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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 38979/21

**REPORTABLE: NO.
OF INTEREST TO OTHER JUDGES: NO
REVISED**

DATE: 25 January 2022

In the matter between

S[....] M[....]1

1st Applicant

S[....] M[....]1

2nd Applicant

(as father and guardian of the minor child)

N[....] V[....] M[....]2

And

T[....] M[....]2

1st Respondent

DEPARTMENT OF SOCIAL DEVELOPMENT

2nd Respondent

(Themba, Hammanskraal)

PAULINA SONO

3rd Respondent

THE STATION COMMANDER, SOUTH AFRICAN

4TH Respondent

POLICE SERVICE, THEMBA

**PROVINCIAL COMMISSIONER SOUTH AFRICAN
POLICE SERVICE, THEMBA**

5th Respondent

THE MINISTER OF SOUTH AFRICAN POLICE SERVICE 6th Respondent

**THE NATIONAL COMMISSIONER OF SOUTH AFRICAN
POLICE SERVICE**

7th Respondent

JUDGMENT

Munzhelele J

Introduction

[1] The applicant (Mr M[...]¹) brought an application for contempt of court order against the first and the third respondents (the respondents). The applicant requests the following orders:

1. that the first respondent be declared to be in wilful contempt of the court order granted on 17 August 2021
2. That the respondents be declared to be in wilful contempt of the court order granted on the 12 October 2021.
3. That the respondents each be committed to imprisonment for a period of 90 days without suspension, alternatively, suspended in the whole or part on such terms and conditions considered appropriate by this court.
4. Second alternatively, that the court could order a punitive sanction of a fine in the amount of R150 000.

5. The appointment of a *curator ad litem* Mr Stanely Malematja to act in the minor child's best interest pending the outcome of the report to be provided by the second respondent.

6. The confirmation of the variation of paragraph 2.5 of the order dated 17 August 2021 with paragraph 3 of the order dated 12 October 2021.

7. That the applicant be granted leave to file a further supplementary affidavit

[2] The respondents opposed the application to file a further supplementary affidavit. However, the respondents' affidavits were not signed and commissioned; as such, they were defective. The application for contempt of court was not opposed because the respondents failed to apply for condonation from the court to be allowed to file their answering affidavits out of time. The fourth, fifth, sixth, and seventh respondents filed their notice to abide by the court's decision.

Background of the case

[3] The background of this case has been obtained from the founding affidavit and the supplementary affidavits of the applicant. Since April 2019 the applicant has been attempting to get an order regulating contact with his minor child whose primary residence and care is with the respondents. The applicant and the first respondent lived together as they were in a relationship before and after the child's birth until their separation on 28 February 2019. From then onwards, the acrimony between the applicant and the first respondent became serious until the matter was referred to the social workers to be resolved and for investigations.

[4] The first respondent refused to engage the social worker to solve the request by the applicant for contact with the child. On 10 June 2019, the

social worker completed her investigations and recommended that the minor child remain in the care of the first respondent and maintain a connection to the applicant and his culture. The respondents never implemented these recommendations.

[5] In December 2020, when the applicant had financial means to pay the attorney, he started with the legal battle to gain access to his minor child. But he could not succeed. In March 2021, the applicant again proceeded to seek contact with his child at the district court, and the district court could not assist him.

[6] The matter was brought on an urgent basis to the Gauteng High Court in Pretoria on 17 August 2021 for adjudication on the issue of contact to the minor child, among others. The matter was heard before Acting Judge Kuny on 17 August 2021, and an interim order was granted. The applicant was granted the following orders pending the outcome of Part B of the application:

1. supervised contact with the minor child N[....] V[....] M[....]2
 - 1.1. every Tuesday from after school at 3.30 pm to 5.00 pm
and
 - 1.2. every Thursday from after school at 3.30 pm to 5.00 pm
2. the supervised contact is to commence on Tuesday the 24 August 2021
3. Supervised contact is to take place at the social worker's office located at stand no: 80 unit 1 Temba, Hammanskraal, Gauteng or at the location approved by the appointed social worker.
4. The appointed social worker is to confirm with both the parties via WhatsApp the location of the supervised contact within 24 hours.
5. The minor child will be dropped off at the specified location for supervised contact.
6. The applicant shall have reasonable telephonic contact with the minor child between 6.00-6.30 pm every night on days he does not

exercise his contact.

7. If the social worker cannot attend the supervised contact, the applicant will exercise the supervised contact at the minor child's home.

[7] Even with the knowledge of the 17th August 2021 court order, the first respondent continued to deny the applicant access to the child. The third respondent was also actively involved in refusing the applicant's access to the child. The third respondent was joined as the third respondent because the minor child was staying with her and had a direct interest in the matter. The applicant also joined the fourth to the seventh respondents on this application which was heard on 12 October 2021. On 12 October 2021, before Judge Molopa - Sethosa, the court order of the 17th August 2021 was varied, and the following orders were made:

1. The interim access to the child and the supervised contact by the applicant remained as in the order of 17 August 2021.
2. The first applicant will collect the minor child from her residence for her contact session with the applicant.
3. The respondents are ordered to hand over the minor child to the first applicant for their visitations.
4. The respondents are directed to encourage the minor child to attend the visitations.
5. The respondents are ordered not to dissuade the minor child from attending the visitations.
6. The applicant, after the visitation, will drop the minor child at her residence.
7. Telephonic contact remained as it was

Contempt of court by the first and third respondents

[8] The first contempt was about paragraph 5 of the 17th August 2021 order, where the child was to be brought to the social worker's office by the third

respondent for supervised contact. The third respondent wanted an amount of R600,00 (six hundred rand) per week for such drop-in of the minor child; otherwise, she will not comply with the order. This amount was disagreed with by the applicant, and an AA rate of R50 was offered instead. On 26 August 2021, the contact session did not materialise because the third respondent refused with the child.

[9] The third respondent informed the social worker that if the applicant wants to see the child, he should follow the third respondent to her home at 4.00 pm. Indeed, they arrived, but he could not see the child because the third respondent said that the child had locked herself inside the room and did not want to see the applicant. The third respondent then also said that the applicant would not be able to exercise telephonic contact with the child because the child cannot use the phone. But what was surprising is the fact that the child could operate the laptop. The applicant was asked if they could use the zoom to communicate since the child is familiar with the laptop. Then the respondent changed and said that the child would be attending the occupational therapist sessions on Tuesdays and Thursdays; and as such, she will be tired when she comes back from therapy because she would want to sleep. It was apparent that the third respondent did not want the father to see the child. However, it is funny that before all these orders were pronounced orders of the court, the parties deliberated on them and all agreed to the contents thereof. On 31 August 2021 at 15.45, the social worker contacted the third respondent to remind her of the contact sessions with the applicant and the child. However, the third respondent refused and said that there had been no money forthcoming for the petrol from the applicant; and as such, she would not bring the child to see his father.

[10] The respondents were served with the court orders, and they were fully aware of the contents thereof. Despite the knowledge of these orders, they have constantly been breaching the said orders. Despite all these breaches of the court orders, the applicant had availed himself all the time to the social workers' office in the hope that he would be allowed to exercise contact with his child.

However, there has never been any day that he has been allowed to see the child.

[11] The contempt of court orders continued until 2022. The matter for such contempt was set down and heard on 25 January 2022. Before the application for contempt of order could be heard, the applicant brought an application to file a supplementary affidavit. This application to file a supplementary affidavit was heard and granted because it was found that there is no prejudice on the side of the respondent if the said affidavit was allowed. The supplementary affidavit outlined the continuation of the respondents' disregard of the court order regarding the applicant's contact with his minor child.

Arguments by the applicant's counsel

[12] The applicant's counsel submits that on the issue of contempt of court, the applicant has proved beyond reasonable doubt that the respondents had no intention of complying with the order. They further submit that the respondents denied the minor child's constitutional rights and rights in terms of the Children's Act¹. These rights include the right to contact her parents, have a relationship with them, know their culture, and know her roots.

[13] The counsel continued her submissions, saying that the applicant has demonstrated on his affidavits how the respondents have wilfully and *ma/a fide* conducted themselves throughout since 2019. The respondents have the onus to rebut the inference of wilfulness and *ma/a fide* on a balance of probabilities which they had failed to do.

The applicant requested the court to impose an imprisonment punishment, alternatively a fine.

Curator ad /item appointment

[14] In light of the fact that the minor child's rights were trampled upon daily, it was requested that the court appoint a *curator ad item*. It was submitted by counsel for the applicant that Mr Stanley Malematja, who is an attorney by profession, has consented to act as a *curator ad item* for the child and shall protect the rights of this minor child.

Variation of the court order

[15] Counsel for the applicant submits that the order which stipulates that the respondent will transport the child to the social worker for contact sessions was creating unending issues or excuses between the applicant and the respondents. The applicant applied to vary the said orders as follows:

The order of the 17th August 2021 is varied in the following manner by the deletion of paragraph 2.5 and the insertion of the 2.5 below:

2.5.

2.5.1. The applicant will collect the minor child from her residence for the purpose of her contact session with the applicant;

2.5.2. The respondents, as the case may be, are ordered to hand over the minor child to the applicant for their visitations;

2.5.3. The respondents, as the case may be, are directed to encourage the minor child to attend the visitations;

2.5.4. The respondents are ordered not to dissuade the minor child from attending the visitations;

2.5.5. The applicant, after their visitation, will drop the minor child at her residence.'

Costs

[16] Counsel for the applicant argued that the respondents should be ordered to pay costs on attorney and client scale because they have blatantly disregarded the court orders.

The principle

[17] Contempt of court cuts deep into the rule of law and the Constitution of South Africa. Section 165(4) and (5) of the Constitution of South Africa provides that:

".....(4) *Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*

(5) *An order or decision issued by a court binds all persons to whom and organs of state to which it applies.*"

[18] If the respondents could just ignore the court orders without recourse, the courts could be undermined, and there will be chaos. The respondents have put the administration of justice into disrepute. This is a fundamental concern for courts and the society that seeks to base itself on the rule of law. Society places reliance on court decisions and arranges their affairs around them, with the expectation that they are made lawfully and will be carried out; when they experience a total disregard of such decisions, that could lead to the prejudice of their fundamental rights and interests as innocent people and the rule of law would suffer a blow and the society will take the law into their own hands. See also *Constitutional Court Review 2019 Volume 9*².

[19] It is trite law that to apply for contempt of court successfully, an applicant must prove the contempt beyond a reasonable doubt. One should prove the following:

1. That there is an underlying court order
2. That the respondent knew the court order and
3. With the knowledge of the order, the respondent acted in a manner

² 283-315 <https://doi.org/10.2989/CCR.2019.0011> (c) The Invalid Court Orders, The Author, Mitchell Nold De Beer. (Constitution of the Republic of South Africa, 1996 s 1(c) ('The Republic of South Africa is one, sovereign, democratic state founded on ... [s]upremacy of the constitution and the rule of law')).

that conflicts with the terms of that order. See *Dezirus V Dezirus*³.

[20] Similarly, In *Fakie No V CCII Systems Pty Ltd*⁴ it was said:

'The civil contempt procedure is a valuable and important mechanism for security compliance with the court order and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements. The respondent in such proceedings is not an accused person but is entitled to analogous protection - as are appropriate to motion proceedings in particular the applicant must prove the requisites of contempt (the order, service, or notice, non-compliance and wilfulness, and mala fides) beyond a reasonable doubt. But, once the applicant has proved the order, service, or notice and non-compliance the respondent bears an evidential burden concerning wilfulness and mala fides. should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide. Contempt will have been established beyond a reasonable doubt.'

Discussion

[21] It is evident from the papers filed by the applicant that there have been court orders on 17 August 2021 signed by Judge Kuny and on 12 October 2021, signed by Acting Deputy Judge President Molopa-Sethosa, which allowed the applicant supervised contact with the minor child N[...] V[...] Mooka on Tuesdays and Thursdays at 3:30 pm until 5:00 pm.

[22] The respondents were aware of these court orders because there is proof that they were served at their home in Temba, Hammanskraal and through the email address of the first respondent. I do not doubt that the respondents know these court orders. They are well aware of the contents of these court orders not only because they were served with the court orders but, they formed part of the deliberations through their attorney before the draft orders

³ 2006 [2AGPHC 77] (21 August 2006) para 16

⁴ 2006 (4) SA 326 (SCA) para 42

could be made an order of the court.

[23] These court orders remain operative, valid, and enforceable until reviewed or set aside. In *Eke v Parsons*⁵ the Constitutional Court affirmed the essential characteristics of a court order. It accepted that a court order must be effective, enforceable and immediately capable of execution. In a minority concurring judgment, Jafta J stated that:

The rule of law requires not only that a court order be couched in clear terms but also that its purpose be readily ascertainable from the language of the order. This is because disobedience of a court order constitutes a violation of the Constitution.'

[24] I have seen and read these court orders, which the respondents were to adhere to; they contained simple issues to understand and execute. The language used is understandable by an ordinary person who could read. Therefore, there can never be any excuse for not abiding by the court orders.

[25] The respondents disobeyed these court orders. The applicant, through his attorneys, filed affidavits that narrated in detail how the respondents failed to comply with the two court orders. At first, they refused to give him contact with the child because he did not pay for transportation costs which costs were never part of the court order. After he had tendered the costs, they still declined to adhere to the court order. The applicant could also not contact the child telephonically because the respondents said that the child could not operate the phone, but the same child could operate a laptop. This clearly indicated that the respondents were not willing to allow the applicant to have any access mentioned on the court orders.

[26] The applicant even involved the South African Police Service in assisting him in having access to the child, but there was no one when he arrived at the house where the child was. The neighbour informed him that the third respondent had just gone out with the child not so long. At some point, the

gate was closed, and the applicant could not access the child. On another occasion, he was informed that the third respondent was at the shops and could not come back at that point. The third respondent had constantly disobeyed the court order. The first respondent did nothing to assist the applicant in accessing the child either.

[27] The applicant ended up paying an amount of R600,00 for transport for Tuesday and Wednesday, but he was only able to see the child on Tuesday. On Thursday, 9 September 2021, the child was no longer brought even when he had paid the transportation costs for the child. The social worker even changed the venue to a closer location to where the child resides. Even when the venue was nearby, the respondents did not allow the father to see or contact the child. This was a clear indication that it was never about the transport money nor the distance, but it was because the respondents did not want the applicant to have access to the child.

[28] With the knowledge of the existing court orders and their terms, the respondents acted in a manner that totally disregarded the existence of such orders. Suppose the respondent felt that the court orders given were impossible to perform. In that case, they should have informed their attorney about opposing or not to agree with the proposal during engagement and deliberations of how this access to the child should be carried forward. This is a question of fact. It must be shown on papers that compliance with the court orders will be impossible. But, they did not do so, and the orders were granted and made an order of court. They did not even bring an application to vary these court orders; instead, the applicant was the one who again had to bring the variation of the court order to accommodate the respondents.

[29] Subsequently, I find that the applicant managed to prove beyond reasonable doubt that there were two interim court orders which emphasized the applicant's supervised access to the minor child. I again am satisfied that the court orders were appropriately served to the respondents, and they knew the

⁵ 2016 (3) SA 37 (CC) (2015 (11) BCLR 1319; (2015] ZACC 30) para 64

contents of the court orders. However, they continue to disobey them.

[30] The respondents are required to prove that their actions were not wilful or mala fide. See *the Fake* case above. There is no version by the respondents to explain whether they did not act in wilful disobedience of the court order.

[31] The respondents' actions as narrated by the applicant above clearly shows that the respondents had wilfully and deliberately intended to disregard the court order without any justifiable cause. This behaviour of the respondents prejudices the child's interest and robs her of the relationship with her father arbitrarily. Section 7(1) (f) of the Children's Act⁶ provides that when determining the best interest of the child, the court should be guided by:

7(1) (f) "The need for the child is -

- (i) to remain in the care of their parent, family and extended family; and*
- (ii) to maintain a connection with their family, extended family, culture or tradition;"*

[32] The father of the child, on the other hand, is also deprived of his rights to access the child and to form the relationship with his daughter as stated in the court orders and also provided in terms of section 21 (1) of the Children Act, which provides that:

"The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

- (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership."*

We already know that the child was born while the father and mother were

staying together, so the father has complied with the act as required, and there is a court order that declares his supervised visitation rights. The respondents should respect such rights.

[33] The mother and the grandmother of the minor child should know that in terms of section 28(2) of the Constitution of South Africa when a court makes a decision that affects the interest of the child and that of her parents, the child's best interests becomes of paramount importance in arriving at a just decision. The best interest of the child, in this case, is the child's right to have a relationship with her father and to know her roots and culture, which will be accentuated over that of her mother and the grandmother. The mother and grandmother's rights will recede to the background in these circumstances. The rights to a child should never be deliberately and arbitrarily obstructed without justification to do so by anyone.

[34] Like any other person, the applicant has a right to be treated equally before the law and has the right to equal protection and benefit of the law, which includes the full and equal enjoyment of all rights and freedoms towards his child. The court will strive to promote the achievement of such equality as protected in the Bill of Rights. See section 9 of the Constitution of South Africa 1996. The father has been disadvantaged unfairly while having court orders in his disposal. The respondents have reduced the court orders into a mere paper that has no value in the hands of the aggrieved father. They have disrespected the applicant and the courts and should be stopped in their tracks to abuse the applicant while he is in possession of valid court orders.

[35] Section 35 of the children's Act provides that:

'(1)Any person having care or custody of a child who, contrary to an order of any court or to a parental responsibilities and rights agreement that has taken effect as contemplated in section 22(4), refuses another person who has access to that child or who holds

parental responsibilities and rights in respect of that child in terms of that order or agreement to exercise such access or such responsibilities and rights or who prevents that person from exercising such access or such responsibilities and rights is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

[36] The respondents acted wilfully with *ma/a fide* to spite the applicant because the applicant and the first respondent were no longer staying together. I have found that the applicant proved beyond reasonable doubt that the respondents are in contempt of court regarding the court orders dated 17 August 2021 and 12 October 2021. The respondents are found guilty of contempt of court orders of 17 August 2021 and 12 October 2021.

[37] The Children's Act⁷ has set out the sentence which the person who has committed a contempt of court order should be sentenced as stated above. However, sentencing is within the discretion of the court. The applicant requested this court on their papers to sentence the respondents each to ninety (90) days imprisonment, which is suspended with appropriate conditions set by the court alternatively a fine to the amount of R150 000,00 (one hundred and fifty thousand rand).

[38] The respondents' dignity should be respected and protected, and their freedom should not be arbitrarily deprived without just cause. However, every right is limited. They have been found guilty to have wilfully disobeyed the court order; therefore, the court is entitled to impose a sanction on them. The sanction should be appropriate in the circumstances of this case.

[39] Contempt of court is a crime that affects the dignity and authority of the court. *In Argus Printing and Publishing Co Ltd and Others v Esselen's Estate*⁸ the court said:

⁷ 38 of 2005

⁸ 1994(2) SA 1 AD at 29E-F

"The purpose which the law seeks to achieve by making contempt a criminal offence is to protect 'the fount of justice' by preventing unlawful attacks upon individual officers or the administration of justice in general which are calculated to undermine public confidence in the court.

Also, in *Uncedo Taxi Service Association v Maninjwa and Others* 1998(2) SACR 166 ECO at 167h-j:

It would appear from cases ... that the object of this type of procedure is the imposition of a penalty in order to vindicate the Court's honour consequent upon the disregard of its order ... and to compel the performance thereof..."

[40] If the respondents are not punished for having disrespected the court that authorized the two court orders, the court, the Constitution, and the rule of law will be in crisis. The sentence aims to protect the courts' dignity and the applicant's rights; otherwise, the applicant will lose faith in court. He will then fall into the statistics of fathers abused by their ex-partners. It should be seen through our sanctions that the rights which the fathers have to their children are also equally important. *In Coetzee v Government of the Republic of South Africa*⁹ the court said:

"If we are truly dealing with contempt of court, then the need to keep the committal proceedings alive would be strong because the rule of law requires that the dignity and authority of the court, as well as their capacity to carry out their functions, should always be maintained."

[41] In the spirit of upholding the Constitution and the rule of law, I find an appropriate sentence for the respondents to be of a custodial sentence. However, this sentence should be suspended to give the respondents a chance to adhere to the court order.

[42] The respondents are each sentenced to thirty (30) days imprisonment; the whole sentence is suspended for five years on the condition that the respondents adhere to court orders of 17 August 2021 and 12 October 2021 during the period of suspension.

Appointment of a curator *ad /item* for the minor child

[43] Looking at the evidence that the applicant has provided through his affidavits, the child requires someone who will act in her best interest in these circumstances. What the child has been subjected to by the third respondent is totally not in her interest or proper upbringing. The child should not be hidden away from his father. I find it proper that curator *ad /item* should be appointed.

Variation of the order

[44] Paragraph 3 of the variation is for the benefit of the third respondent. This will make access to the child easy. I find that the variation clause is proper and will be granted.

Costs

[45] The applicant submits that the respondents have disregarded the rules for quite a long time. Out of all the days the applicant wanted to have contact with his daughter, he had only seen his daughter once since 2019. This has been fueled by acrimony between the applicant and the first respondent, which spilt over to the respondents' family. They have abused the applicant. They have disrespected the courts' authority. The respondents should pay the cost on an attorney and own client scale.

Order

[46] As a result, the following order is made:

1. The draft order I signed on 25 January 2022 remains an order of court.

M. Munzhelele
Judge of the High Court Pretoria

Heard: 24, 25 & 28 January 2022

Electronically Delivered: 25 January 2022

Appearances:

For the Applicant: Adv. N Strathern

Instructed by: Ulrich Roux & Associates

For the Respondent: Adv. R Ngobeni

Instructed by: Seribe Mathabatha Attorneys