THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 10540/16

In the matter between

MDN **APPLICANT**

and

SDN **RESPONDENT**

Coram: Rogers J

Heard: 2 November 2020

Delivered: 13 November 2020 (by email to the parties and same-day release to SAFLII)

JUDGMENT

Rogers J

[1] The applicant ('the wife'), the plaintiff in a pending divorce action, has applied for a finding that the respondent ('the husband') is in contempt of a rule 43 order made by agreement on 16 March 2017. Among the order's provisions are monthly cash maintenance of R18,000 and payment of a domestic worker's salary. The non-compliance which the wife alleges are short payments of cash maintenance for the months of May-August 2020 and non-payment of the domestic worker's monthly salary of R2345.58 for the same period.

[2] The husband's knowledge of the order and, subject to two special defences, his non-compliance, are common cause. The question is whether he has put up evidence creating reasonable doubt that non-compliance was wilful and *mala fide*. 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).

[3] The husband's special defences are (a) an alleged oral agreement that he would be relieved of paying the domestic worker's salary during the national lockdown; (b) set-off. There are also procedural defences of lack of urgency and non-compliance with rule 41A.

[4] Because contempt relief is final, the *Plascon-Evans* rule relates to factual disputes. In other words, the husband's version must be accepted unless it is so far-fetched or otherwise untenable that I can reject it on the papers.

Urgency

[5] As to urgency, the application was launched on 20 August 2020 for hearing on 10 September 2020. The husband gave notice of opposition on 27 August and filed his answering papers on 7 September. On 10 September the matter was postponed by agreement for argument on 17 September but on that date it was postponed, again by agreement, for hearing on the semi-urgent roll on 2 November. Both orders preserved the husband's right to contest urgency.

[6] Contempt proceedings are by their nature urgent, because the vindication of the court's authority is at stake (*Protea Holdings Ltd v Wriwt & another* 1978 (3) SA 865 (W) at 868B-869A). Contempt proceedings relating to maintenance are particularly important, since most often it is women and the children in their care for whose benefit such orders are made. Such women and children are a vulnerable class, and unfortunately non-compliance by husbands and fathers is widespread (cf *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) SA 363 (CC) paras 27-30).

[7] Correspondence between the attorneys regarding non-compliance terminated on 20 July 2020, when the wife's attorneys wrote to the husband's attorneys rejecting his proposal for reductions and requiring him to comply with his obligations under the order, failing which further legal proceedings would be taken.

[8] The wife can be criticised for having taken a further month to institute contempt proceedings. As against this, the application was not launched as one of extreme urgency. About two and a half weeks' notice was given, and the husband

was able to file answering papers timeously. It appears that the parties were ready to argue the matter on 17 September 2020. It is unclear why it was further postponed. Be that as it may, there is no doubt that, at the very least, a hearing on the semi-urgent roll was justified. Urgency is thus not a basis for declining now to entertain the case on its merits.

Non-compliance with rule 41A

[9] For the first time in his counsel's heads of argument, the husband raised a procedural objection that the wife had failed to comply with the new rule 41A(2)(*a*), in that she had not, together with her application, served a notice indicating whether she agreed to or opposed referral of the dispute to mediation.

[10] I do not wish to be understood as under-estimating the value of mediation and the importance of compliance with the rule. Nevertheless, it is a relatively new provision, so one can understand that it will on occasion still be overlooked. The husband's legal representatives apparently also overlooked it, because the husband did not, when giving notice of opposition or when delivering his opposing affidavit, filed the similar notice required from a respondent in terms of rule 41A(2)(*b*). There is no statement from the husband under oath that he would have wanted the matter to be referred to mediation.

[11] These are contempt proceedings in which the court itself has an interest in vindicating its authority. While I would not wish to exclude the possibility of mediation where contempt is in issue, I think the court would more readily overlook non-compliance in such cases. Since courts are not slaves to the rules, I am not prepared to uphold this technical objection.

Oral agreement re domestic worker?

[12] The husband alleges that during April 2020, when he was visiting the children at the former matrimonial home in Durbanville (where the wife still

resides), he and she agreed expressly that the domestic worker would not be rendering any services during the lockdown and that he would not be required to cover her salary during that time. He said he recorded the conversation, and tendered it to her and the court.

[13] The applicant's legal representatives evidently did not take up the invitation, but I asked for the recording. I have listened to it. The husband's note at the beginning of the recording is that it was made on 29 May 2020 (not April, as he alleges in his affidavit). It was a fraught discussion about various matters. At some point the husband starts talking about Covid-19 and the levels of infection in Fernwood (where he lives) and Durbanville (where she and the children live). He tells her that the problem is exponentially worse in areas like Nyanga, 'so you don't want a [domestic worker] coming in'. She interjects indistinctly but her words seem to be, 'I'm not getting my [domestic worker] in now'. He carries on, almost as if she had not spoken, 'and you don't want children going to school now.'

[14] This falls far short of an agreement of the kind alleged. The husband was not seeking to reach an agreement with the wife. His concern seems to have been the risk that the children might be infected. The wife said no more than at that time (29 May 2020) she was not insisting that the domestic worker come to work. The wife did not say that she was not continuing to pay the domestic worker, and did not say for how long she would relieve the domestic worker of the obligation to attend at the house. She alleges that domestic workers were allowed to return to work when the country moved from Level 4 to Level 3, which took place with effect from 1 June 2020, but that the husband has failed to pay the required contribution in respect of her domestic worker's salary.

[15] I thus reject the husband's defence on the score. His allegations in that respect are discreditable. The impression created by the recording is that the husband is manipulative and that the wife responded to his statements spontaneously and emotionally. I do not accept that the husband could honestly have believed, on the strength of this conversation, that the wife had agreed that he need not pay the domestic worker's salary over the period May-August 2020.

[16] I should record that the wife's counsel argued that it was not permissible in law for the husband to set up the alleged agreement while the rule 43 order remained in its current form. For the reasons stated above, it is unnecessary for me to consider that submission, though I am inclined to think that compliance with a stipulation in a court order made solely for the benefit of the particular person may be waived by that person.

Set-off?

[17] The husband and his parents are involved in a family construction business, […] ('DNC'). He alleges that DNC has ceded to him certain claims it has against the wife, and that by virtue of set-off of the ceded claims his obligations to her under the order have been discharged.

[18] The session was concluded in September 2020, presumably just before the husband's answering papers were signed. Even if the session operated as the husband alleges, set-off would not be a defence if he was otherwise in contempt at the time the application was launched on 20 August 2020, though it might have a bearing on an appropriate order.

[19] The ceded claims arise from the fact that, so the husband alleges, a vehicle belonging to DNC was provided to him but placed at the wife's disposal at the husband's request. He alleges that while the car has been in her possession, she has been involved in various collisions, and is thus liable for the excess amounts

under DNC's insurance policy. He alleges, further, that she has also incurred speeding fines which DNC has had to settle because had it not done so other vehicles belonging to it would not have obtained licence clearance.

[20] He attaches a schedule setting out the amounts allegedly covered by the session. The items under 'motor vehicle accidents' (totalling R228,219.80) and 'vehicle maintenance, repairs and damages' (totalling R71,379.46) do not appear to be excess insurance payments but unliquidated amounts. The items in the former category are dated in October 2017 at April 2019 while those in the latter category cover the years 2014-2019. The fines total R3350.88 and were allegedly incurred in 2014 and 2015.

[21] Apart from the fact that the bulk of the ceded claims are unliquidated, and therefore do not qualify for set-off, the husband's affidavit is hopelessly vague as to the legal basis on which the wife is responsible for these amounts. He does not say that she contractually agreed to be liable, so presumably the claims are delictual.

[22] On the assumption that delictual claims would be consistent with whatever the agreed basis was for the vehicle being made available to the wife, those claims that arose before September 2017 were prescribed by the time of the cession. It is true that a court cannot take judicial notice of prescription (s 17(1) of the Prescription Act 68 of 1969), but that only operates, it seems to me, where a plaintiff seeks to recover a prescribed debt in legal proceedings. Since set-off, where it applies, operates automatically without the intervention of the court, the common law sensibly provides that a prescribed debt cannot be the subject of set-off, and this rule has not been abrogated by the Prescription Act (De Wet & Van Wyk *Kontraktereg en Handelsreg* 5 ed p 277 Bradfield *Christie's Law of Contract in South Africa* 7 ed p 556).

[23] Finally, in law an obligation to pay maintenance in respect of a wife and children is not susceptible to set-off (*Tregoning v Tregoning* 1914 WLD 93; *Hodges v Coubrough NO* 1990 (3) SA 58 (D) at 65A-B). Voet speaks in this regard of the special favour shown to maintenance so that the beneficiary thereof is not deprived (Voet 16.2.16, translation Gane))

[24] The common law draws a distinction between future and past maintenance, arrear maintenance being regarded as a simple debt not entitled to protection (*Schierhout v Union Government* 1926 AD 286 at 291, where the legal position was not explored because the case was not about maintenance). I have some difficulty with the distinction. Set-off could obviously not operate in respect of maintenance which is not yet due, because the necessary reciprocity would not exist. To say that as soon as the maintenance becomes due and is not paid it becomes maintenance in arrears and susceptible to set-off would destroy any protection for maintenance, future or past.

[25] The distinction which the common law drew was based on the maxim *in praeteritum non vivitur* – 'one does not live in arrears' (Voet 2.15.14, being the earlier passage the jurist had in mind in para 16.2.16). That maxim is qualified in modern law (see *Africa v Africa* 1985 (1) SA 792 (SWA) at 794D; *Cary v Cary* 1999 (3) SA 615 (C) at 622E). Furthermore, the maxim does not apply where, as here, a maintenance order is in existence (*Carstens v Carstens* 1985 (2) SA 351 (E) at 353H-I quoting Professor Hahlo). To the extent that there is any doubt on the question, I consider that it would be in keeping with constitutional values and modern circumstances to recognise the common law's protection as precluding set-off in relation to maintenance which a spouse has been ordered to pay to the other spouse.

Inability to pay

[26] The husband is DNC's commercial manager. When the parties got married in January 2013, he held a 50% members interest in the corporation. In the rule 43 application, the husband attached an association agreement with his father which reflected that the husband held only 15%, the balance being owned by his father. In his opposing affidavit in the present case, the husband says that he no longer has any interest in DNC – he was forced to dispose of it due to his extensive borrowings from DNC, borrowings made *inter alia* to meet his maintenance obligations to the wife.

[27] It is not in dispute that the rule 43 order was made on the footing that the husband would meet a substantial part of his maintenance commitments via DNC and a family trust. His own assets and salary would not have provided him with sufficient resources to do so. According to him, DNC until recently paid the monthly cash maintenance and paid (and still pays) the charges relating to the Durbanville property (rates, electricity, water etc). DNC also provides the wife with a vehicle and covers its insurance and petrol costs up to R2000 per month. Amounts paid by DNC to the wife on the husband's behalf are debited to his loan account in the corporation. A family trust pays the children's school fees. The amounts personally paid by the defendant are the DSTV, internet and security charges, the domestic worker's salary, insurance and medical aid.

[28] The husband alleges that his net salary at DNC is R20,128.44. However, the pandemic has wreaked havoc with DNC's business. Its financial woes have been compounded by the fact that debtors have failed to make payments. His parents, who both work in the business, are not drawing a salary, and there have been a number of retrenchments, including the office manager, one site manager and three site workers. Retrenchment payments were made on 1 September 2020.

[29] The family trust is also facing financial pressure, according to the husband, because it depends for its income on the payment of rent by commercial tenants who are unable or unwilling to pay and on loans from the husband's father. This has led to arrears in respect of school fees, but the husband is trying to reach a payment plan with the school.

[30] The husband states, further, that DNC has been unable to pay him his normal salary. In May 2020 he received nothing; in June 2020 he received a TERS payment of R6859.68; in July 2020 he received a TERS payment of R6638.40; in August 2020 he received salary of R19,686.36 in lieu of holiday pay; and in September 2020 he received nothing.

[31] The husband alleges that he has exhausted his credit lines and credit card limit. DNC and a family trust have already advanced him substantial funds which he will have to repay. It would be unfair to his siblings if his parents caused all of his expenses to be paid. He is paying what he can from his own earnings and out of funding which his father is willing to make available to him via DNC. The husband alleges that there has been a material change in the circumstances and that once the contempt proceedings or finalised he intends to bring a rule 43(6) application for a variation of the rule 43 order.

[32] In a recent case bearing some similarities to the present one, *KT & others v AT* [2020] ZAWCHC 110, I said the following (para 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.'

[33] The distinction between that case and the present one is that there the defaulting husband owned the close corporation and was thus in a position to determine its actions and to disclose its financial circumstances. Furthermore, in that case the corporation did not seem to have been as severely affected by the pandemic as the husband was claiming, and there was inconsistent financial evidence in that regard.

[34] In the present case, if the husband were DNC's controller I would have expected him to provide with me with its management accounts as from March this year and with its bank statements. However, the husband states that he now has no members interest in the DNC, and I cannot reject that version on the papers. I cannot find, as the wife's counsel invited me to do, that the disposal of his members interest is a sham and that he his the *de facto* owner of the corporation. Although DNC is a family enterprise, I cannot find on the papers that it is under an obligation to make payments to the husband or to the wife on his behalf or, for that matter, to supply the husband with its financial information. Even if DNC's bank statements showed that there was some surplus cash or an unutilised overdraft facility, DNC is not under a legal obligation to benefit the wife or the husband at the potential expense of its business. What the husband has done is to provide me with his monthly payslips, and these reflect the reduced benefits he alleges.

[35] Since the husband's income does not enable him to meet his obligations under the order in full, the remaining question is whether he has assets which he could realise or against which he could borrow so as to fulfil his obligations. The only asset which might fall into this category is his undivided half-share of the Fernwood property where he and his life-partner reside. The property is unencumbered, and the defendant values his half-share R3,5 million.

[36] The wife's counsel submitted that if the husband were in earnest about complying with the order, he should have taken steps to turn this property to account. In answer, the husband has stated that he would not be able to borrow against the security of the property, given his current financial circumstances. A sale of his undivided half-share would be unattractive to an independent third party. The wife's counsel argued that he could have sought a partition of the joint ownership. If his partner did not agree to sell the property, an *actio communi dividundo* could be brought (*The Law of South Africa* 2 ed paras 270-271).

[37] It is true that the husband could have initiated proceedings along these lines. Clearly it would not have yielded money in time to avoid the husband falling into default. Even if he had embarked on such a process in May, it is unlikely – unless his partner gave her agreement – that it would yet have reached the stage of yielding money.

[38] While the taking of such steps would have shown that the husband was serious about meeting his obligations, I am not satisfied beyond reasonable doubt that his failure to do so shows that his non-compliance with the order has been wilful and *mala fide*. It is perhaps expecting too much that it should have occurred to the husband that he would be expected to realise the house where he lives and of which he is half-owner in order to ensure compliance with the order. We do not know what his partner's attitude to partition would be. It is not unlikely that she would resist it. There is an air of unreality about expecting the husband to sue his partner for partition in circumstances where neither he nor she desire it.

[39] If the husband's half-share of the Fernwood property is the only resource from which he can comply with his obligations under the order, the wife's remedy is to obtain a warrant of execution and to attach his half-share. If she can show that the half-share of the Fernwood property is the only means which the husband

has to comply with the rule 43 order, she may succeed in getting an order of special executability.

[40] A final consideration which counts in the husband's favour, on the question of wilfulness and *mala fides*, is that he complied with the rule 43 order for more than three years before falling into default. On his version, he was in credit at the end of March of this year before starting to fall behind in April. This does not suggest that the husband has been looking for ways to evade his obligations under an order which he admittedly seems to regard as unduly generous to the wife.

Conclusion

[41] It follows that the court cannot find that the husband is in contempt. However, because the husband has invoked two special defences (which I have rejected) in order to dispute that he is still in arrears, it would be appropriate to declare that he remains in default.

[42] There is a modest dispute of fact about the extent of the arrears. The husband alleges in para 31 of his answering affidavit that his short payments as at early September totalled R52,000. Since this figure excludes the domestic worker's salary for May-September 2020 (R2345.28 × 5 = R11,726.40), his figure must be increased to R63,726.40.

[43] When the wife launched her application in late August 2020, she alleged that the arrears were R52,382.32. On the husband's figures, adjusted for the domestic worker's salary for May-August 2020 (R2345.28 × 4 = R9381.12), his arrears at the end of August were R47,381.12.

[44] As to costs, both sides have had a measure of success. However, it may emerge at the trial that the husband's evidence in the present proceedings about

his relationship with DNC has not been candid. I shall thus order costs to stand over for determination of the trial. Although the trial judge will have an unfettered discretion, my *prima facie* – in case it should be of assistance to the trial judge – is that unless the husband's evidence in the present case is shown at trial to have been materially untruthful, the parties should bear their own costs of the present application.

[45] I make the following order:

(a) It is declared

(i) that as at the date the application was launched on 24 August 2020, the respondent was in default under the order of 13 March 2017 to the extent of at least R47,381.12;

(ii) that such default has not been reduced or eliminated by set-off pursuant to the cession constituting annexure 'AA5' to the respondent's answering affidavit.

(b) The foregoing declaration is without prejudice to the applicant's right to contend that as at 24 August 2020 the respondent's arrears exceeded R47,381.12.

(c) The costs of this application are reserved for determination at the trial of the divorce.

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O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

For Applicant	R B Engela Instructed by Enderstein van der Merwe Inc 2nd Floor, 1 High Street Rosendal, Bellville
For Respondent	P Tredoux Instructed by NME Nilssen & Associates 23 Mimosa Crescent Plattekloof, Ext 2 Parow