(AMMENDED JUDGMENT)

/SG
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 21 AUGUST 2006
CASE NO: 37655/05

REPORTABLE

In the matter between:

FRANCIS CORNELIA DEZIUS APPLICANT

And

ANDREAS WILLI DEZIUS RESPONDENT

JUDGMENT

PATEL, J

Introduction

[1] The applicant and respondent are engaged in divorce proceedings. The applicant secured a *pendente lite* order:

> "(a) Dat die Respondent onderhoud aan die Applikant moet betaal in die bedrag van R1 200.00 per maand;

(b) Dat die Respondent ’n bydrae moet maak tot die Applikant se regskoste in die bedrag van R1 500.00 in paaiemente van R50.00 per maand;

(c) Dat die betalings van bogemelde moet geskied vanaf 7 Oktober 2005 en daarna voor of op die 7de dag van die daaropvolgende maande;

(d) Koste in die geding.”

[2] The applicant claims that the respondent has disobeyed the court order. She now seeks an order committing the respondent to prison for a period of six months for contempt of court. In the alternative, she proposes that the period of six months imprisonment be suspended for two years. In essence, the applicant seeks an avowedly punitive order rather one that will compel the respondent to comply with the court order.

[3] This application certainly calls for circumspection and careful consideration before a committal order is issued for disobeying an order of court pertaining to interim maintenance and contribution towards legal costs.

[4] An order for committal for contempt of court arising from matrimonial issues *pendente lite* invariably involves the likelihood of depriving the offending spouse of his liberty, suspended or otherwise, and concomitantly jeopardising the prospects of the recipient spouse in procuring any maintenance and contribution towards legal costs.

[5] Lord ORMROD in *Ansah v Ansah*[1] aptly alluded that:

> "Such a breach or breaches of an injunction in the circumstances of such a case as this do not justify the making of a committal order, suspended or otherwise. Breach of such an order is, perhaps unfortunately, called contempt of court, the conventional remedy for which is a summons for committal. But the real purpose of bringing the matter back to the court, in most cases, is not so much to punish the disobedience, as to secure compliance with the order in the future. It will often be wiser to bring the matter before the court again for further direction before applying for committal order. Committal orders are remedies of last resort; in family cases they should be

[1] [1977] 2 All ER 638 (CA) at 643a/b-c

the very last resort. They are likely to damage complainant spouses almost as much as offending spouses."

[6] An offender should not be deprived of his liberty except in accordance with the precepts of fundamental justice[2] and in compliance of procedural safeguards[3]. The public sanction of imprisonment for disobedience of a court order requires conclusive proof[4]. It is, therefore, imperative that, before a committal order is issued, the court should scrutinise the facts with great care.

[7] When this matter came before me on 30 May, I invited counsel to address the Court regarding the test and standard of proof in civil contempt of court proceedings as well as whether poverty – concomitantly indigency – is a competent defence to avert an order

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[2] In *R v Cohn*, (1985) 10 CRR 142 at 159, GOODMAN JA said:

> "The function of the court is to ensure that an alleged contemnor is not denied his right to a fair trial and fundamental justice. ..."

[3] Herbstein and Van Winson: *The Civil Procedure of South Africa*, 4th edition at 818:

> "What is clear, however, is that the imposition of a penalty for contempt may not be imposed unless the person accused of contempt has been afforded a fair hearing complying with procedural safeguards embodied in s 25(3) of the Constitution. Including the rt to legal assistance at public expenses if justice requires"

[4] *Fakie v CCII Systems (Pty) Ltd* [2006] SCA 54 (RSA) at para [30] per CAMERON JA:

> "While the applicant may disavow punishment as a motive ... the means the court is asked to employ remains the same: the public sanction of imprisonment for disobedience of a court order. The invocation of that sanction in my view requires conclusive proof. No less than punitive committal, purely coercive committal uses imprisonment, or its threat; and whenever loss of liberty for disobedience of an order of court is threatened it seems to me necessary and proper that the infraction should be proved conclusively."

for committing a defaulting spouse to imprisonment for disobeying an order of court. The parties were afforded an opportunity to file supplementary heads of argument and the matter was postponed *sine die*. Both counsel filed comprehensive heads of argument. Before I turn to consider the facts and arguments advanced, it is necessary to allude to the legal principles in civil contempt of court proceedings.

Towards defining civil contempt of court adjudication

[8] Contempt of court adjudication is not an uncommon sequel in matrimonial disputes. It is too often disputes over spousal and child maintenance and contribution towards costs. There is firmly an established practice of seeking, by way of an application on a notice of motion, a committal for contempt of court for breaching an order of court in order to bring about a proper discharge of obligation under an order *ad factum praestandum*. Civil contempt of court provides the ultimate sanction against the defaulter who refuses to comply with an order of court. The form of committal is to imprisonment or a fine. Such punitive coercion is intended to assist the complainant to enforce his or her remedy. This objective is very rarely attained in matrimonial cases. It is unlawful to intentionally disobey an order of court since it savours of criminality.

[9] In *Fakie v CCII Systems*[5], CAMERON JA recognised the constitutional legitimacy in punishing civil contempt:

> "This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained."

[10] Then the learned Judge of Appeal elaborated, by postulating the test when disobedience of a civil order tantamounts to contempt of court, as follows:

> "[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a

[5] [2006] SCA 54 (RSA) para [6] (footnotes omitted)

manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

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

[10] These requirements – that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders

> is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."[6]

[11] A divided three-to-two Bench of the Supreme Court of Appeal in *Fakie v CCII Systems* considered the nature of civil contempt of court and whether in such proceedings the standard of proof to be applied, and is whether the alleged defaulter was in contempt is on a balance of probabilities or beyond reasonable doubt. The Court was unanimous both on the facts and finding of contempt, but indeed divided on the issue of the standard of proof to be applied in civil contempt of court cases.

[12] For the majority, CAMERON JA (with whom HOWIE P and CACHALIA AJA concurred), after a comprehensive and erudite exposition, favoured the stringent standard of proof - beyond reasonable doubt - in cases of civil contempt and concluded that[7]:

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[6] Footnotes omitted
[7] Footnotes omitted

"[39] These expositions seem to me compelling. A court in considering committal for contempt can never disavow the public dimension of its order. This means that the use of committals for contempt cannot be sundered according to whether they are punitive or coercive. In each, objective (enforcement) and means (imprisonment) are identical. And the standard of proof must likewise be identical.

[40] This approach conforms with the true nature of this form of the crime of contempt of court. As pointed out earlier (para 10), this does not consist in mere disobedience to a court order, but in the contumacious disrespect for judicial authority that is so manifested. It also conforms with the analysis in *Beyers* (para 11 above), where this court held that even though enforcement is the primary purpose of committal, it is nevertheless not imposed merely because the obligation has not been observed, 'but on the basis of the criminal contempt of court that is associated with it'. The punitive and public dimensions are therefore inextricable: and coherence requires that the

criminal standard of proof should apply in all applications for contempt committal.

[41] Finally, as pointed out earlier (para 23), this development of the common law not require the applicant to lead evidence as to the respondent's state of mind or motive: once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and *mala fide*, the requisites of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and *mala fides* on balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It follows, in my view, that Froneman J was correct in observing in *Burchell* (para 24) that in most cases the change in the incidence and nature of the *onus* will not make cases of this kind any more difficult for the applicant to prove. In those cases where it will make a difference, it seems to me right that the alleged contemnor should have to raise only a reasonable doubt."

[12] The learned Judge of Appeal then summed up that:

> "(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
>
> (b) The respondent in such proceedings is not an 'accused person' but is entitled to analogous protections as are appropriate to motion proceedings.
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> (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.
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> (d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether

non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[13] However, for the minority, in a rather compelling exposition, HEHER JA (with whom FARLAM JA concurred) contrasted the differences between coercive and punitive orders[8]:

"[73] Upon proper analysis the distinction between coercive and punitive orders has something to do with the intent of an applicant or the court but much to do with the consequences of the order. It is the latter aspect to which any judicial officer who is required to consider whether an order of committal for contempt of court should be granted should pay careful attention.

[74] The following are, I would suggest, the identifying characteristics of a coercive order:

[8] Footnotes omitted

1. The sentence may be avoided by the respondent after its imposition by appropriate compliance with the terms of the original (breached) order *ad factum praestandum* together with any other terms of the committal order which call for compliance. Such avoidance may require purging a default, an apology or an undertaking to desist from future offensive conduct.

2. Such an order is made for the benefit of the applicant in order to bring about compliance with the breached order previously made in his favour.

3. Such an order bears no relationship to the respondent's degree of fault in breaching the original order or to the contumacy of the respondent thereafter or to the amount involved in the dispute between the parties.

4. Such an order is made primarily to ensure the effectiveness of the original order and only incidentally vindicates the authority of the court.

[75] By contrast a punitive order has the following distinguishing features:

1. The sentence may not be avoided by any action of the respondent after its imposition.

2. The sentence is related both to the seriousness of the default and the contumacy of the respondent.

3. The order is influenced by the need to assert the authority and dignity of the court and as an example for others.

4. The applicant gains nothing from the carrying out of the sentence."

[14] HEHER JA, suggesting what seemingly appears to be a more pragmatic approach, opined [9]:

> "[78] I consequently do not accept that a party in civil proceedings who exposes himself to the deprivation of freedom which flows from civil contempt and a consequent coercive order against himself deserves or needs an extension or adaptation of the common law to satisfy the imperatives of s 12(1). In the circumstances the existing procedures are entirely consonant with the constitutional values which underpin s 12.

And the Judge of Appeal elaborated:

> [80] I would go further. The extension of the criminal standard of proof to civil contempt would have harmful consequences. In my experience the ordinary litigant (often an indigent woman) finds it difficult enough under present procedures to pin down a party who is determined to avoid the consequences of a judgment. Absence of wilfulness and *mala fides* are frequently

[9] Footnotes omitted

highly subjective and the respondent's protestations often serve to carry the day, particularly as these are matters within his own ken and the applicant seldom has the means to pursue the enquiry with the necessary vigour. If the onus were to be increased to one beyond reasonable doubt the efficacy of the remedy (and with it the worth of a civil judgment) would be reduced, to the detriment of justice.

[81] I should also add that, in principle, it would be wrong and unfair to align the frailty of the subject with the power of the State by requiring the former to discharge the criminal *onus* without comparable means to do so, unless such a conclusion cannot be avoided.

[82] That is indeed the only conclusion in punitive proceedings for contempt. For that reason the law does require development: a judicial officer who has found a litigant in civil proceedings to be in contempt and who forms the opinion that a punitive sentence may be warranted, should (whether or not he imposes a coercive sentence) refer the matter to the Director of Public

> Prosecutions with a view to prosecution in a criminal court. This would in my view be a desirable and justified development of the common law to ensure that those forms of the remedy of contempt of court (and the concomitant procedures) which are criminal in substance are tried in accordance with criminal standards, while leaving those that are truly civil in history, objectives and effects to be treated, as they always have been, according to civil standards."

[15] Until the *Fakie* decision, differing views regarding the standard of proof were expressed by court of first instance.[10] The majority decision now ensures that a person ought not to be deprived of his or her liberty by the application of a less stringent burden of proof that is merely on a balance of probabilities.

Jurisdictional requirement for contempt of court

[16] It is now settled that in an application for committal to prison for contempt of court, an applicant must, in order to be successful, prove the contempt beyond reasonable doubt, that there is an underlying court order and that the respondent with the knowledge of the order

[10] *Davis v Davis* 1947 3 SA 111(W); *Du Plessis v Du Plessis* 1972 4 SA 216(O); *Laubscher v Laubsher* 2004 4 SA 350 (T); cf; *Uncedo Taxi Service Association v Maninjwa* 1998 3 SA 417(E); *Uncedo Taxi Service Association v Mtwa* 19992 SA 495 (E); *Deyzel v Deyzel* 2005 JOL 16230 (T)

acted in a manner which is in conflict with the terms of that order. Once the applicant proves the jurisdictional requirements then she or he is *prima facie* entitled to the relief sought subject to the court's wide discretion.

[17] The respondent can, however, defend him or herself by adducing evidence to establish a reasonable doubt that he or she did not breach the underlying court order wilfully and not acted in bad faith. It is clear that the evidential burden regarding the respondent's *bona fides* is on him or her. He or she has the evidential burden of showing absence of intention to disobey the order. However, unreasonableness of conduct *per se* does not reflect the absence of *bona fides*.

Is poverty a defence in civil committal adjudication?

[18] Ours is a society riven by a high incidence of poverty. Too often the focus is on the most vulnerable persons. Thus, MOKGORO J in *Bannatyne v Bannatyne (Commision for Gender Equality as* Amicus Curiae)[11] noted:

> "Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to

[11] 2003 2 SA 363 (CC) at para [27]

> ensure that the rights of all are protected. The Judiciary must endeavour the secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law."

And the learned Justice of the Constitutional Court also said[12]:

> "Compounding these logistical difficulties is the gendered nature of the maintenance system. The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance

[12] Id, at para [29]

payments are therefore essential to relieve this financial burden."

[19] However, with deference to the learned Justice, this observation serves only to immortalise the perception of women being vulnerable and disadvantaged. It simply perpetuates stereotypical images of women. Both poverty and its twin indigency are gender-blind. They are non-sexist in their affliction. Thus, the pertinent question is, is poverty and indigency valid defences in committal proceedings?

[20] In a long line of matrimonial cases in which contempt orders were made for failure to comply with orders to pay spousal and child maintenance[13] as well as for failure to comply with an order directing the payment of contribution towards costs in instalments[14] *pendente lite* confirm that the nature of the obligations arise out marriage and parentage. They are not money judgments or orders *per se*, since it is well established that maintenance orders are in a special category in which such relief is competent.

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[13] *Slade v Slade* (1884) 4EDC 243; *Longman v Longman* (1908) TS 1054; *Hawkins v Hawkins* (1908) 25 SC 784; *Bold v Bold* 1934 NPD 278; *Davidson v Davidson* 1936 WLD 33; *Gillies v Gillies* 1944 CPD 157; *Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 1 SA 224 9T) at 227F/G – 230A; *Hofmeyer v Fourie, B.J.B.S. Construction (Pty) Ltd v Lategan* 1975 2 SA 590 (C) at 594B-99D.

[14] *Bocian v Bocian* (1921) SWA 17; *Swanepoel v Swanepoel* 1961 3 SA 193 (O); *Bezuidenhout v Bezuidenhout* 1964 1 SA 7 (T)

[21] The first reported case in which imprisonment for contempt for a failure to comply with a maintenance order was *Slade v Slade*[15] where a husband was separated from his wife. He had failed to pay alimony in monthly instalments of £7 at the Cape of Good Hope Bank at Tarkastad. BARRY JP said[16]:

> "The order of Court upon the respondent was for alimony. That implied the Court had investigated not merely the amount of liability, but the respondent's capacity to pay at certain times and places certain sums of money for the special purpose of supporting his wife. Unless the money be paid in the manner ordered, the object of the order, which was to give the wife her daily bread, would be defeated. The order was in fact equivalent to an order would *factum praestandum*. Disobedience to such an order would not prevent the applicant from resorting to an action for the money, but if wilfully disobeyed the applicant may procure an attachment for contempt."

[15] (1884) 4 EDC 243
.
[16] At 246

[22] More than fifty years later, SCHREINER J in *Carrick v Williams*[17] said:

> "It seems to me that the reason for holding maintenance orders, whether for the maintenance of a separate wife or of children, to be orders *ad factum praestandum* is that they are not really money judgments at all. In their essential nature they are orders that the defendant do something, namely, maintain the wife or the children. This duty might be performed in various ways, including the provision of housing, clothing and food in kind, or the transfer of property; but in practice the Court indicates how the defendant and the needs of the party to be maintained at the time of the making of the order. This direction by the Court does not convert the judgment from one ordering the doing of an act by the defendant into one awarding a sum of money to the plaintiff."

[23] In this present matter, the respondent's plaintive plea is: "*Had I been in a position to do so, I would gladly pay the maintenance* pendente lite *to the applicant. If I had R50.00 spare I would pay that over to*

[17] (1937) WLD 76 at 83

the applicant too, but the truth of the matter is I am not in the position to do so."

[24] A plea of lack of means is a viable indicator of poverty and indigency. As far back as 1884, SHIPPARD J in *Slade's* case stated[18]:

> "What gives the Court power to deal with this case as one for a committal order, is the fact that the respondent was, after the investigation as to his circumstances, ordered to pay alimony to his wife at a certain place and by a certain date. It is on that account, and because there was a judgment not merely for a money payment in general terms, but for alimony to be paid in a prescribed manner, that the Court is enabled to deal with the respondent's refusal as a contempt. Every case of this kind must be dealt with on its merits. I am far from saying that in every case where an order for the payment of money, and also *ad factum praestandum*, has been disobeyed, the Court would entertain an application for committal for contempt. The exercise of the power of committal, even where an apparently strong *primâ facie* case has arisen, must always be entirely within the discretion of the Court; for the party in default may

[18] (1884) 4 EDC 243 at 249

> be prepared to show that he was not able to comply with the judgment. In such a case the respondent is to be heard in his own justification or defence before he is committed to prison; and proof of his inability may protect him. ... If a respondent should prove that he was unable to pay the amount in terms of the order, the Court would take a merciful view of the case; and the mere fact of non-payment in accordance with the judgment would not be sufficient ground for committing."

[25] This view was approved by TINDALL J in *Wickee v Wickee*[19] that after investigating into a man's circumstances and he was ordered to pay maintenance, then it is for him to show reasons why he should not be committed. His inability to pay may protect him.

[26] In *Chinamora v Angwa Furnishes (Pty) Ltd and Another (Attorney-General Intervening)*[20] GUBBY CJ said:

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[19] 192 WLD 145

[20] 1998 2 SA 432 (ZSC) 442D-E; see also at 440I-441E regarding the approach in the United States of America to civil imprisonment of an impecunious debtor:

> "The position in the different states is exemplified in the decision of the Supreme Court of Colorado in *Kinsey v Preeson* 746 P 2d 545 (Colo 1987). It was pointed out that the Constitution of the United States provides no express sanction against imprisonment for debt, but Federal Judges are required to follow the law of the state in which they sit.
>
> > 'Body execution statutes are not uniform, but most authorize a body execution whenever a defendant is found guilty to some kind of wrongdoing, such as committing a fraud, or tort, or misconduct in public office or professional employment, or embezzlement or conversion of the plaintiff's property, or where the defendant is about to abscond. A

> "[T]o commit a debtor to prison who through poverty is unable to satisfy the judgment debt is contrary to the purpose of civil incarceration, which is to coerce payment. The only real effect of imprisonment of an impoverished debtor is that of punishment."

[27] In the Supreme Court of India, KRISHNAIYER J, with PATHAK J concurring, in *Jolly George Verghese and Another v Bank of Cochin*[21] stated:

> Freeman 3 *Law of Execution* 451 at 2393 (3d ed 1900). The intent of prohibitions against imprisonment for dept is to exempt from imprisonment the honest debtor who is poor, and unable to pay his or her debts.'
>
> In striking down Colorado's body execution statute as invidiously discriminatory and unconstitutional, the learned Judge remarked at 549:
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> > 'In the case of the indigent judgment debtor, there is no provision in the statute to prevent an indigent debtor from suffering a "punishment" not visited upon the debtor means. Under prior case law, it is clear that imprisonment as a result of a body judgment does not discharge the debt. *In re Thompson* 104 Colo 171, 89 P 2d 538 (1939). Thus, an indigent judgment debtor will suffer imprisonment based solely on an involuntary inability to pay the judgment and still owe the entire amount of the judgment after serving time in jail. Imprisoning an indigent debtor will not serve the coercive purpose of the body execution statute. In fact, jailing the indigent debtor defeats the purpose of obtaining payment for the judgment creditor by precluding gainful employment during the period of incarceration.
> >
> > In *Williams v Illinois* 399 US 235 (1970) and *Tate v Short* 401 US 395 (1971) the United States Supreme Court struck down statutes which subjected indigents to incarceration solely because of their inability to pay a fine. These cases are analogous to the case before us where an indigent judgment debtor is incarcerated while those of greater means have the keys to the jail.'"

[21] [1980] INSC 20; [1980] 2 SCR 913 at 921-922, (http://ww.commonlii.org/in/cases/INSC/1980/20.html)

"Imprisonment is not to be ordered merely because, like Shylock, the creditor says: 'I crave the law, the law, the penalty and forfeit of my bond.' The law does recognise the principle that 'Mercy is reasonable in the time of affliction, as clouds of rain in the time of drought .... The high value of human dignity and the worth of human person ... obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence ... . It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his ... liability is appalling. To be poor, in this land of ... Narayana, is no crime and to 'recover ' debts by the procedure of putting one in prison is too flagrantly violative Art.21 (of the Constitution: 'No person shall be deprived of his life and liberty except according to procedure established by law') unless there is proof of minimal fairness of his failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonable and unfairness is such a procedure is inferable from Art. 11 of the (International Covenant on Civil and Political Rights of 1966: 'No-one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.')"

The learned Judge then indicated that:

> "The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not a mere omission to pay but an attitude of refusal or demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently."

Application to the facts of the matter

[28] The applicant has proved beyond a reasonable doubt that an order of court *pendente lite*, in terms of rule 43, was issued on 27 September 2005. A copy of the order was faxed to the respondent's attorneys on 4 October 2005. The respondent had knowledge of the order and that he has not complied with the terms of the order. Ms Erasmus, for the applicant, contended that the respondent only needs to prove his *bona fides* beyond reasonable doubt. This contention is certainly incorrect. It is clear from the

majority judgment in *Fakie's* case that the respondent only needs to prove his *bona fides* by showing a reasonable doubt. The evidential burden is on the respondent to show that there is a reasonable doubt that he did not comply with the order wilfully and he is not *mala fide.*

[29] The explanation the respondent gives for non-payment of maintenance *pendente lite* and contribution towards costs to the applicant is that he is unfortunately not in the position to pay the amount of R1 200.00 in respect of maintenance *pendente lite*. This infuriated the applicant and she threatened to have him locked up. This threat manifest the applicant's intention not to compel the respondent to pay but it is avowedly punitive. Compliance can be secured without resorting to imprisonment of the defaulter, who disobeys a *pendente lite* order in terms of Rule 43, neither accidentally nor unintentionally, to pay maintenance or contribute towards the spouse's legal costs. She can obtain an order attaching his earnings periodically rather than his person.[22] That is surely a far more effective remedy.

[30] When the respondent received the rule 43 order, he personally approached the maintenance court in order to have the amount

[22] In England and Wales section 11 of the Administration of Justice Act, 1970 (as amended); section 3(4) of the Attachment of Earnings Act, 1971 provides that the High Court or County Court may make an attachment of earnings order in lieu of a committal order, unless it appears that the defaulter's failure to comply with the maintenance order was due to his wilful refusal or culpable neglect (section 3(5)).

payable to the applicant reduced. In confirmation he annexed the notice of set down in the magistrate's court. On 2 December 2005 at that hearing he represented himself and the applicant was represented by an attorney, Mr Megaw. The maintenance officer told the applicant to settle the matter since he is not able to pay the maintenance that he is required to pay to the applicant. The maintenance officer also indicated that they should settle the main action. Mr Megaw informed the maintenance officer that he would endeavour to do so. Since 2 December 2005 the respondent has not received any settlement offers from Mr Megaw.

[31] The respondent asserts that he is not in wilful default of the court order. However, had he been in a secure financial position then he would gladly pay the maintenance *pendente lite* to the applicant. If he had R50.00 to spare he would pay that amount to the applicant too, but the truth of the matter is that he is not in the position to do so. He needs to fund his legal representation and the applicant is unnecessarily prolonging the divorce action. It is common cause between the parties that the marriage relationship between them has broken down irretrievably. The respondent has tendered that the applicant has custody of their youngest daughter, Heidi. The custody of their son, Christopher, is not in issue since he is in Germany, living

with the respondent's parents. Their assets have already been divided between them. The only issue that is impeding in finalising the divorce action is that the applicant is insisting on an amount for maintenance for herself and she is well aware that the respondent is unable to pay.

[32] The respondent is presently living with Pamela and they have to scrape their last pennies together just to meet their monthly financial obligations even though he still does not have sufficient funds to meet all his financial obligations. Pamela approached ABSA Bank to secure a loan in order for them to buy food and pay the water and electricity bills. They have been bathing in ice cold water and living in the dark since they were not able to pay the electricity bill. The contractual agreement entered into between Pamela and ABSA Bank is tendered as prove of the loan she secured for their living.

[33] The respondent endeavoured to improve his standard of living. He found new employment at a slightly better monthly income than that which he previously earned in order for him to enable him to meet his monthly financial obligations, but on his evidence he does not have sufficient means to pay maintenance to the applicant and contribute towards her legal costs.

[34] The respondent has tendered sufficient evidence regarding his inability not only to pay maintenance to the applicant but also to meet all his financial obligations. Objectively it is well nigh impossible for him to pay the maintenance to the applicant. Undoubtedly he is in a precarious financial predicament.

[35] On the conspectus of all the facts, I find that the applicant has not shown beyond reasonable doubt that the respondent has intentionally avoided paying maintenance. Under the circumstances, the respondent has discharged the evidential burden by raising a reasonable doubt as to his inability to pay maintenance and contribute towards the applicant's legal costs.

Order

[36] Accordingly, the application is refused and the applicant is ordered to pay the respondent's taxed costs including the previously reserved costs.

E M PATEL

JUDGE OF THE HIGH COURT

37655/2005

Date of hearing:	30 May 2006
For the Applicant:	Adv N Erasmus
Instructed by:	R E Megaw Attorneys, Pretoria
For the respondent:	Adv D Hinrichson
Insgtructed by	Van Zyl's Incorporated, Pretoria
Date of Judgment:	21 August 2006
Revised on:	29 August 2006