

**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Not Reportable**

Case no: 771/21

In the matter between:

**A[...] J[...] S[...]**

**APPELLANT**

and

**G[...] S[...] - H[...]**

**RESPONDENT**

**Neutral citation:** *S[ ... ] v S[ ... ] - H[ ... ]* (Case no 771/21) [2023] ZASCA 49  
(13 April 2023)

**Coram:** MOLEMELA, NICHOLLS, MOTHLE and MEYER JJA and  
OLSEN AJA

**Heard:** 15 February 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 11h00 on 13 April 2023.

**Summary: Civil procedure - Contempt of court** - whether appellant was entitled to a postponement to allow him to present his case before high court made the order committing him to prison - high court did not determine

whether the appellant's conduct was *male fide* and wilful beyond a reasonable doubt - this must take place before there is an order for committal.

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## ORDER

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Kubushi J, sitting as court of first instance):

- 1 The appeal is upheld, with no order as to costs.
- 2 The order of the Western Cape Division of the High Court, Cape Town, is set aside and substituted with the following order:
  - ‘1 The application for postponement is granted.
  - 2 The respondent is to pay the wasted costs occasioned by the postponement on the unopposed scale.’
- 3 The appellant is to file his answering affidavit in the application for committal within 15 days of the date of this order, and the respondent may file a replying affidavit within 10 days of receipt of the answering affidavit.

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## JUDGMENT

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**Nicholls JA (Molemela, Mothle and Meyer JJA and Olsen AJA concurring)**

[1] This appeal arises out of a maintenance order made in the Western Cape Division of the High Court, Cape Town (the high court), pursuant to a longstanding and acrimonious matrimonial dispute. The central question is whether the appellant should be committed to prison for three months for contempt of court, as a result of his failure to make payment in terms of the maintenance order. Aligned to this, is whether the appellant was entitled to a postponement to present his case before the high court made the order that he be committed to prison.

[2] The appellant, who was the respondent in the high court, is a practising advocate in the Western Cape. The respondent, the applicant in the high court, is a Judge in the same division. To avoid any suggestion of impropriety, judges from other divisions presided over matters concerning the parties.

[3] Pursuant to divorce proceedings, on 29 July 2013 Samela J granted an order against the appellant, which inter alia, provided that he pay a contribution towards the maintenance of the minor children in the sum of R6000 per month per child; all amounts owing to the Springfield Convent School (the school); and all educational costs, including the costs of extra-mural activities and uniforms at the school. The appellant did not appeal this order.

[4] The appellant failed to make the payments as ordered. After making numerous attempts, over a period of many years, to enforce compliance with Samela J's order, the respondent finally brought an urgent application for payment of the sum of R138 413.90. This was allegedly the outstanding

maintenance amount in terms of Samela J's order. The urgent application was successful and on 4 December 2020 the high court (per Mudau J) ordered the appellant to comply with the order of Samela J and that R138 413.90 be paid to the respondent by no later than 17h00 on Friday 18 December 2020. Further, if the appellant failed to comply, the respondent was granted leave to set the matter down on 48 hours' notice for an order that the appellant be declared in contempt of court, a warrant be issued for his arrest and he be committed to imprisonment for a period to be determined by the court.

[5] The appellant failed to make payment of the sum of R138 413.90, or any part thereof, before 18 December 2020. As provided for in Mudau J's order, the respondent launched an application that the appellant be held in contempt of Samela J's order and that a period of imprisonment be imposed as a result of his wilful disregard of the court order.

[6] The application for committal was heard by Kubushi J in the high court, on 2 March 2021. The high court was satisfied that the respondent had made out a case for the relief that she sought and ordered that the appellant be declared in contempt of Samela J's order of 29 July 2013 and be committed to a period of three months' imprisonment. An application for a postponement brought by the appellant on the day of the hearing was dismissed.

[7] The appellant applied for leave to appeal against the decision of the high court dismissing his application for a postponement and for finding him in contempt of court. In respect of the latter, his grounds of appeal were that

he only owed R20 000 as the unpaid school fees were due to the school and not the respondent who, at best, had a claim of unjustified enrichment against him. He repeated his stance that the COVID-19 pandemic had ‘profoundly diminished’ his financial situation. Leave to appeal was dismissed by the court a quo but granted by this Court.

[8] In this Court, the respondent has elected to abide by the Court’s decision. The thrust of the appellant’s argument is that the high court erred in refusing him a postponement in order to provide him with an opportunity to file a further affidavit in response to the respondent’s supplementary affidavit. It is therefore the refusal of the postponement that is the focus of this appeal.

[9] In her supplementary founding affidavit to the application for committal, the respondent set out details of the appellant’s conduct after Mudau J’s judgment and order on 4 December 2020. A few days later, on 8 December 2020, the appellant’s attorneys wrote to the attorneys of the respondent indicating that the appellant would not be in a position to pay school fees given his ‘precarious financial circumstances’. It was therefore clear that he would not abide by the court order.

[10] This prompted the respondent to re-issue a writ of execution against the appellant, in an attempt to attach a Range Rover SUV which was registered in his name. The Sheriff attended the premises on 10 and 14 December 2020, and observed the said motor vehicle parked at the property. However, the return of service included only a list of movables in the sum of R19 000 which were the subject of an interpleader application. When the

sheriff returned on 21 February 2021, there was a Mercedes Benz and a Mini Cooper parked at the premises but the Range Rover was nowhere to be seen. The appellant handed over an affidavit stating that he had sold the Range Rover and it had not been in his possession since 17 December 2020. He refused to inform the sheriff to whom it had been sold or the whereabouts of the vehicle. An eNatis inquiry, conducted on 22 February 2021, revealed that the appellant was still the registered owner.

[11] The respondent alleged that this was a pattern of behaviour that she had previously borne the brunt of. After successfully obtaining an anti-dissipation order against the appellant on 08 September 2015, the respondent alleged that the appellant had sold an immoveable property which he held as an investment, to a cousin, in an attempt to ensure that it would not be placed in trust as ordered by the court.

[12] As regards the payment of school fees, on 10 December 2020, the appellant unilaterally gave notice of termination to the children's school because of his precarious financial position which rendered him unable to pay school fees. He requested the appellant to consider a more affordable secondary school.

[13] The notice of set down for the committal of the appellant was served on him on 24 February 2021, to be heard on 2 March 2021. In his affidavit requesting a postponement, the appellant stated that on 22 February 2021, two days before receiving the notice of set down, he received a report from a neurosurgeon at Kingsbury hospital that his sister had been diagnosed with terminal 4<sup>th</sup> stage lung and spinal cancer. This unexpected news of her imminent death had a devastating effect on him.

[14] Despite being an advocate practising mainly in criminal law, the appellant stated that he was unable to secure the services of a legal team before 1 March 2021. It is inexplicable why he was unable to secure the services of a legal team before 1 March 2021. In any event, he had an attorney throughout. It can safely be assumed that the appellant was not oblivious to the consequences of failing to comply with a court order. Requests to the respondent's legal representatives for a postponement were turned down, forcing the appellant to bring a substantive application for postponement on the day of the hearing.

[15] Other than his sister's illness, the appellant's grounds for postponement are as follows. Firstly, he states that a substantial portion of the monies claimed are not due. As a result, the respondent has no *locus standi* to bring this application which is an abuse of the legal process. The appellant is only in arrears for a small amount and this was occasioned by the adverse effects of COVID-19 on his practice. Thus, the quantum is in dispute. Secondly, the application for his committal is based on inadmissible hearsay evidence and the appellant requires time to deal with what he refers to as 'spurious allegations'. A further complaint is that the respondent's husband should have recused himself from the process rather than securing judges from outside the province. Finally, the respondent seeks radical relief which has been brought with indecent haste and has the effect of trammelling his constitutional right to liberty.

[16] The high court criticised the appellant for bringing the application for postponement on the day of the hearing, when he was aware as early as

24 February 2021 that the respondent was going to oppose the application. Moreover, he was aware that the proceedings could be brought on 48 hours' notice. The court did not engage with the reasons advanced for requesting postponement but found that the appellant's argument that the amount in arrears was in dispute and much less than R138 413.90 did not assist him, especially as he was in arrears before the COVID-19 pandemic, which he blamed for his inability to pay. As the full amount was not paid and the appellant remained in contempt of court, the application for postponement was dismissed on the basis that the grounds raised by the appellant did not assist him in the main application.

[17] All South Africans have a duty to respect and abide by the law. As the Constitutional Court stated in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*,<sup>1</sup> courts 'unlike other arms of the State . . . rely solely on the trust and confidence of the people to carry out their constitutionally mandated function'<sup>2</sup> which is to uphold, protect and apply the law without fear or favour.<sup>3</sup> Disregard of court orders is an attack on the very fabric of the rule of law.

[18] The attempt to evade payment of maintenance orders is particularly egregious as it also undermines the best interest of the child principle.<sup>4</sup> If court orders in respect of maintenance are habitually evaded with relative

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<sup>1</sup> *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC).

<sup>2</sup> Ibid para 1.

<sup>3</sup> See also *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 17.

<sup>4</sup> Section 28(2) of the Constitution provides that '[a] child's best interests are of paramount importance in every matter concerning the child.'



impunity, not only is the justice system discredited but also the interests of the child are not adequately protected. Courts are enjoined to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children.<sup>5</sup>

[19] The requirements for contempt of court are now trite. They are the existence of a court order; the contemnor must have knowledge of the court order; there must be non-compliance with the court order; and, the non-compliance must have been wilful or *male fides*. Once the first three elements have been shown, wilfulness and *male fides* will be presumed and the evidentiary burden switches to the contemnor.<sup>6</sup>

[20] It has been recognised by our courts that where a committal is ordered, the standard of proof in civil contempt matters has to be the criminal standard.<sup>7</sup> In those circumstances, wilfulness and *male fides* have to be shown beyond reasonable doubt.<sup>8</sup> Put differently, the contemnor has an evidential burden to create a reasonable doubt as to whether his conduct was wilful and *male fide*. There is a different standard of proof where no criminal sanction is sought; then, the standard of proof is that of a balance of probabilities. While all wilful disobedience of a court order made in civil proceedings is a criminal offence, civil mechanisms that are designed to

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<sup>5</sup> *Bannatyne v Bannatyne and Another* [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) para 32.

<sup>6</sup> *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA); *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC); *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Other* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC).

<sup>7</sup> *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 61.

<sup>8</sup> *Ibid* para 62.

induce compliance without resorting to committal, are competent when proved on a balance of probabilities.<sup>9</sup> The hybrid nature of contempt proceedings which results in committal, combine civil and criminal elements. But this does not mean that contemnors are not afforded the substantive and procedural protections which apply to any individual facing the loss of his freedom.

[21] It is in the light of the above that the refusal of the postponement must be considered. Whether or not the request for postponement was merely a delaying tactic, once there is the potential of an individual's loss of liberty, it was incumbent on the court to ensure that the appellant's conduct was *male fide* and wilful beyond a reasonable doubt. Whether the failure to meet his financial obligations to the respondent was intentional, or as a result of the deterioration of his financial circumstances, was not an issue that was considered by the high court, despite the appellant having raised it in his application for postponement. Nor was this aspect considered by Mudau J, who left that question open and merely stated '[w]hether or not that explanation is truthful is irrelevant to the first part of this application, paragraphs 1 and 2 of the relief sought by the applicant remains uncontested'. Paragraph 1 referred to the urgency of the matter, while in paragraph 2, the respondent sought an order that the appellant comply with Samela J's order of 29 July 2013, by making payment of the sum of R138 413.90, into the trust account of the respondent's attorneys by no later than 17h00 on 18 December 2020. This means that whether the conduct of the appellant was wilful and *male fides* beyond reasonable doubt has not

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<sup>9</sup> *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 17; *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*; *Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) paras 64-67.

been determined. Such an exercise must take place before there is an order for his committal.

[22] The maintenance orders are for the benefit of the appellant's minor children, not his ex-wife, the respondent. While I am mindful of the fact that the appellant was forced to approach this Court, thereby incurring costs, I am equally mindful that the respondent did not oppose the appeal and undertook to abide. I am therefore of the view that the circumstances are such that there should be no costs order in this appeal.

[23] In the result I make the following order:

- 1 The appeal is upheld, with no order as to costs.
- 2 The order of the Western Cape Division of the High Court, Cape Town,  
is set aside and substituted with the following order:
  - ‘1 The application for postponement is granted.
  - 2 The respondent is to pay the wasted costs occasioned by the postponement on the unopposed scale.’
- 3 The appellant is to file his answering affidavit in the application for committal within 15 days of the date of this order, and the respondent may file a replying affidavit within 10 days of receipt of the answering affidavit.

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C H NICHOLLS  
JUDGE OF APPEAL

## Appearances

For appellant: J van der Schyff

Instructed by: NSW Attorneys, Cape Town  
Phatshoane Henney Attorneys, Bloemfontein