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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. 17/08208

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED:

Date: 05/07/2022

In the matter between:

S [....] J [....] D [....] G [....]

Applicant

and

R [....] K [....] L [....]

Respondent

JUDGMENT LEAVE TO APPEAL

MAHOMED, AJ

The applicant applies for leave to appeal a judgment I handed down on 15 March 2022, in which I ordered for his incarceration for contempt of a court order. On 25 February 2019 Weiner J made a settlement agreement in a divorce hearing, an order of court. The evidence before me was that the applicant had been in default of the order for over two years, as he failed to pay maintenance in respect of his two minor children. I found that the respondent met the requirements to prove prima facie that he was in contempt of the order. It is trite that the onus then is on the applicant in casu to disprove that he was wilful and mala fide, to discharge his onus. Having considered the facts and the law on contempt of court I ordered for his incarceration, for 10 days which was to be effective after 30 days of my order.

I ordered the applicant to pay the costs of the application.

1. In **PHEKO v EKURHULENI METROPOLITAN MUNICIPALITY**,¹ the court stated,

‘the presumption rightly exists that when the first three elements of the test of contempt of court have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create a reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt is established.

2. The applicant attacks all of the judgment and in the main, it is argued on his behalf that I am to grant him leave to appeal, in the interests of justice.

3. Mr Riley on behalf of the applicant relied again on **STRIME v STRIME**,² in which the court ordered that no order can be made where an application for a variation is pending and he proffered that the order can apply retrospectively. Ms Kinghorn reminded the court that the judgment in that case applied in respect of spousal maintenance and the respondent agreed to pay a lower figure and performed his obligations. In casu the payment is in respect of minor children.

4. The reliance on Strime is misplaced. The matter before me was on an issue of contempt of court and has nothing to do with payment or a non-payment of maintenance or variation of a maintenance order.

5. Counsel furthermore argued that this court had prejudged the variation hearing³ and that if the order is varied, the applicant’s incarceration would be without

¹ No 2 [2015] ZACC 10; 2015 (5) SA 600 CC

² 1983 (4) SA 850 (C)

³ Caselines 022-46 par 22

cause and furthermore, be unlawful.⁴

6. I am of the view that the applicant conveniently conflates two distinct issues. This court has not pronounced on the prospects of success regarding the variation application.⁵

7. In **SS v VV-S**,⁶ where the court stated,

*“it can only be described as unconscionable when a party seeks to invoke the authority and protection of this Court to assert and protect a right it has, but in the same breath is contemptuous of that very same authority in the manner in which it fails and refuses to honour and comply with the obligations issued in terms of a court order.” This court was of the same view, directly to the issue of ignoring a court order.*⁷

8. The applicant failed to discharge the onus to disprove mala fides and wilfulness.

9. The aspect of wilfulness was considered and appears in the reasons,⁸ and as to his mala fides, this court considered the facts as repeated in the respondent’s heads.⁹

10. In **VICTORIA PARK RATEPAYERS ASSOCIATION v GREYVENOUW CC**

⁴ Caselines 022-46 par 23

⁵ See reasons 020-12-13par 34-41

⁶ 2018 JDR 0275 (CC)

⁷ Caselines 020-14 par 45

⁸ Caselines 020-12 to 23 par37 and 41and 43

⁹ Caselines 022-7 par 6.1.9.1

and OTHERS¹⁰ the court stated'

“ contempt of court is not merely a means by which a frustrated successful litigant is able to force his or her opponent to obey a court order. Whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as the guardian of the public interest.”

11. Any court in a constitutional democracy, is enjoined to and it entrusted with the guardianship of the public and its interest. That is its whole purpose, and its very existence is wholly dependent on that public.

12. In casu, it is trite that the court is the upper guardian of minor children. The applicant claims leave to appeal in the interest of justice¹¹, and the question arises how the court in casu must weigh that interest, when the actual “contestant” on the “other side” are his children. I use the words in italics with caution.

12.1. In my view this is the aggravating factor in this matter. I must weigh the children’s constitutional rights above both their parents.

13. In **HOFMEYR v FOURIE, B.J.B.S. CONTRACTORS (PTY) LTD v LATEGAN**,¹² was stated that although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief if competent.

¹⁰ (511/03) [2003] ZAECHC 19 (11 April 2003) par 23

¹¹ Caselines 022-44 par 16 and 17

¹² 1975 (2) SA 590 (C)

14. Advocate Kinghorn referred the court to the matter of **BANNATYNE**,¹³ where the reality on the ground is set out,

“Courts need to be alive to recalcitrant maintenance defaulters who use the legal processes to side step their obligations towards their children. But whatever excuse he might have had for failing to comply with the existing order, there was no excuse for his failure to pay even the reduced amount that he contended should be substituted for it. The respondent appears to have utilised the system to stall his maintenance obligations through the machinery of the Act. It appears from the evidence of the CGE, that this happens frequently in the maintenance courts. The hardships experienced by maintenance complainants need to be addressed and the proper implementation of the provisions of the Act is a matter that calls for the urgent attention of the Department of Justice.”

14. The evidence at the hearing of this matter and in this application is overwhelming on the applicant’s total disregard for the dignity of the court and his attempts to manipulate the system to avoid his responsibility.

15. Mr Riley submitted at the hearing of the matter, that his client was destitute and could not afford to file a further affidavit to counter all that was included in the replying affidavit. In this application, counsel further informed the court that the applicant cannot afford legal fees. Ms Kinghorn raises a very pertinent point as to how the applicant would afford the security for costs for an appeal?

16. The test for leave to appeal is trite, and the question to answer is “would” the appeal have a reasonable prospect of success before another court?

17. I am of the view, on the facts relating to the contempt of court, he does not have prospects of success. Another court would still require the applicant to discharge the onus on the facts on record. Accordingly, leave to appeal is refused.

¹³ (CCT 18/02) [2002] ZACC 31 ,2003 (2) SA 363 (CC) (20 December 2002)

18. I am of the view that punitive costs are appropriate. I am not persuaded that that the applicant has financial challenges as he continues to litigate but cannot afford R89 000, even in instalments, to an appeal.

I make the following Order:

- 1) The application for leave to appeal is refused.
- 2) The applicant is to pay the respondent's attorney client costs.

MAHOMED AJ

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 5 July 2022.

Date of Hearing: 27 May 2022

Date of Judgment: 5 July 2022

Appearances:

For the applicant:

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For Respondent:

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