximum monthly amount of R1500 and must also meet the dogs' veterinary, medical and pharmaceutical expenses. It is necessarily implied that the latter costs must be reasonable.

Ms [NM] and Mr [TC]

[19] I have already mentioned the substantive content of para 3.7. The husband's obligation thereunder is stated to be subject to the proviso that

Ms [NM] and Mr [TC] work for ASC at specified times – on Wednesdays and Thursdays from 14:30 in the case of Ms [NM], and between 13:00-17:00 from Wednesday to Friday in the case of Mr [TC].

[20] There is a factual dispute as to the circumstances in which the husband has failed to pay Ms [NM] and Mr [TC] the full amounts required by para 3.7. The question of interpretation, however, is whether his obligation to pay the specified amounts is contingent on their working for ASC at the specified times. In my view the answer is yes.

[21] In giving this answer, I do not mean that the ‘provided that’ clause is a suspensive condition. It does, however, specify an obligation which Ms [NM] and Mr [TC] must perform if they (or the wife on their behalf) are to receive payment. It is a case of reciprocity. The salaries are to be paid on the 25th of each calendar month, which indicates the payment in arrears. On ordinary contractual principles, the employee must perform the service in order to have a right to claim the salary. If he or she has not performed the service, the other party may raise the *exceptio non adimpleti contractus* (*ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 808-809). As applied to para 3.7, the wife cannot enforce this term unless she causes Ms [NM] and Mr [TC] to perform the services for ASC specified in the proviso.

[22] Whether a provision such as para 3.7 should properly have formed part of an order made in terms of rule 43 may be open to question, but the order stands, and neither side took issue with it as a matter of principle. On the contrary, each side submitted a draft order to Goliath DJP containing just such a term.

Joinder of Ms [NM] and Mr [TC]

[23] Ms [NM] and Mr [TC] were joined as second and third applicants in order to enforce para 3.7 of the order. The husband contends that this is a misjoinder.

[24] Ms [NM] and Mr [TC] were not parties to the rule43 proceedings. They did not get any rights directly under the order. The relevant provision of the order formed part of wife's claim for maintenance (Ms [NM] and Mr [TC] work for her as domestic workers other than at the times specified in the proviso). It was up to her to enforce payment.

[25] Accordingly, the objection of misjoinder is well taken. However, and as the husband's counsel acknowledged, nothing turns on this, because the wife is entitled to enforce compliance with para 3.7, and no additional costs were incurred by the joinder of two additional applicants.

Para 2 of Part A - husband's non-compliance

[26] Para 2 of Part A of the wife's notice of motion lists the respects in which he was in alleged default of Goliath DJP's order when the application was launched. I shall consider these matters in the order there set out. They constitute what the wife styles contempt counts 1-34. In this part of my judgment, I simply determine the extent to which the non-compliance has been proved, leaving contempt for later discussion. The wife's application was signed on Friday 5 June 2020 and served on Monday 8 June 2020.

Cash maintenance

[27] There is a complaint of short-payment of R175,10 for February 2020. The husband alleges that the wife incurred a medical expense in January 2020, before Goliath DJP's order became effective. The expense was only partly covered by Discovery. To avoid a bad credit rating, he paid the difference (R175,10) and deducted it from the February maintenance. Since para 3.1 of the order states that the husband must pay the maintenance 'without deduction of set-off', he was not entitled to do so. He was required to pursue the wife separately to recover the money.

[28] It is common cause that for May and June 2020 the husband only paid R5000 per month instead of R10,000. His 'defence' is that he seeks a reduction in his rule 43(6) counter-application.

[29] Non-compliance as alleged has thus been established.

Pajero maintenance

[30] The wife alleges non-compliance with para 3.2.2 of the order because the husband failed to pay R6713 to have the Pajero's brakes fixed. On the wife's version, the husband was obstructive in regard to obtaining quotes. The brakes were in such a poor state that she stopped driving the Pajero on 9 April 2020.

[31] On the husband's version, he was unaware, until receipt of the wife's application, that she had actually gone ahead with the repair. The wife incurred the repair cost on 29 May 2020. Her application was dated 5 June and was served on his attorneys on 8 June 2020. The actual repair cost was somewhat lower than the service provider's quotation of 12 February 2020.

[32] In terms of para 3.2.2, the husband's prior written consent is needed for incurring Pajero maintenance expenses, which consent may not be unreasonably withheld. The husband acted unreasonably in failing to consent to one or other of the quotations after the wife furnished him with the second quotation dated 9 March 2020.

[33] However, the non-compliance alleged in the notice of motion is a failure to pay an expense which the wife only actually incurred on 29 May 2020, and there is nothing to refute the husband's version that he was not told in advance that the wife was going ahead to have the vehicle repaired by the supplier of the first quotation. The husband has now agreed to pay this amount, though it is one of several expenses he wishes to pay off in four equal instalments. For present

purposes, it suffices to say that the wife has not established non-compliance in this respect as at the date she launched her application.

Rates

[34] The wife alleges non-payment by the husband of rates of R5669,86 and R508,10 for [UR] and [RL] respectively. The husband states that the municipal bills are sent to the wife, and he has to wait for her to send them to him. He alleges that the bills reflecting the foregoing amounts were only sent to him under cover of FMA's letter of 3 June 2020. Her application was issued a couple of days later.

[35] The municipal bill for [UR] in the amount of R5669,86 reflects that R2479,08 thereof was only due on 15 June 2020, after the application was launched. The balance of R3190,78 is shown as being in arrears. The husband alleges that, having not received the municipal bills, he paid R2834,93, being half of the anticipated rates. He paid half because in KMA's letter to FMA of 28 April 2020 his attorneys had proposed this temporary adjustment of his obligations under the order. The payment of R2834,93 was not reflected in the municipal bill on which the wife relied. Accordingly, on his version the only amount in arrears at the time the application was issued was R355,85.

[36] However, the wife pointed out in her supplementary affidavit, filed a week before the hearing, that the payment of R2834,93 was only made on 11 June 2020. Accordingly, at the date the application was issued the arrears totalled R3190,78.

[37] The municipal bill for [RL] in the amount of R508,12 reflects that R120,78 thereof was only due on 29 June 2020. The balance of R387,34 was shown as being in arrears. The husband says that in June 2020 he paid R381,09, leaving a true arrears of only R6,25. He does not say when he paid the amount of

R381,09, but it seems to have been before he received the bill, because he says he paid an estimate. The wife does not deal with this in his supplementary affidavit.

[38] I thus find that the arrears at the time the application was launched were R3190,78 ([UR]) and R6,25 ([RL]). Furthermore, since it is necessarily implicit in the order that the husband must be given a reasonable period to make payment after becoming aware of the expense (measured in days, not weeks, I should add), I cannot find that his non-payment of these arrears as at the date the application was launched amounted to non-compliance.

Pool maintenance

[39] The wife alleges non-payment of pool maintenance expenses of R660, being the amount she spent on pool chemicals in February 2020. Given my interpretation of para 3.3.4 of the order, this non-compliance has not been established.

Ms [NM] and Mr [TC]

[40] The wife alleges short-payment in respect of Ms [NM] of R1500 for April 2020 and R3500 for May 2020; and short-payment in respect of Mr [TC] of R594 for March 2020, R900 for April 2020 and R2900 for May 2020.

[41] The Covid-19 nationwide lockdown started on 27 March 2020. The husband alleges that ASC's business ground to a temporary halt. On 17 April ASC was declared an essential service, and there was a phased return to work. Although ASC has a no-work-no-pay (NWNP) rule, its 79 employees received their full March and April salaries against their annual leave entitlements. To obtain full pay on this basis, they needed to sign leave forms. Some employees did not have enough accrued leave, which meant that if they did not return to work they did not get paid, leading to a staff reduction of 5% – 10%.

[42] Because of the lockdown, Ms [NM] did not work for the last five days of March 2020. The husband says that he nevertheless paid her in full for March 2020 because, like other ASC employees, she signed the leave form. She did not come to work in April or May 2020. I infer from the husband's affidavit that she did not have sufficient leave, with the result that on the NWNP rule she was not entitled to her salary.

[43] In respect of similarly placed employees, ASC lodged applications on their behalf for relief in terms of the UIF's Covid-19 Temporary Employee-Relief Scheme (TERS). ASC made such an application for Ms [NM]. In the interim, he paid her R3500 for April 2020, being what he believed to be the maximum benefit she could expect to receive from TERS. The application was rejected as being non-compliant with the TERS rules. He alleges that Ms [NM] thereafter failed to provide him with certified copies of the documents needed to submit a compliant application. In order that she should not be left without any income, he paid her R1500 for May 2020.

[44] Following the lockdown, Mr [TC] did not work the last five days of March, and did not return to work in April or May 2020. The husband alleges that Mr [TC] refused to sign the leave form, and was thus not paid out for the last five days of March, this being treated as unpaid leave. As with Ms [NM], ASC paid Mr [TC] R3500 for April 2020 pending the outcome of a TERS application, and R1500 for May 2020. Like Ms [NM], Mr [TC] failed to provide ASC with certified copies of the documents needed to submit a compliant TERS claim.

[45] The husband states that if Ms [NM] and Mr [TC] provide him with the necessary documents, he will resubmit their TERS claims and pay them any benefit received from the UIF. They returned to work in June, and ASC will thus revert to paying their full salaries.

[46] The husband alleges that the conduct of Ms [NM] and Mr [TC] in not returning to work was such that a disciplinary hearing would have been justified. Even before 26 March 2020, they arrived and left as they pleased (KMA raised a complaint in this regard as early as 20 February 2020), and Ms [NM] (so the husband says) was half-hearted in performing her duties. They were sullen and disrespectful. Although the rest of ASC's staff returned to work in May 2020, Ms [NM] and Mr [TC] did not.

[47] The wife did not deal with these allegations in her replying affidavit. She did, however, comment thereon in her affidavit opposing the husband's counter-application. She said that Mr [TC] had not refused to sign the leave form, he had merely asked the company to give him with a copy so that he could take legal advice on its contents, a request which was refused. In regard to the documents required for a TERS application (ID/passport), ASC ought to have had these on file. Mr [NM] and Mr [TC] could not have been expected to supply certified copies under Levels 5 and 4 of the lockdown.

[48] Given my interpretation of para 3.7 of the order, and having regard to the *Plascon-Evans* rule, I cannot find that the husband failed to comply with the order in this respect. It is uncontentious that Ms [NM] and Mr [TC] did not, as from 27 March 2020 until the end of May 2020, render the services which were a precondition for the husband's obligation to procure payment of their salaries. On his version, he made certain payments to them *ex gratia* and/or in anticipation of TERS benefits, but they have not given the cooperation needed for compliant TERS applications to be made.

Psychologist's fees

[49] Para 3.6 of the order requires the husband to pay the fees of the wife's psychologist, limited to one session per week. Such payment must be made

directly to the psychologist, but the wife must provide the husband with the relevant invoice so that he can claim reimbursement from his medical scheme.

[50] The psychologist charges R1100 per session. The wife alleges non-payment of R1100 for 7 April 2020 and short-payment of $R120,90 \times 3$ for 14, 21 and 28 April 2020. She also alleges that the husband's failure to meet these fees caused the psychologist to decline to give the wife her four sessions in May 2020. Finally, she alleges that the husband has failed or refused to pay for four sessions in June 2020.

[51] The husband answers these allegations as follows. Until the end of March he paid the psychologist's fees in advance. Following the lockdown, MKA wrote to FMA seeking confirmation that the psychologist was in possession of a certificate as an essential supplier and that the session of 31 March 2020 (which the husband had prepaid) actually took place. The husband says that he did not know whether the wife was continuing with the sessions during the lockdown.

[52] FMA did not respond to MKA's enquiry. The husband thus assumed that the wife was not at that stage continuing with her psychology sessions. He alleges that before receiving the application he had not seen the documents attached to her founding affidavit showing that she had her sessions in April 2020 and that she had the necessary Covid-19 permission to attend them. From the attached documents, he now inferred that the wife had paid in full for a consultation on 7 April 2020, that the psychologist had claimed directly from Discovery in respect of the other three April sessions, and that Discovery had reimbursed the psychologist R997,10 per session, resulting in a short-payment of R102,90 per session.

[53] It is not strictly correct that the husband only learnt of these matters when the application was served on 8 June 2020. At 16:50 on Wednesday 3 June 2020

FMA emailed KMA about various aspects of alleged non-compliance. Paras 4 and 5 contained the information which the husband says he inferred from the application. The application was issued on Friday 5 June and served on Monday 8 June.

[54] Although up to the end of March the husband prepaid for the psychology sessions, he has explained why he did not continue doing so in April. It was only a couple of days before the launching of the application that his attorneys were told that the wife had four sessions in April. When the application was launched, so the husband says, he had still not received the psychologist's invoices. In his opposing affidavit, he tendered to make up the three short-payments (totalling R308,70) once he got the invoices. He also tendered to refund the wife R1100 for the consultation on 7 April, though this is one of several sums he seeks permission to pay off in four instalments.

[55] The husband's version has not been refuted in the wife's responding affidavits. Accordingly, and although the husband's liability in respect of the amounts alleged by the wife for her April sessions is not in dispute, I cannot find that there was non-compliance as at the date the application was issued. At worst for him, he only learnt of the April sessions a couple of days before the application was launched, and at the time he made his answering affidavit he did not yet have the psychologist's invoices.

[56] It is unfortunate that the wife had to forego her May sessions, though since Discovery was willing to reimburse the psychologist R997,10 per session, it is surprising that the sessions were abandoned just because of a temporary shortfall per session of R102,90. The fact of the matter is that the May sessions did not take place. Since the order did not require the husband to prepay the psychologist, I cannot find that there was non-compliance with the order in this respect.

Furthermore, I do not see on what basis the husband can now be ordered to pay R1100 \times 4 for the lost May sessions. There is nothing to show that, medically, the loss of these sessions requires the wife to have an extra four sessions (ie over and above the usual four per month).

[57] In regard to the June sessions, payment in respect thereof was not due at the time the application was launched. The husband had by then proposed an amelioration of his obligations by reducing the psychology sessions to two per month, and he prepaid for two June sessions. Subject to the husband's counter-application, he will be in breach of the existing order if he pays for only two sessions per month as from June, but such non-compliance would not be one existing at the time the application was launched.

Electricity

[58] In terms of para 3.3.2 of the order the husband is liable to pay for [UR] electricity subject to a maximum of R2000 per month. I gather from the correspondence that the house has a prepaid meter and that the husband fulfils his obligation by providing the wife with prepaid electricity vouchers.

[59] On 28 April 2020 his attorneys proposed that his liability for electricity be reduced to R1000, and he has thereafter acted in accordance with this proposal, resulting in short-payments of R1000 at the beginning of May and June 2020. Non-compliance in this respect has thus been established. I note that in his answering affidavit he has tendered to make good the electricity short-payments (R2000) as part of the sum he wants to pay off in four instalments.

Vox internet charges

[60] Para 3.3.5 of the order obliges the husband to pay all Vox internet charges in respect of [UR]. The wife alleges a failure by the husband to pay the amounts of R589,01 due for May and June 2020. The husband admits non-payment. I note,

once again, that he has tendered to make up the Vox non-payments (totalling R1178,02) as part of the sum he wants to pay off in four instalments.

Dog expenses

[61] The wife alleges the following non-compliance in respect of the dogs: R1000 for the dog walker for June 2020; R1454,24 for veterinary costs incurred in February 2020; R1001,80 + R1013,20 for medication costs incurred in April 2020; and R1500 \times 2 for dog food in April and May 2020.

[62] In regard to the dog walker, the husband alleges that he met his obligations for February and March. Due to the lockdown, the dog walker was not allowed to render services in April or May 2020. The non-payment relates to an invoice issued by the dog walking firm, Urban Canine, dated 3 June 2020, which, puzzlingly, the wife paid on 1 June 2020. The husband disputes the invoice, stating that the dog walker previously charged in arrears.

[63] The claim for the dog walker was first made in para 7 of FMA's letter of 3 June 2020. Proof of payment, though not an invoice, was attached to the letter. The wife's responding affidavits do not dispute that previously the dog walker charged in arrears. It seems that the invoice of 3 June 2020 may, as a departure from Urban Canine's usual practice, have been generated in advance, in anticipation of its use by the wife in her application. But in fairness to Urban Canine, the invoice does not reflect that it was immediately due and payable. In the 'Date' column, describing the dog-walking service in respect of each dog, the date reflected is 30 June 2020.

[64] In his rule 43(6) application, the husband seeks to delete his obligation to pay for dog walking. Subject to that application, there will be non-compliance with Goliath DJP's order if he fails for June and following months to pay R1000

per month. However, I am not satisfied that there was non-compliance of a due obligation in this respect at the time the application was launched.

[65] I have rejected the husband's argument regarding the R1500 cap. Since it applies only to dog food, and since the husband admits having made no payments for dog food for April and May 2020, non-compliance in this respect (totalling R3000) has been established. (From the wife's answering affidavit in the counter-application, it appears that on 11 June 2020, a few days after the application was served on him, the husband paid R1500 in respect of April 2020.)

[66] Regarding the veterinary expenses of February 2020, the husband has not placed the invoice in issue. He was duly called upon to pay it but failed to do so. This constitutes non-compliance with the order.

[67] In regard to the medication expenses of April 2020, the invoices are perfectly legitimate. The husband considers that the claim for Bravecto, an anti-flea/tick medication, involves a 'creative' interpretation of the order. I disagree. Para 3.3.7 requires the husband cover the 'veterinary, medical [and] pharmaceutical expenses' in respect of the dogs. The Bravecto medication is squarely covered.

[68] Demand for reimbursement of the April medication expenses was contained in paras 3 and 12 of FMA's letter of 3 June 2020. The same letter, in para 11, repeated the claim for the veterinary expense of February 2020. Since the husband was entitled to a reasonable opportunity to make payment, I cannot find that there was non-compliance in respect of the April expenses at the date the application was issued, though the husband clearly was under an obligation to make payment within a reasonable time.

Para 3 of Part A – mandatory orders

[69] In para 3 of Part A of her notice of motion, the wife seeks orders, said to be pursuant to para 3.3.4 of Goliath DJP's order, obliging the husband to pay on due date the following service providers (or their successors) for professional services rendered at the [UR] property: (a) Cleancut Garden Specialists at R270 per week plus VAT; (b) Kleenbin at R290 per month; (c) Summerpools at R165 per week plus VAT, plus all such other costs of repairs and maintenance which are excluded from their service fee. I shall refer to these as claims (a), (b) and (c).

[70] Although the wife describes these claims as contempt counts 35-37, it is not apparent to me on what basis she treats this as contempt, since she does not claim amounts allegedly in arrears. It appears from the papers that there is a dispute between the parties as to whether these claims are covered by Goliath DJP's order.

[71] Para 3.3.4 requires the husband to pay 'reasonable and necessary repair and maintenance costs' in respect of the [UR] property, including for the swimming pool. His prior written consent is needed in order for such costs to be incurred. He may not unreasonably withhold consent. It is clear from the correspondence that the husband has declined to give consent to claims (a), (b) and (c). The question is whether the three claims are reasonable and necessary repair and maintenance costs.

[72] Claim (a) is based on a quotation for weekly garden maintenance. Claim (b) is based on a quotation for cleaning the wife's two municipal bins every week. Claim (c) is based on a quotation for vacuum-cleaning of the pool, brushing down the pool walls, netting debris on the pool surface, backwashing and rinsing the filter.

[73] In his answering affidavit the husband describes these claims as ‘simply outrageous’. His tender to pay for repairs and maintenance was never intended to cover these types of services. He says that Mr [TC] used to do these chores at the [UR] property, and there is no reason why he should not continue to do so. Mr [TC] is at the wife’s disposal for the whole of Thursdays and Saturdays, and for six hours on Wednesdays, Thursdays and Fridays.

[74] I am not satisfied that these claims are reasonable and necessary. The wife alleges that Mr [TC] helps her in her [CB] business (a toddlers’ creche). However, she has not put up evidence to show that his help in that business is, or needs to be, full-time. Moreover, the business was not operational over the period April-July 2020, which would have freed up the time which Mr [TC] and the wife would otherwise have spent in that business. From her replying affidavit, it appears that her plan was to reopen [CB] on 4 August 2020.

Paras 4 and 5 of Part A – contempt of court

[75] The wife has discharged the burden of proving that at the date she launched her application the husband, with knowledge of the order, had failed to comply with it in the respects set out in the following paragraphs in Part A of her notice of motion: para 2.1 (monthly maintenance), para 2.10 (electricity), para 2.11 (Vox internet), para 2.13 (veterinary costs of February 2020) and para 2.15 (dog food for April and May 2020).

[76] The question is whether she has proved beyond reasonable doubt that the husband’s non-compliance was wilful and *mala fide*. An evidentiary burden rested on the husband to allege facts creating reasonable doubt, but the ultimate burden rests on the wife. If, on a conspectus of all the evidence, it is a reasonable possibility that the husband’s non-compliance was not wilful and *mala fide*, he cannot be subjected to criminal sanctions for contempt (*Fakie NO v CCII Systems*

(Pty) Ltd 2006 (4) SA 326 (SCA) 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).

[77] Non-compliance with a court order will not be wilful and *mala fide* if it is reasonably possibly the case that the party sought to be punished genuinely, albeit mistakenly, thought that he had complied with the order. In respect of paras 2.13 and 2.15 (veterinary costs and dog food), the husband alleges that he understood his liability for veterinary costs and dog food in combination not to exceed R1500 per month. Although I have found that interpretation to be wrong, I cannot find beyond reasonable doubt that he did not genuinely understand the order in that way. At the hearing his counsel argued that his was indeed the correct interpretation.

[78] In respect of February 2020, the husband paid R1055,80 in respect of medication and R444,20 for dog food, ie a total of R1500. He had thus, on his understanding of the order, met his full liability for that month, from which it follows that his non-payment of the veterinary cost of R1 454,20 incurred in February 2020 was not wilful and *mala fide*.

[79] On his version, he made no payments – either for dog food or veterinary/medical costs – in respect of April and May 2020 (his ‘April’ payment of R1500 was only made on 11 June 2020). His non-payment in respect of these two months can thus not be ascribed to a misunderstanding of the terms of the order.

[80] There is likewise no question of a misunderstanding of the terms of the order in regard to the monthly cash maintenance, [UR] electricity and Vox internet charges. In regard to the modest shortfall of cash maintenance in February 2020, the husband does not say that he did not notice the express language of the

order which prohibits deduction or set-off, and this was pertinently pointed out to him in para 1 of FMA's letter of 10 April 2020.

[81] The question is thus whether it is reasonably possible that, as the husband claims, he could not afford to pay these amounts. It is common cause that Goliath DJP made the order she did on the basis that the husband's salary, and his ability to make additional drawings, from ASC placed him in a financial position to meet the obligations imposed on him. It is not in dispute that at the time the order was made he could in this way afford to meet those obligations. Although the husband did not agree with the wife's claims, and does not necessarily agree with all aspects of Goliath DJP's order, his defence in the rule 43 proceedings was not that he could not afford to pay the claims.

[82] The husband alleges that the Covid-19 pandemic and national lockdown materially affected ASC's performance. Some contracts were lost while others were suspended or continued at discounted rates. He alleges that at that time Goliath DJP made her order, his net salary from ASC was R33,540, and that his total net salary plus drawings totalled R68,650 per month. The blow suffered by ASC's business meant that in April and May 2020 he was only able to draw a net salary of R9900 per month. He was forced to cut expenses across the board. Whereas previously ASC operated with a positive cash balance in its bank account, it was now usually operating at the limit of its R500,000 overdraft. ASC had to retrench three employees at the end of June 2020. By taking a large cut in his own salary, he was able to keep on another eight employees who would otherwise have had to be retrenched.

[83] The husband filed an affidavit by Mr J N Coetzee of Callidus Chartered Accountants, ASC's accountants. Mr Coetzee attached an income statement for 1 March – 31 May 2020. Total sales (revenue/turnover) in that period were

R2,099,103, with a net profit before tax of R166,083. At the time he made his affidavit, he did not have the figures needed to include June in the income statement. However, he had sales figures for June, because he says that for the period 1 March – 30 June 2020 ASC's sales totalled R2,629,742, as against R3,278,862 for the same period in 2019. This was a decrease of R649,120 over four months (R162,280 per month).

[84] Mr Coetzee's affidavit was filed about a month after the husband's. In para 64 of the husband's affidavit, he stated that for the period 1 March – 22 June 2020, ASC's sales dropped to a monthly average of R720,205. This suggests that for the period March – June 2020 ASC's revenue totalled R2,880,860, considerably more than the figure stated by Mr Coetzee. The discrepancy is unexplained. (The husband contrasted the monthly average of R720,205 with the 12-month average for the financial year ended 29 February 2020, namely R834,773, but that is not a like-for-like comparison, because a landscaping business' revenue may be 'lumpy' rather than evenly earned over the year.)

[85] When one bears in mind the dire effects which the pandemic has had on many businesses, the effects on ASC do not seem particularly severe. Although there has been a significant drop in turnover, profitability remains good. Indeed, if Mr Coetzee is right about the profit earned for 1 March – 31 May 2020, the pre-tax profit is excellent – 7,9% of turnover. The pre-tax profit as a percentage of turnover was only 2,9% in ASC's 2020 financial year and 1,3% in the 2019 financial year. Furthermore, the net pre-tax profit of R166,083 reflected in the management accounts for March – May 2020 is after a depreciation allowance of R65,616. Since depreciation is a non-cash provision, one could say that the profit was R231,700 after making allowance for all cash-flow expenses.

[86] The husband's attorneys set out his case for an amelioration of his obligations in their letter of 28 April 2020. In reply, FMA asked for various documents to enable the wife to assess the request. On 6 May 2020 MKA furnished FMA with the husband's Capitec bank statement for the period 1 January – 30 April 2020, his FNB statement for the period 2 March – 4 May 2020 and his Discovery credit card statements dated 7 February, 9 March and 9 April 2020. MKA advised FMA that they were awaiting ASC's management accounts for the relevant period.

[87] The Capitec bank statement shows a credit balance of R30,646 as at 30 April 2020. The FNB statement shows a credit balance of R5837 as a 4 May 2020. The balance in the FNB account would have been R55,000 more if the husband had not withdrawn that sum from his account in order to lend it to ASC.

[88] Among the documents FMA had requested were ASC's bank statements for the period 1 March 2019 – 30 April 2020. Although these must have been available to the husband when his attorneys wrote their letter of 6 May 2020, they were not supplied. This was not remedied when the husband filed his opposing papers, and he did not update his personal bank statements either. The result is that we only have the husband's say-so that ASC was operating at an overdraft of R500,000. (While I do not think that the bank statements up to the end of February 2020 were material, those as from March 2020 clearly were.) The husband's counsel asked me to bear in mind judicial disapproval of prolixity in rule 43 affidavits. However, and even if that were a reason not to attach the relevant bank statements to the husband's answering affidavit, it is no excuse for not making them available to the wife's attorneys so that they could assess whether his assertions were true.

[89] In my view, the husband's failure to provide the bank statements is a critical gap in his attempt to create reasonable doubt, particularly having regard to the management accounts attached to Mr Coetzee's affidavit. The amounts which he failed to pay the wife were not very large in relation to ASC's affairs: R175,10 at the beginning of March 2020, R1500 in April 2020, R8089 in May 2020, and R6089 at the beginning of June 2020. His usual salary was much more than what he chose to draw. He controlled ASC and had the power to draw a higher salary if the corporation was able to pay it. Without ASC's bank statements, we do not know that it could not afford pay him the extra few thousands of rands which would have been needed in March – May to enable him to meet his obligations.

[90] To this must be added that he had a positive combined balance of more than R43,000 in his Capitec and FNB accounts at the end of April 2020, more than enough to have met the amounts in respects in which he was non-compliant in March and April. Furthermore, the husband does not state that he and/or ASC were not able to borrow an additional amount to meet his obligations to the wife. He owns a business which has operated successfully and profitably for some years. The business was not crippled, even though it was negatively affected, by the pandemic, and his expectation was that within a few months things would be more or less back to normal. On the face of it, he and his corporation were good candidates for a short-term bridging loan.

[91] It also appears from the papers that the husband's parents have resources, and have set up several family trusts of which the husband is a beneficiary. Although the parents and the trusts (of which the parents are trustees) may not be obliged to assist the husband, he does not say that he sought their assistance and that it was declined. He states that his parents have helped both of their children in the past.

[92] The husband has responded evasively to the wife's allegation that he has bought a flat at [KH] in Milnerton. She alleged that he took ASC staff there during the lockdown period to do renovations pending transfer. In response, the husband said that he had not bought the property: 'I have taken staff members to the property to work there but not because the property belongs to me.' If this was an armslength ASC contract, I would have expected the husband to say so and to identify the client.

[93] In an affidavit filed a week before the hearing, and primarily in response to Mr Coetzee's late affidavit, the wife stated that the husband had now moved into the [KH] flat while renovations were being carried out at the [FG] property. The [FG] property belongs to a family trust and is the place where the husband has been residing since leaving the matrimonial home. It also serves as ASC's office. It appears from the husband's affidavit that ASC leases the [FG] property from the trust and that in lieu of rent it is effecting improvements to the property. The wife states that the [UR] property is next door to the [FG] property, so she can see the daily building renovations activity.

[94] It must also be remembered that the husband already 'saved' certain expenses he had under the order by not paying the veterinary bill of February 2020 and the psychologist's fees for April and May 2020, and he will not be found in contempt in these respects. He has also, for the period 1 May – 31 July 2020, enjoyed a payment holiday from the bank in respect of the mortgage bond payments for [UR]. It is unclear whether he has also sought and obtained a payment holiday in respect of [RL]. Despite this, in his opposing affidavit he treated the [UR] and [RL] bond instalments as expenses he needed to meet. Moreover, the expenses he has borne, and will in the future bear, in respect of the wife's psychologist are in the main recoverable from the medical scheme.

[95] Compliance with court orders is always important. There is a particular scourge in this country of spouses, particularly husbands, failing to pay judicially ordered maintenance. While a spouse facing a criminal sanction is entitled to the benefit of reasonable doubt, a court should not too readily find such doubt to exist where the spouse has failed to put up evidence which should have been available to him to support a claim of unaffordability. In the present case, the husband acted in a high-handed and disdainful way in giving effect to the proposals in his attorneys' letter of 28 April 2016. I conclude that his evidence does not raise reasonable doubt. Contempt in the respects identified above has thus been established.

[96] I should make clear that in reaching this conclusion I have not accepted the submissions made on behalf of the wife with reference to ASC's draft financial statements for the year ended 29 February 2020. Although the financial statements show that ASC is a successful concern, it is wrong to equate its retained profits of R2,226,465 with ready cash. The balance sheet shows that at year-end those retained profits were not backed by cash but were tied up in non-current assets, trade receivables and an anticipated tax refund.

[97] The wife's attorney submitted that a period of suspended imprisonment would be an appropriate sanction. In my view, imprisonment is not called for. I am dealing with a first infraction, which is considerably narrower than what the wife alleged. A suitable sanction would be a fine of R20,000, suspended for three years on condition that the husband is not convicted of contempt for non-compliance with a court order committed during the period of suspension.

[98] Although the question of sanction was dealt with fully in the wife's attorney's heads of argument, it was not addressed by the husband's counsel. Accordingly, and in case there should be any suggestion of unfairness, the

aforesaid sanction will be imposed provisionally. If the husband considers that a lesser sanction should be imposed, he will have two weeks from the date of this judgment to make written submissions in that regard, in which event the wife will be entitled to file a responding submission. I should nevertheless emphasise that in civil contempt proceedings a respondent can ordinarily be expected, in his opposing papers and in argument, to deal with the question of sanction in the event of contempt been proved.

The husband's counter-application

[99] In terms of para 3 of his rule 43(6) notice, the husband applies for the following variations to Goliath DJP's order: (a) reducing the monthly cash maintenance to R5000; (b) reducing his liability in respect of the dogs to a maximum of R1000 per month; (c) reducing the psychology sessions he must cover to two sessions per month; (d) requiring the wife not to incur medical expenses and treatment exceeding R1000 of the medical aid cover without first obtaining the husband's written consent which shall not be unreasonably withheld (currently para 3.6 sets the foregoing limit at R1500).

[100] In regard to (b) above, there was some ambiguity in the formulation of the rule 43(6) notice, but the husband's counsel clarified that the intention was that the husband would no longer be liable for the cost of dog walking, and that his liability for veterinary, medical, pharmaceutical and dog food expenses would in totality not exceed R1000 per month.

[101] It is unnecessary to mention the relief claimed by the husband in paras 5 and 6 of his notice, because his counsel acknowledged that such relief was not competent under rule 43. In para 7 he asks that his obligation to pay the municipal charges in respect of [UR] and [RL] be clarified as being an obligation to do so within seven calendar days after receipt by him of the invoices.

[102] The husband's application is based on the effects of the Covid-19 pandemic on ASC's business. His initial proposal for amelioration was made in KMA's letter of 28 April 2020. In his answering affidavit, he said that the business was slowly clawing its way back, though the discounts he had to offer on two large contracts would remain in place for the foreseeable future. By that stage (he signed his affidavit on 25 June 2020) he was better able to gauge ASC's position, and this meant that he could limit the amelioration he was seeking to those set out in his rule 43(6) notice (the letter of 28 April was more ambitious).

[103] I accept that the pandemic has adversely affected ASC's business. Whether this is a 'material' change for purposes of rule 43(6) depends on whether this adverse effect has made what was previously affordable unaffordable. Because of the husband's failure to produce his own bank statements for May and June 2020 and his failure to produce ASC's bank statements for March –June 2020, and because of his failure to disclose whether he has made attempts to obtain temporary additional finance from other quarters, I am not satisfied that he has discharged the burden of showing this.

[104] I am inclined to agree that a dog walking service is a luxury. Most owners derive pleasure from walking their dogs, and the wife also has domestic employees who could assist. However, it is not my role to revisit Goliath DJP's order. I must assume that the order in respect of this item was a reasonable one to impose, the only question now being whether there has been a sufficient change in the husband's financial circumstances to render it unreasonable to expect him to continue meeting the expense.

[105] Whether the wife continues to need as many as four psychology sessions per month is not something on which I am able to comment. It may or may not be

an unnecessary luxury, but on the information before me I cannot find that the husband is unable to afford four sessions.

[106] If the husband considers that ASC's business remains depressed to an extent that he cannot reasonably be expected to pay some of the expenses covered by Goliath DJP's order, my dismissal of his counter-application will not preclude him from renewing it, but he will then need to put up substantiated evidence. In advance of any such renewed application, he would be well advised to furnish the wife's attorneys with updated management accounts and up-to-date bank statements (personal and corporate). He should also address his ability to raise finance from sources, the question of the [KH] flat and the expenditure on the [FG] renovations.

[107] In view of some of the arguments advanced on the wife's behalf, I should make clear that I do not consider that, in order to show a 'material change' in circumstances for purposes of rule 43(6), the husband necessarily has to show that the adverse effect of the pandemic on ASC's business has been so severe that compliance with Goliath DJP's order is for all practical purposes impossible. Goliath DJP made her order in circumstances where the husband's financial position was such that he could comfortably meet his obligations under the order while still living at a reasonable level of comfort himself. It is not necessarily reasonable to expect him to continue meeting his obligations under the original order if to do so he has to live in materially reduced circumstances himself. That is not a scenario which Goliath DJP had to consider.

[108] It is also not necessarily the case that maintaining the wife at the level set out in Goliath DJP's order must take rigid priority over the survival of ASC's business. Goliath DJP made her order in circumstances where the financial circumstances of the husband and his company were such that he did not need to

choose between maintaining his wife and keeping his business. Indeed, a thriving business was the premise of his being able to afford to meet the maintenance obligations imposed by the order. The learned judge would not necessarily have made the same order if the position had been that the husband would have needed to liquidate the business in order to maintain the wife at that level.

[109] In regard to para 7 of the husband's counter-application, it is probably sensible, if only to avoid future disputation, to specify a period within which the rates must be paid. I think seven calendar days is reasonable.

Conclusion

[110] In regard to para 2 of Part A, I shall order the husband to make payment of those amounts in respect of which he was non-compliant at the date the application was launched on 5 June 2020, such payment to be made within one week of the order. The fact that I do not make similar orders in respect of the other items in para 2 does not mean that such other items did not become due and payable after 5 June 2020. The extent to which the husband is liable for such other items will be apparent from what I have said above.

[111] By virtue of an interim order made on 23 July 2020 by agreement, but without prejudice to the wife's application, the husband was to pay off, in four equal instalments, an outstanding amount of R12,990,92. The last instalment falls due on 7 October 2020, just a few days after this judgment is to be handed down. Accordingly, I will leave those amounts to be finally settled in accordance with the order of 23 July 2020.

[112] In regard to costs, the wife has proved non-compliance as at 5 June 2020 in respect of items 2.1, 2.10, 2.11, 2.13 and 2.15, totalling R17,807,32 out of a total alleged non-compliance of R54,004,88 (33%). In respect of these items, contempt has been proved except for item 2.13. This contempt, in monetary terms,

is 30% of the total amounts in respect of which the husband was alleged to be in contempt.

[113] The wife's claims in para 3 have failed, and she has not pursued Part B, even though the husband was called upon to deal with it in his answering papers. On the three main interpretive issues, she has failed on two of them. As against this, the husband's counter-application has failed.

[114] Although the wife has only succeeded to the extent of one-third in relation to para 2 of Part A, that is not because the husband is not liable for the rest of the items. Given the attitude he was adopting, he probably fell into default in respect of a number of those items subsequent to the issuing of the application. Coupled with the strong disapproval the court always has for contempt, the husband must bear the bulk of the costs. I do not intend to distinguish between the costs of the application and counter-application, because the issues were to some extent intertwined.

[115] I do consider, though, that there should be some recognition of the wife's failure. I should also say that in some respects she seems to have been unattractively intent on extracting more than her 'pound of flesh'. I shall thus deprive her of 25% of her costs, and I will not order the husband to pay costs on a punitive scale. I have borne in mind the *in limine* points made by the husband, but I cannot find that they militate against the costs order I intend to make.

[116] I make the following order:

- (a) In regard to para 2 of Part A of the applicant's notice of motion, but subject to para (b) below, the respondent must, to the extent that he has not already done so, pay the amounts set out in paras 2.1, 2.10, 2.11, 2.13 and 2.15 within one week of the date of this order.

- (b) In respect of the amounts regulated by para 8 of the order of 23 July 2020, the respondent must complete payment thereof in accordance with that order.
- (c) Save as aforesaid, the claims in paras 2 and 3 of the said Part A are dismissed.
- (d) The respondent is found to be in contempt of the order of 7 February 2020 in the respects set out in paras 2.1, 2.10, 2.11 and 2.15 of the said Part A.
- (e) In respect of the said contempt, the respondent is sentenced to a fine of R20,000 suspended for a period of three years on condition that he is not convicted of contempt of any court order committed during the period of suspension.
- (f) The sentence in (e) is provisional. If the respondent considers that a lesser sentence should be imposed, he must, within two weeks of the date of this order, file a written submission in support of such lesser sentence, in which event the first applicant shall be entitled to file a responding submission within one further week. If the respondent does not file a written submission as aforesaid, the sentence in (e) will become final.
- (g) The order of 7 February 2020 is varied by the insertion of the following paragraph, numbered 3A, immediately before para 4 thereof:
- ‘3A. The respondent must make payment of the expenses referred to in paragraphs 3.3.2 and 3.4.2 above within seven calendar days of receipt by him of the relevant invoices.’
- (h) Save as aforesaid, the respondent’s counter-application is dismissed.
- (i) The respondent must pay 75% of the first applicant’s costs in the application and counter-application.

O L Rogers
Judge of the High Court
Western Cape Division

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