

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 04303/2019

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED: YES

17 January 2022

In the matter between:

M[....] B[....] J[....]

Applicant

and

M[....] B[....] P[....]

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 17 January 2022. The date of hearing was on 29 November 2022

Summary: Civil Procedure – Application for leave to appeal in terms of Section 17 of the Superior Court Act 10 of 2012-Applicant was found in contempt of rule 43- Whether the applicant has reasonable prospect of success-Applicant failed to establish that another court would come to a different conclusion.

Order

Application for leave to appeal dismissed with costs

JUDGMENT

CORAM: MATSEMELA AJ

1. The applicant herein is the respondent and the respondent is the applicant in the contempt of court proceedings. This is an opposed application for leave to appeal in terms of which the applicant seeks leave to appeal against the order granted by this Court. In terms of the said order, the applicant was found to be in contempt of the Rule 43 order granted by the Cele J, in terms of which he was ordered to, amongst other others,

- (i) pay maintenance in the amount of R 30,00.00;
- (ii) pay the school fees and educational expenses of the minor children:
- (iii) put the children on a medical aid and
- (iv) provide the respondent with a vehicle.

COMMON CAUSE

2. It is common cause that at the time the application for contempt was heard and argued before me, the applicant had failed to comply with the terms of the Cele J order.

LEGAL ISSUES

3. The defence raised by the applicant upon which the application for leave to appeal is also based is that in the contempt proceedings I did not inquire about the applicants' financial prospects. My decision relates primarily to the company that is run by the applicant and that he did not disclose his financial position. Therefore, I misdirected myself and erred when I found the applicant to be in contempt.

4. Whether the applicant was not in wilful contempt of the Cele J order and/or that he was not mala fide in failing to pay over any amount in lieu of his maintenance

obligations.

EVIDENCE

5. The evidence which has been put before me is the following:

5.1 The applicants' business dealings and status within the company he runs;

5.2 The failure by the applicant to pay over any amounts in maintenance since the granting of the Cele J order almost 2 years ago;

5.3 The failure by the applicant to set out his financial position supported by the relevant evidence and documentation;

APPLICABLE LEGAL FRAMEWORK

6. The applicable test in applications for leave to appeal is set out in Section 17 of the Superior Court Act, No. 10 of 2013. It regulates the circumstances in which leave to appeal is to be sought and granted. The section to a large extent codifies the common law grounds of appealable decisions.

Section 17(1) provides:

"17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration¹;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a)²; and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt

¹ The kind of contemplated "compelling reasons" would include, also the type of compelling reason contemplated in *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 where the High Court's interim interdict had the effect, for as long as it was in place, of preventing the national executive from fulfilling its statutory and budgetary responsibilities.

² Section 16(2)(a)(i) reads: "When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

resolution of the real issues between the parties”

7. Section 17(1)(a)(i) retains the proper and long-established test for an application of this nature, namely a determination of whether there are reasonable prospects of success (i.e. reasonable prospect of another court coming to a different conclusion). The test is thus not merely that a case is arguable, or some such or another lesser test.

THE REQUIREMENTS FOR CONTEMPT

8. In the well referenced decision in *Fakie NO v CCII Systems (Pty) Ltd*³ it was stated that the preliminary requirements for contempt are:

- (a) the existence of the order;
- (b) service or notice to the contemnor;
- (c) non –compliance; and
- (d) wilfulness and mala fides.

9. It was further held that 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.

10. The existence of the order, service of the order on the applicant and his subsequent non-compliance therewith are not in dispute. The only issue is whether the applicant was mala fide and wilfully elected to not comply with the court order.

11. The order that was granted by Cele J is a Rule 43 order. If the applicant experienced any financial difficulty and/or change in his financial means, he had more than ample legal representation to have advised him to bring an application in terms of Rule 43(6). Under that subsection, the applicant would set out to the court how his personal circumstances have changed which changed inhibits his ability to comply with the court order, 2 years after the grant of the Rule 43 order and the

³ 2006 (4)SA 326 (SCA)

applicant is yet to bring such an application.

12. It is my view that Cele J did consider the evidence regarding applicant's financial means and evidence he submitted to substantiate the contention that he cannot afford the amounts set out in his order. The difficulty for the applicant is that:

- (a) the court also found that he was not candid about his disclosures and
- (b) only disclosed selective information regarding his financial status to suit the narrative and overall impression he was trying to create. The applicant was simply not forthcoming with the court.

THE APPLICATION IN CONTEXT

13. The applicant has failed to provide sufficient evidence to support the very impression he is trying to create. The Cele J order was granted almost 2 years ago and to date he failed to provide sufficient evidence to dispel the finding that he can afford to meet the terms of that order.

14. The applicants' entire application for leave to appeal is primarily grounded in the argument that his means have not sufficiently been established. However, that is information that is squarely within the applicants' knowledge and which he has failed and/or refused to fully disclose to the court. The applicant thus cannot rely on his own shortcoming to argue that as a result of the "insufficient" information before Cele J, the Cele J order ought not to have been made alternatively he ought not to have been found in contempt thereof.

15. The onus on the applicant has always been and remains quite a simple one. He must make a full and frank disclosure of his means to support the contention that he is not in a position to comply with the Cele J order. Instead, he has done the opposite.

16. The applicant has failed to pay any maintenance since the hearing of the contempt application and to date has not paid over any amounts to the respondent for the maintenance of the minor children.

THE BEST INTEREST OF THE MINOR CHILDREN STANDARD

17. The acrimonious relationship between the applicant and the respondent unfortunately means that there will in all likelihood be perpetual litigation between the parties. This in turn means that there is potential for the obstruction of the administration of justice and justice for children.

18. It is the consideration that I took into account when I ordered the applicant to be contempt of the Cele Jorder. Over and above the disputes between the parties there are minor children that need **to be taken care off** and as the breadwinner⁴ and parent of those children, the duty at present primarily rests with the applicant.

19. The applicant, despite contending that he is unable to pay the amounts ordered by the Cele J, has also failed to disclose how much he can afford and pay that amount. The impression sought to be created by the applicant is that in fact, he is in no position to pay any amount of maintenance towards the upkeep of the minor children.

20. The one aspect which has been maligned in the application for leave to appeal is the finding by this Court that the applicant has failed to pay over any amount for maintenance, even the little he contends he can only afford due to the precarious position his company finds itself in. There is and there can never be an explanation for the applicants' failure in this regard to pay over any amount whatsoever.

21. The conduct of the applicant has in fact to ignore the any interests let alone the best interests of the minor children.

22. Cele J has found that the applicant runs companies and controls assets in excess of R400 million, runs his operations from Dunkeld in Sandton and yet can barely make enough to contribute any amount in respect of his maintenance obligations.

23. I am of the view that the applicant's grounds for appeal do not meet the threshold required. It is the result or the order that is the subject matter of the application for

⁴ The respondent is unemployed as she worked for the applicant and her employment has since been terminated

leave to appeal, not the reasons for the order. In *Minister of Home Affairs and Others v Tsebe*⁵ it was said

---“We cannot ordinarily grant leave to appeal where the criticisms of High Court judgement do not amount to prospect of success”. ---

I am of the view that in the above circumstances, there exists no possibility that another court would come to a different conclusion.

24. There are also no “compelling reasons why the appeal should be heard” in the present instance nor is such a case made out by the applicant.

CONCLUSION

25 Heher JA in *Fakie NO v Cll Systems (Pty) Ltd*⁶, paragraph 6 says the following
“It is a crime unlawfully and intentionally to disobey a court order. 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”

26. In *Victoria Ratepayers Association v Greyvenouw CC and Others*,⁷ Plaskett AJ (as he then was) held:

“Contempt of Court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has wilfully and in bad faith ignored or otherwise failed to comply with a court order. This added element provides every such case an element of urgency”

27. Having referred to the case law above, it is clear that the issue of contempt is not the one between the parties but rather between the applicant and the court. The

⁵ 2012 (5) SA (CC) at paragraph 89. See also *New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) at 262D, paragraph [40] and *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 575B.

⁶ 2006 SCA 54

⁷ [2004] 3 All SA 623 (SE).

applicant in this matter has not:

- (i) rendered any compliance with a court granted in October 2019;
- (ii) pursued any application to have the maintenance obligations altered to meet what he contends he can afford;
- (iii) tried to comply by paying over what he could afford.

28. The failure by the applicant to launch and pursue an application in terms of Rule 43(6) is neither a mistake or unintentional. The applicant would have to make full financial disclosures insofar as he seeks to rely on change in his circumstances which inhibit his ability to render full compliance with the Cele J order. I have found in my judgment for the contempt of court, that the applicant is not willing to make such disclosure in connection with his financial means.

29. Therefore I am satisfied that the applicant wilfully and mala fide breached the order by Cele J and remains in contempt of such order. The applicant had the knowledge of not only the existence of and the operation of the order but also the underlying intention, which is to maintain his wife and minor children. The failure by the applicant to comply with such order and the consequent failure to approach this court for a relaxation of the terms of the order in light of his alleged “difficulties” with implementing and/or complying with the order, shows that effectively the applicant acted, wilful and in contempt of Court.

30. The contentions made on behalf of the applicant in the application for leave are without merit. The application for leave to appeal is brought only to frustrate the rights of the respondent and delay the execution of the contempt order. In light of the foregoing, I am of the view that there are simply no prospects on appeal and the application for leave to appeal stands to be dismissed with costs.

Order

The application for leave to appeal is dismissed with costs.

MOLEFE MATSEMELA
Acting Judge of the Gauteng High Court, Pretoria

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 17 January 2022

Heard on 08 December 2021

FOR THE APPLICANT

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INSTRUCTED BY

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