REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 42743/2010

DATE: 30/03/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

LOUW, HENDRIK Applicant

and

HESSELINK, ANN-MARI ELIZABETH Respondent

In re:

HESSELINK, ANN-MARI ELIZABETH Applicant

and

LOUW, HENDRIK Respondent

APPLICATION FOR LEAVE TO APPEAL

MOSHIDI, J:

INTRODUCTION

[1] This is an application for leave to appeal against the whole of my judgment and order granted on 7 December 2010.

THE EFFECT OF THE ORDER

[2] The effect of the order was to compel the appellant to comply with certain of the obligations he undertook in the divorce settlement which was made an order of court on 15 October 2009. The obligations included one intended partly to benefit the minor son of the parties, H A L, born on 5 April 2006. Primary residence and care of the minor son was awarded to the respondent subject to the appellant's rights of reasonable contact. A further order in respect of which leave to appeal is now sought relates to the costs of

the application. Costs were awarded on the scale as between party and party. (Regrettably, the typed copy of the court order omits to mention such costs order.) The submission was such costs should have been ordered to be paid by the appellant on the scale as between attorney and own client.

[3] The grounds of appeal filed by Attorneys Hooyberg on behalf of the appellant are as set out in the notice of application for leave to appeal dated 15 December 2010. I shall deal with the grounds of appeal later hereunder.

[4] The application for leave to appeal is opposed by the respondent who filed a lengthy opposing affidavit dated 25 January 2011. Her opposing affidavit was attested to on 24 January 2011. The latter date becomes relevant later in this judgment. The respondent has urgently applied in terms of Rule 49(11) of the Uniform Rules of Court to declare the order granted on 7 December 2010 executable with immediate effect. The appellant filed an answering affidavit opposing this application. At the hearing of the application for leave to appeal, both counsel agreed not to proceed with the Rule 49(11) application at that time.

[5] The conduct of the appellant in this matter displays a measure of disrespect for the Rules of Court. The appellant has shown signs of deliberate obstructiveness, and tardiness. He has taken technical points especially in regard to the proceedings of 7 December 2010 even although he clearly was not prejudiced by the claimed breaches of the Rules. I would have expected the approach of an experienced counsel at the Johannesburg Bar which the appellant is to have been different. The matter concerns the

interests of his child whose interests require that he seek to deal with and resolve the matter expeditiously cheaply and on its merits. I was surprised to be required to deal with the obstructive points raised. They were clearly raised with a view of delaying the matter and not because the Appellant was actually prejudiced..

THE GROUNDS OF APPEAL

[6] The first ground of appeal is that during the proceedings of 7 December 2010, the Court committed certain irregularities by permitting the respondent's counsel to make submissions pertaining to this matter in the absence of the appellant's counsel, and in allowing the respondent's counsel to hand up a further affidavit, which affidavit had not been seen by the applicant's counsel or his attorneys. The second ground of appeal contends that the Court erred in finding that the service of the notice of motion by the respondent on the appellant's erstwhile attorneys of record was not proper service in terms of Rule 4(1) of the Uniform Rules of Court. The third and the fourth grounds of appeal are, respectively, that the Court incorrectly exercised its discretion in refusing a postponement in order to allow the appellant to file answering papers, and that the Court failed to apply its mind to the merits of the application.

[7] It is abundantly clear that when the grounds of appeal were formulated, neither the appellant nor his legal representatives had sight of the typed transcript of the record.

[8] This matter came before me in the busy unopposed motion court on 7 December 2010. Mr Pullinger who appeared for the applicant was not available to argue the matter during the course of the morning owing to what he called "*commitments in other courts*". (This can only suggest that Mr Pullinger was double briefed.) Adv J van den Berg SC of the Pretoria Bar represented the respondent and was present in Court. In the absence of Mr Pullinger, the Court indicated that any relevant documents should be handed up so that the Court could read same prior to the hearing of the application. This was purely to facilitate the hearing of the matter and constituted no ruling on their admissibility. Counsel for the respondent handed up short heads of argument, as well as a supplementary affidavit by the respondent's attorney of record which dealt with the correspondence exchanged between the parties' attorneys, as also certain matters concurring whether or not the notice of application had been properly served. When the matter was called later respondent's counsel said that the affidavit and the short heads of argument had been handed to Mr Pullinger during the lunch adjournment.

[9] When Mr Pullinger eventually became available during the course of the afternoon, the matter was recalled. The appellant had not filed answering papers in spite of repeated requests for him to do so prior to the hearing of the matter and his ability to do so during the intervening period had he wished to do so. The appellant submitted that the appellant intended to vigorously oppose the application. Two issues were raised namely that as no answering affidavit had been delivered that he required a postponement to file answering

papers and with regard to the service that the service of the application on the appellant's erstwhile attorneys during the divorce action namely N Becker, was improper, accordingly there had been no service at all so it was submitted. The submission was that the Court should postpone the matter to enable an affidavit to be filed or strike the matter off the roll as there had been no service. The applicant also objected to the Court having regard to the affidavit of the respondent's attorney, Mr Johan Schoeman ("*Schoeman*") which had been handed up in his absence, this notwithstanding that the appellant's counsel had seen same prior to the hearing. Counsel for the respondent argued his case and moved for an order in terms of the prayers in the notice of motion.

[10] At the end of the argument, it was apparent that the service of the notice of application had been effective whether or not the attorneys on which it was served were only appointed by the applicant for the divorce proceedings. The proceedings had in fact come to the attention of the appellant timeously. It was not in dispute that the affidavit of Schoeman showed that the notice of application had been served on N Becker as far back as 22 October 2010, some six weeks before the hearing during December.. It was also not in dispute that pursuant to such service, there ensued much correspondence between N Becker and Schoeman concerning the matter. This correspondence continued until about 2 December 2010. The service clearly had the desired effect of bringing the notice of application to the attention of the appellant. This conclusion is corroborated by the fact that the appellant instructed his current attorneys of record, Hooyberg Attorneys,

as well as briefed Mr Pullinger to appear in the matter on his behalf on 7 December 2010, the date set down for the hearing.

[11] On that date, the Court being satisfied with service considered the merits of the application and formed the view that the respondent had made out a case for the relief claimed in the notice of motion. At the time, and in the presence of applicant's counsel, the Court gave brief reasons for the order granted. These reasons effectively rejected the submissions of the applicant. In the instant judgment, the Court provides further reasons for the order granted on 7 December 2010, as it is entitled to do. The appellant has in any event, and in an irregular and procedurally incorrect manner requested reasons for the order of 7 December 2010 prior to the hearing of the present application, as discussed below.

[12] It is not in dispute that N Becker acted for the appellant in the divorce action which was finalised on 15 October 2009. Schoeman acted for the respondent and has continued to act up to the present. The parties' divorce was acrimonious. This is borne out by, *inter alia*, the huge volume of correspondence exchanged between the parties through their respective attorneys. In para 5.5 of the founding affidavit, attached to the notice of application leading to the order of 7 December 2010, the respondent stated:

> "*By way of introduction I state that numerous letters have been exchanged between our respective attorneys with regard to the issues raised above (the appellant's failure to comply with parts of the settlement agreement) and notwithstanding demand that the Respondent comply with his obligations, he has failed to do so. I have been advised that it is not necessary to attach the numerous letters*

> *exchanged between our respective attorneys … Should the Respondent however deny that numerous letters have been exchanged between our respective attorneys and that numerous demands have been made to him to comply with his obligations, same will then be addressed in my replying affidavit and the correspondence attached.*" (my insertions)

The correspondence was exchanged up to about 2 December 2010, approximately one week prior to the proceedings of 7 December 2010.

[13] The affidavit of Schoeman did not deal with the merits of the application at all. It was handed up in support of the respondent's submission that, not only was the notice of application served on N Becker on 22 October 2010, but also to prove the ensuing correspondence between the respective attorneys, and that the appellant was in fact timeously made aware of the pending proceedings. For example, in the letter dated 27 November 2010 N Becker acknowledged receipt of the notice of application. The letter proceeded to state that:

> "*… Should your client see fit to proceed with the threatened application, a special order of costs will be sought against her.*"

In a letter of 15 November 2010 addressed by the respondent's attorneys to the appellant's attorneys, N Becker, the following was stated in the second-last paragraph thereof:

> "*With regard to our client's application which was served at your offices, we have noted the contents of your letter of the 27th of October 2010. Your letter makes it clear that your client is in receipt of the said application and we are proceeding on 7 December 2010 to obtain the relief as sought in the notice of motion. If your client wishes not to oppose the application and/or to file opposing papers, he does so at*

> *his own risk. If your client does decide to file opposing papers, same will be out of time and he is requested to bring the necessary condonation application with regard thereto.*" (my underlining)

[14] On 22 November 2010 a further letter was addressed by N Becker to the respondent's attorneys of record. Again on 22 November 2010, a further letter was addressed by the appellant's attorneys, N Becker, to which was attached a cheque for R13 915,66 being the balance outstanding on the amount of R1 million which was owed by the appellant to the respondent in terms of the divorce settlement. On 22 November 2010, N Becker again wrote to the respondent's attorneys. The last paragraph of this letter reads as follows:

> "*As regards the remainder of the contents of your letter under reply, we have requested our client for instructions and will furnish you wish a response in regard to the contents thereof in due course*/." (my underlining)

On 23 November 2010, a further letter was addressed by N Becker, still acting on behalf of the appellant, to the respondent's attorneys. On 24 November 2010, the respondent's attorneys wrote a letter to N Becker confirming that they still acted for the respondent. On 26 November 2010, the respondent's attorneys addressed a letter to N Becker. In this letter, the respondent's attorneys, *inter alia*, enquired whether N Becker still acted for the appellant, or whether they should address future correspondence to the appellant directly. On 30 November 2010, (several days before the proceedings), N Becker, still acting on behalf of the appellant, addressed a letter to the respondent's attorneys, stating *inter alia*, that:

"*In the circumstances, you are advised that a copy of the letter will be placed in the court file and should your client attempt to enrol the matter for hearing and take an Order in absentia, a punitive de bonis costs order will be sought against your Mr Schoeman.*"

[15] On 2 December 2010, some mere five days before the hearing of the application, the respondent's attorneys addressed a letter to N Becker. It is necessary to reproduce the entire contents of the letter:

"*Our client's application was served on your offices and you acknowledged receipt thereof. You have acted as attorney for Adv. Louw since the inception of the divorce matter and continue so to act as is evident from your letter under reply and previous letters dealing with the said application. You have commented on the merits of our client's application, stating that same is bad in law and that your client intends having the application dismissed with a punitive cost order. The subject matter of the application has also been the subject matter of numerous letters exchanged between our respective firms with regard thereto. It appears to us from a reading of your letter that the only point your client wishes to raise is that the application was not served on him by the sheriff and that service of the application on him via your offices is not proper service in terms of the Rules of Court. We disagree with your contention but in any event the Court can condone the manner of service of the application on your client. Your client is aware of the fact that the relief sought by our client is of semi-urgent basis and has now become urgent as the motor vehicle in question is no longer safe for our client's use and the use of their son, Alexander, and must be sold but cannot be sold because of your client's obstructive behaviour in not complying with the Court Order. Your client continues not to comply with his obligations with regard to his son's maintenance. As indicated in the notice of motion, our client is proceeding on 7 December 2010 to obtain an order as therein requested. Your client has now, for the fourth time been informed that the matter will proceed on 7 December 2010 on an unopposed basis as your client, with full knowledge of the application and the relief our client seeks, has chosen not to oppose same. This letter will equally be brought to the attention of the Court at the hearing of the application.*" (my underlining)

On the basis hereof, the respondent's counsel submitted that service of the notice of application was properly effected on the appellant and that he indeed received the application and had knowledge of the contents thereof. All the above evidence establishes that N Becker was acting in the matter and only shortly before the hearing ceased acting. There was no notice of appointment or withdrawal as attorneys of record served and filed by N Becker. The evidence shows that prior to the commencement of the proceedings on 7 December 2010, the respondent's counsel was phoned by applicant's counsel who informed that he was acting on behalf of the appellant on instructions of new attorneys, Hooyberg. During that conversation applicant's counsel denied any knowledge of N Becker having acted for the appellant and also requested that the matter be stood down as he was busy in another court.

[16] The correspondence between the attorneys does not at all allude to the fact that a notice of appointment as attorneys of record was filed and served by Attorneys Hooyberg once they received instructions from the appellant shortly before the proceedings of 7 December 2010. What is apparent from the evidence is that although the appellant knew in good time of the proceedings of 7 December 2010, he deliberately chose not to file and serve any opposing papers. The correspondence shows that insofar as merits are concerned the appellant consistently neglected/or failed to comply with his obligations in terms of the divorce settlement, particularly in regard to the motor vehicle and the interests of his own minor son. The applicant chose not to file papers timeously. He has made his bed, and must now lie in it. The appellant submitted that the fact that the affidavit had been received in his

absence meant that the Court had entertained submissions from the respondent's counsel in the absence of the appellant's counsel, in full knowledge that the appellant was represented. This submission led to the next submission which was that the Court had prejudged the issues and made up its mind prior to hearing submissions from the appellant's counsel. There is no merit in the suggestion that the Court acted improperly or irregularly in having a cursory glance at the affidavit of Schoeman in preparation for the hearing. The main argument presented by Mr Pullinger when he eventually became available, was that the service of the application on N Becker was not proper. This submission was made notwithstanding the fact that the appellant was in fact represented at the hearing and had been represented throughout as I have found earlier. The applicant advanced contrary arguments. The applicant sought relief on the basis he had not been served and also sought a postponement of file and answering affidavit, as it he had been served. The applicant was not prejudiced by the service even if it was irregular. His current claims that he was not served and that the application be reserved are ludicrous and constitute a play to gain time. This conduct amounts to an abuse of the Rules.

RULE 4 OF THE UNIFORM RULES OF COURT

[17] Rule 4 of the Uniform Rules of Court prescribes variously that court processes must be brought to the notice of a party against whom legal proceedings are instituted by way of serving a copy of the process in the

manner directed by the rules. In a sense, and partly relevant to the facts in the present matter, Rule 4(1)(aA) provides:

> "*Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.*"

It is clear that this subrule caters mostly for interlocutory proceedings such as Rule 43 proceedings in a pending divorce action. See *Willies v Willies* 1973 (3) SA 257 (D) at 259C-H. It is indeed correct, as argued by Mr Pullinger that the respondent did not institute interlocutory proceedings in a pending divorce action, but issued the proceedings under a new or different case number than that of the divorce action finalised on 15 October 2009.

[18] However, in spite of the above rules relating to service of process, each case must be decided on its own merits, and in appropriate cases, the Court retains its discretion. For example, in *Van Rensburg v Condoprops (42) (Pty) Ltd* 2009 (6) SA 539 (ECD), the plaintiff sued the defendant for estate agent's commission. The Court was called upon to decide on a special plea in which the defendant argued that the present plaintiff lacked *locus standi*, and that the claim had prescribed. The Court also had to deal with the question of the prescribed process to be followed in effecting the substitution of a party, and certain non-compliance therewith. The original plaintiff had been substituted by the present plaintiff. At para [7] of the judgment, Leach J said:

> "*One would probably normally have expected a substantive application to be made for substitution. But the failure to proceed in that way is not necessarily fatal. It must be remembered, as was stressed by Nienaber JA in the Brummer case cited above, (Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere 1999 (3) SA 389 (SA), that the substitution of a plaintiff is purely a matter of process. The rules of court are designed to facilitate its process and, as is so often said, the rules are there for the court, not the court for the rules. Accordingly, if the same result can be obtained by way of a different civil process, it does not seem to me to matter which process is used. The important thing to consider is whether the objective of the process (in this instance, the substitution of party) has been achieved.*"

The Court went on to hold that the substitution had been valid. A similar conclusion was reached in *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C). Although the Courts have traditionally adopted a restrictive interpretation in respect of the service of court orders, there is a clear suggestion that a more liberal approach should be adopted with regard to the service of, for example, motion proceedings, which is the case in the present matter. See for example, *Garrett v Lea Hobbs Milton and Co* 1979 (4) SA 922 (W), and *Hessel's Cash and Carry v SACCAWU and Others* 1992 (4) SA 593 (E). In the present matter, as stated above, the service of the proceedings on N Becker on 22 October 2010 had the desired effect. Not only did the appellant thereafter continue to instruct N Becker to continue to correspond with the respondent's attorneys, but he also later instructed Attorneys Hooyberg and briefed Mr Pullinger to represent him at court on 7 December 2010.

[19] The objections of the appellant to the admissibility of the affidavit of Schoeman are without merit and profoundly spurious. The affidavit corroborates the version of the respondent as stated in para 5.5 of her

founding affidavit. The evidence is of immense assistance to the Court in determining the hotly disputed issue of the validity of the service. The ground of appeal alleging irregularities in the proceedings in regard to the affidavit is without substance at all.

[20] So too, is the perplexing ground of appeal contending that the Court allowed the respondent's counsel to make submissions in the matter in the absence of the appellant's counsel. The matter was specifically stood down to allow for the presence of Mr Pullinger. These are plainly desperate submissions which are not based on the evidence. The typed record reflects the following at page 1:

> "*MR VAN DER BYL: May I ask that the matter just stand down until he (Mr Pullinger) arrives at Court so he can address your lordship? M'Lord, I understand the only aspect in dispute is service, there is no opposition on the merits, there is no opposing affidavit. The respondent (present appellant) merely wants to complain about the manner in which the application was served, but the address will be two minutes long, M'Lord.*
> *COURT: Thank you matter 330 is standing down.*" (my additions)

Counsel for the respondent (applicant in the motion court) made the above request to stand the matter down after he had informed the Court that he had earlier been contacted by Mr Pullinger who appeared for the appellant. The typed record should properly reflect "*Mr Van den Berg*" instead of "*Mr Van der Byl*".

[21] By way of concluding on the issue of service, the following emerges. The motion proceedings were served on the appellant's attorneys of record (N Becker) who acted on his behalf in the divorce action and thereafter. The

appellant belatedly appointed Attorneys Hooyberg to act on his behalf. There was no indication that Attorneys Hooyberg served and filed the requisite notice of appointment as attorneys of record. The appellant, as stated earlier in this judgment, is an officer of this Court, not a layperson. He must have understood his rights and the Court procedure. There was no evidence that he suffered any prejudice. To the contrary, it is the respondent and the minor son who would have been prejudiced as a result of the appellant's failure to comply with his obligations to file an answer had a postponement been allowed in consequence of the applicant's play. As it is the respondent has been kept out of what is due to her and the child due to the application for leave to appeal. The respondent's affidavit was attested to on 24 January 2011 and the present application launched on 25 January 2011. She was also compelled to bring an application in terms of Rule 49(11) of the Uniform Rules of Court. The application was not proceeded with at the hearing of the instant application.

[22] Having found that the service of the notice of application was adequate, and had the desired effect of having the appellant before court on 7 December 2010 (through legal representation), I was satisfied that a postponement in order to allow the appellant time to file an answering affidavit, was not justified in the circumstances as it would be prejudicial to the respondent, and the minor son. The appellant had more than adequate time to file such answering papers. The prejudice he suffered was knowingly undertaken by him. It is trite law that the grant of a postponement is discretionary. The only reason advanced in support of the application for a

postponement was the technical contention that there had not been proper service. In regard to the ground of appeal that the Court failed to apply its mind to the merits of the application, I need say very little. The provisions of the divorce settlement are clear and unambiguous, and require no extraneous evidence. During the proceedings of 7 December 2010, no reasons were advanced, save for the alleged improper service, why the appellant elected not to deal with the merits of the application. As stated in the brief reasons furnished at the time of the order, I was satisfied that the respondent had made out a case for the relief sought in the notice of application. The appellant deliberately chose not to file answering papers under circumstances where he ought to have done so. In my view, this ground of appeal also qualifies to be dismissed. Prior to dealing with the applicable test in applications of this nature, there is one other matter which, was alluded to earlier in this judgment, which should be mentioned. Once the present application was filed, and on 28 January 2011 (during court recess), the appellant's attorneys, Hooyberg, addressed a letter directly to the Court (not through the Registrar of this Court or the Judge's Registrar), in the following terms:

> "*We refer to the above matter and confirm that we act on behalf of the Respondent herein, Hendrik Louw, our client. We refer further to the application that was heard before you and the order granted in favour of the applicant on 7 Desember 2010. In the light of the order made against our client, our client's application for leave to appeal such order (which was launched on 15 Desember 2010), and the applicant's application in terms of Rule 49(11) (which was launched on 25 January 2011), it would be greatly appreciated if you could, as a matter of urgency, furnish us with written reasons for your order of 7 December 2010.*"

Although Judges and their judgments in our democratic order should be accessible to litigants and their representatives, and indeed sensitive to criticism, the letter reeks of discourteousness. This is so not only towards the Court, but also in respect of the established procedure in matters of this nature. The letter was clearly written on the instructions of the appellant, an officer of this Court. There is indeed nothing wrong in a Judge receiving from a legal representative or a litigant a request for reasons for judgment or order. It is in fact the manner in which it is done which can be improper. See *Ex Parte Oppel and Another* 2002 (2) All SA 8 (C) at 10a-e. By comparison, in regard to enquiries regarding reserved judgments, in Practice Direction 2004 (6) SA 84 (T), it is said:

> "*An enquiry by an attorney wanting to know when a reserved judgment will be delivered is to be directed to the Deputy Judge President of each Division. In the case of an unrepresented party such request shall be similarly directed.*"

[23] In the instant matter, there was no need for the blatantly irregular letter. The reasons sought were on record already, and easily available. This once more, shows a disregard for the practice and rules of Court. The brief reasons were furnished in the presence of Mr Pullinger. Mr Pullinger and the appellant should have applied timeously to the Court transcribers, an independent company, for a copy of the transcript prior to launching the present application.

THE TEST ON LEAVE TO APPEAL

[24] The test in applications of this nature is, and has always been, whether there are reasonable prospects of success on appeal. It applies with equal force in both criminal and civil matters. The test goes back as far as *Rex v Baloyi* 1949 (1) SA 523 (A) at 524 where the Court said:

> "*This Court has laid down the rule that leave to appeal should not be granted unless the appellant will have a reasonable prospect of success on appeal.*"

See also *Building Society v De Jager and Others* 1964 (1) SA 247 (O) at 247F. In *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 28C-D, Corbett JA said:

> "*The need for trial Courts to apply this test properly has been emphasized by this Court from time to time. (See S v Ackerman en 'n Ander 1973 (1) SA 765 (A) ; S v Sikosana 1980 (4) SA 559 (A), in which many of the earlier decisions are referred to.) Although the cases quoted were criminal appeals, the same test and the same need for the test to be applied properly applies in civil matters.*"

(*Cf. Normkow Administrators (Pty) Ltd v Fedsure Health Medical Scheme* 2005 (1) SA 80 (W) at 82-83.)

CONCLUSION

[25] For all the reasons stated herein, as well as the brief reasons given *ex tempore*, I conclude that there are plainly no reasonable prospects of success on appeal in regard to all the grounds of appeal. The application for leave to appeal falls to be dismissed with costs.

ORDER

[26] In the result, the following order is made:

The application for leave to appeal is dismissed with costs.

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPELLANT	E L THERON
INSTRUCTED BY	HOOYBERG ATTORNEYS
COUNSEL FOR THE RESPONDENT	J P VAN DEN BERG
INSTRUCTED BY	SCHOEMAN ATTORNEYS
DATE OF HEARING	4 MARCH 2011
DATE OF HEARING	30 MARCH 2011