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THE REPUBLIC OF SOUTH AFRICA



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

Case Number: 11677/2006 and
18206/2007

In the matter between:

V[...] L[...] (PREVIOUSLY V[...])

Applicant

and

O[...] C[...] V[...]

Respondent

Coram: Wille, J

Heard: 12 August 2024

Delivered: 29 October 2024

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an application to hold the respondent in contempt of court and for an order that he be incarcerated. In addition, the applicant requires a warrant of arrest to be issued compelling the respondent to hand himself over to the police. The applicant also seeks costs against the respondent on a punitive scale.¹

[2] The underlying cause for the contempt and incarceration of the respondent is the non-payment of money to the applicant encapsulated in a court order. The respondent opposes the application on several discrete grounds. He argues that the failure to pay a sum of money cannot be enforced by way of incarceration through contempt proceedings. This is his primary argument.²

[3] In addition, the respondent contends this court is not vested with the necessary and requisite jurisdiction to make an order directing his incarceration, and (in any event) he does not have the money or assets to settle the amount owed. Thus, he has not acted contemptuously. The respondent avers that the stated purpose of the application is to coerce payment of a civil debt through the threat of imprisonment, which he says is abusive and constitutionally impermissible.³

CONTEXT

[4] The parties were married, and they divorced about seventeen years ago. They settled their differences and entered into a settlement agreement (consent paper), which provided for: (a) spousal maintenance; (b) maintenance for their children and, (c) regulated the proprietary consequences of their erstwhile marriage.⁴

[5] The obligations imposed upon the respondent were meticulously recorded in writing. One part of the agreement recorded his maintenance obligations, and the division of their respective assets was recorded in a separate portion of the

¹ *The application is essentially for the incarceration of the respondent.*

² *Under the provisions of the Abolition of Civil Imprisonment Act, 2 of 1977 (“ACIA”).*

³ *The respondent argues that the amount he owes is not maintenance.*

⁴ *The provisions of the consent paper were made an order of the court.*

agreement. The agreement was made an order of the court when the divorce decree was issued.⁵

[6] The parties, among other things, had agreed: (a) that the applicant would get the former matrimonial home; (b) upon registration of transfer of the former matrimonial home into her name, the respondent would settle the bond registered over the property, and (c) pending such transfer, the respondent was to pay the bond instalments.⁶

[7] The respondent did not comply with the terms of this agreed settlement, and the applicant sought leave to have the respondent held in contempt of court. By agreement, the initial court order was amended to record the following: - (a) the respondent would transfer his share in the former matrimonial home to the applicant as soon as possible or within sixty days; (b) the respondent would be obliged to pay all sums due in terms of the mortgage bond, and (c) if the respondent defaulted on the mortgage payments, the applicant would be entitled to recover the outstanding value of the loan from the respondent.⁷

[8] The respondent alleged that his business failed, and he fell into arrears with his mortgage bond obligations. Thus, the former matrimonial home was sold nearly fifteen years ago. The respondent then emigrated to Saudi Arabia, and he has only visited this country sporadically since his departure.⁸

PRIOR LITIGATION

[9] About three years ago, the applicant launched an application and sought the following relief: - (a) a declarator to determine the extent of the sum due to her in terms of the amended agreement; (b) an order directing payment of the sum thus found to be so determined, and (c) authority to hold the respondent in contempt should he fail to make such payment of the amount declared to be due by the

⁵ *These obligations were recorded under separate headings in the consent paper.*

⁶ *These were the bond instalments due to the bank regarding the then-extant mortgage bond.*

⁷ *This is then the dispute as to the "nature" of the amount due.*

⁸ *Thus, the amount due comprises the respondent's aliquot share of the mortgage bond payments.*

respondent. The respondent opposed the relief sought because he alleged that the applicant had waived her rights regarding certain aspects of the amended court order. The respondent did not engage with the contempt application but expressly reserved the right to do so should such an application be moved against him in due course. This is then the application.⁹

[10] This waiver shield (raised by the respondent) was dismissed by the court (in my view correctly), and the court ordered the respondent to pay the outstanding amount due to the applicant. The respondent did not pay this amount, and the applicant now seeks to hold the respondent in contempt of the new amended court order.¹⁰

THE RESPONDENT'S FINANCIAL POSITION

[11] Insofar as the respondent's financial situation is concerned, the papers show that when the sheriff of the court attempted to execute a writ on the movables and immovables of the respondent, a '*nulla bona*' return was rendered. The applicant's erstwhile attorneys then sent a letter to the respondent's attorneys alleging that, according to them, the respondent had committed an act of insolvency and did not possess sufficient assets to satisfy his debts. In addition, they alleged applicant that the respondent had secreted some of his assets away in a Trust.¹¹

CONSIDERATION

THE PRIOR ORDER

[12] As a general proposition, an applicant seeking an order for contempt of court against a respondent must demonstrate to a court: - (a) that an order was granted against the respondent; (b) that the respondent was aware of the order, and (c) the respondent had failed to comply with the order. If this is demonstrated, wilfulness

⁹ Under this rubric, the court made a monetary declaration or determination.

¹⁰ It was not specified in this prior order that the amounts outstanding were for "maintenance".

¹¹ They alleged that the respondent had committed an act of insolvency and was factually insolvent.

and *mala fides* are presumed against the respondent, who then attracts an evidentiary burden to negate these presumptions.¹²

[13] The applicant relies on the wording of the court order, which, in essence, (she says) permitted her to pursue an application for contempt of court. This court order only authorised the applicant to prosecute the respondent for his alleged unlawful conduct.¹³

[14] However, it did no more than this. I say this because it could not make the alleged conduct at the instance of the respondent 'unlawful' with retrospective effect, culminating in an order for contempt of court and then for his subsequent incarceration.¹⁴

JURISDICTION

[15] Turning now for a moment to the issue of jurisdiction. The applicant seeks an order that the respondent be incarcerated for contempt of court in the specific circumstances where he is no longer a resident of the Republic of South Africa and has left the Republic of South Africa.¹⁵

[16] It is unclear on what basis the applicant contends that this court has the jurisdiction to do so. It may be that this court could hear the application if the applicant did not seek the respondent's incarceration. The respondent's imprisonment (in these circumstances) seems to me to be legally impermissible.¹⁶

[17] I say this because it is not the subject of any serious dispute that the respondent has relocated to Saudi Arabia permanently. Thus, as a matter of law, it

¹² *Snowy Owl Properties 284 (Pty) Ltd v Celliers and Another JDR 0963 (SCA)*.

¹³ *Nothing more than authority was granted (if indeed, it was even needed)*.

¹⁴ *The order only granted the applicant leave to apply for a contempt order on the same papers (supplemented if necessary)*.

¹⁵ *This was not the subject of a serious dispute*.

¹⁶ *Di Bona v Di Bona and Another 1993 (2) SA 682 (C) at 695 A*.

must be so that this court is not vested with the necessary jurisdiction to order the arrest and detention of the respondent.¹⁷

[18] The applicant says this court has jurisdiction because the respondent has actively litigated in this country and in this court. No doubt this is correct, but the respondent has always maintained the status of a defendant or a respondent in this litigation at the instance of the applicant.¹⁸

[19] Whether or not the respondent, in this case, submitted to the jurisdiction of this court is a factual question which requires me to consider whether the cumulative effect of the proven facts establishes submission to the jurisdiction of this court on a balance of probabilities.¹⁹

[20] Further, elaborating on this theme, the applicant says the respondent is 'hoisted by his own petard' because he alleged that he may soon relocate to South Africa. The respondent alleged that if he became unemployed in Saudi Arabia, he may be forced to relocate to South Africa. The respondent advanced nothing more and nothing less than this.²⁰

[21] Thus, I am not persuaded that the respondent submitted to this court's jurisdiction. Still, even if I am wrong on the jurisdiction point, the ACIA prohibits the imprisonment of debtors for the non-payment of a civil debt. As I have said, the 'causa' in this matter is no longer maintenance as it now relates to an amount due following an asset redistribution agreement and, thus, a civil debt.²¹

[22] The starting point in the debate about jurisdiction in claims sounding in money (among other things) is that even if the court does have jurisdiction on one or other

¹⁷ *JC v DC 2014 (2) SA 136.*

¹⁸ *The respondent did not institute any proceedings against the applicant.*

¹⁹ *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd 2005 (2) SA 522 (SCA).*

²⁰ *This certainly did not equate to any sort of submission to this court's jurisdiction.*

²¹ *BJBS Contractors (Pty) Ltd v Lategan 1975 (2) SA 590 (CPD).*

common law grounds, what thereafter requires consideration is an application of the doctrine of effectiveness.²²

[21] This means that the doctrine of effectiveness must also be satisfied in the sense that the court must be able to give effect to the judgment or order sought. Our jurisprudence may have been somewhat diluted over time concerning the required degree of effectiveness. However, a court must still be able to give effect to an order made by it.²³

[22] I further find support for my views in the eloquent reasoning by Howie P in *Strang* when he formulated the correct application of the doctrine of effectiveness as follows:

*'...the responsibility for achieving effectiveness, absent attachment, is essentially that of the parties, and more especially the plaintiff. Economic considerations will dictate whether a South African judgment has prospects of success abroad and thus influence a plaintiff in deciding whether to attach and sue here or to sue there...'*²⁴

ONUS

[23] The applicant seeks to bring about the respondent's incarceration. Thus, the respondent needs only to put up evidence to raise reasonable doubt to unsettle the application at the instance of the applicant. On the contrary, the usual civil onus applies (with a criminal element) where a coercive order is sought. Thus, a clear distinction must be drawn between punitive and coercive contempt applications.²⁵

[24] The language of the prior order relied upon by the applicant records that the sum paid by the respondent is no longer a maintenance payment. I say this because

²² *FIFA v Sedibe* 2021 JDR 2021 SCA.

²³ *Lin and Another v Minister of Home Affairs and Others* 2015 (4) SA 197 (GJ).

²⁴ *BID Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA).

²⁵ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) at paragraph [67].

the wording explicitly describes an amount due after the division and distribution of assets.²⁶

[25] Upon evaluating the evidence, there is reasonable doubt as to whether the respondent can satisfy the court's money order. I say this because the respondent left this country over a decade ago when he was hopelessly insolvent. Thus, the allegation that he cannot satisfy the debt in question has not only surfaced now for the first time.²⁷

[26] The *nulla bona* return, read with the letter by the applicant's attorney, supports the allegations that the respondent does not have sufficient means or assets to pay the sums due to the applicant. This evidential material is not new and was in the applicant's possession before launching this application.²⁸

[27] Judgments (court orders) sounding in money may not be enforced by incarceration through contempt proceedings. The legal position on this score has now been eloquently formulated in the following terms:

*'...Save for one exception, an order for the maintenance of one whom the judgment debtor is liable to maintain, a money judgment is not enforced by contempt proceedings but by execution...'*²⁹

[28] This distinction between maintenance orders and other judgments (court orders) sounding in money is that maintenance orders are not money judgments but fall into a different category.³⁰

[29] Our legal landscape has since changed as courts no longer have the power to order the imprisonment of debtors for failure to pay civil debts. By legislation intervention the following:

²⁶ *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another 2004(2) SA 611.*

²⁷ *Correspondences on this aspect between the attorneys concerned occurred some time ago.*

²⁸ *The respondent stated in writing that he was unable to settle this debt owed to the respondent.*

²⁹ *Jayiya v MEC for Welfare, Eastern Cape 2004 (2) SA 611 (SCA) at paragraph [15].*

³⁰ *Dezius v Dezius 2006 (6) SA 395 (TPD) at paragraph 21.*

*'...No court shall have power to order the civil imprisonment of a debtor for his failure to pay a sum of money in terms of any judgment...'*³¹

[30] There was a saving provision that provided that these provisions would not affect the power of a court to grant an order for the committal of any person for contempt of court or to sentence a judgment debtor to imprisonment in terms of any provision for failing to satisfy a judgment by way of enquiry proceedings and then enforcement proceedings in the lower courts. However, these saving provisions have been repealed and declared constitutionally invalid.³²

CONCLUSION

[31] It cannot now be contended that the sums due to the applicant by the respondent are maintenance obligations. Thus, the applicant cannot compel payment of a civil debt, using imprisonment as her method of execution.³³

[32] This being the case, it was not demonstrated that the respondent intended in any manner to disobey the court order, thereby holding the judiciary and the judicial system in disrepute. It also seemed doubtful on the material before that the respondent could satisfy the civil debt in the foreseeable future. Thus, the respondent's incarceration would serve no purpose other than perhaps to fulfil the applicant's need for what she perceives as 'poetic justice' in this case's unfortunate and peculiar circumstances.³⁴

COSTS

[33] That being said, at the end of the day, this is a regrettable, acrimonious, emotional and depressing matter where one would have hoped that the applicant and respondent would have let sanity and maturity prevail to resolve their financial

³¹ Section 1 of ACIA.

³² *Coetzee v Government of the Republic of South Africa 1995 (4) SA 631 (CC)*.

³³ *This would be constitutionally impermissible.*

³⁴ *The sending of the respondent to prison will not settle the debt due to the applicant.*

difficulties amicably. In these circumstances, I am also not prepared to make a cost order against the applicant, as this will no doubt exacerbate her already strained financial position.³⁵

ORDER

[34] The following order is granted:

1. The application is dismissed.
2. There is no order as to costs.

E.D. WILLE
Cape Town

³⁵ *The applicant finds herself in a challenging financial position.*