

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, GQEBERHA**

CASE NO: 1889/2022

In the matter between:

IRENE LORNA LAWRENCE
(IDENTITY NUMBER: 4[...])

Applicant

and

LORNA VAN HUYSSTEEN
(IDENTITY NUMBER: 6[...])

First Respondent

STEPHANUS ALBERTUS VAN HUYSSTEEN
(IDENTITY NUMBER: 6[...])

Second Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

LOWE J

INTRODUCTION

1. In this matter, I originally heard extensive argument for both sides followed by a full judgment dealing with all the issues raised on the papers and in argument

dismissing the application against both first and second respondents, each party to pay their own costs.

2. Applicant seeks leave to appeal, in an extensive notice of application for leave to appeal, to the Full Court alternatively the Supreme Court of Appeal, against the whole of my judgment and order, save in respect of the dismissal of the application to strike in terms of Rule 6(15) and the dismissal of the application in respect of second respondent, but including the costs order granted in relation to both the main application and the application to strike.

3. In the application for leave there are four grounds argued, to which I will refer more fully hereafter insofar as is necessary.

THE APPROACH TO APPLICATIONS FOR LEAVE TO APPEAL

4. I have given careful consideration to the principles, which are applied by our courts in respect of applications for leave to appeal and particularly in terms of Section 17(1) of the Superior Courts Act 10 of 2013 and the sometimes suggested slightly changed onus or level that has to be applied thereto as has been suggested in a number of cases particularly in the Labour Court.¹ I am, in any event, in agreement with Smith J in the matter of **Valley of the Kings and another v Al Mayya International**², in which Smith J dealt extensively with the test to be applied at the application for leave to appeal stage, in which he determined the matter on the basis simply whether there were reasonable prospects that another court may find merit in arguments advanced by the losing party.

5. Put otherwise, if there are reasonable prospects of success that another court may differ, leave to appeal should be granted.

¹ **The Mont Chevaux Trust (IT 2012/28) v Goosen and 18 others** LCC14R/2014; **Fair Trade Tobacco Association v President of the Republic of South Africa and Others** (21688/2020) [2020] ZAGPPHC 311.

² Grahamstown case no: 2226/2016, 10 november 2016

6. I have also had careful regard to the decision of the Supreme Court of Appeal, **Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others**³, a judgment given on the 15 March 2016 in which Wallis JA dealt with an application for leave to appeal, commenting on appeals in which there is a particularly important matter to be decided that is a matter of public importance. At paragraph [23] he outlined the basis underlying what he said in paragraph [24], which I intend to quote selectively, and it was against this background that it was suggested that in that matter jurisprudence should have been considered as a guide to whether, notwithstanding the High Court's view in that matter as to the prospects of success, leave to appeal should have been granted, having regard to the importance of the matter to various parties and the public.

7. His Lordship said as follows at paragraph [24]:

“That is not so say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.”

8. In any event, it is clear that if there is a reasonable prospect that another court may differ on the issues raised, leave to appeal must be given.

THE ARGUMENTS IN THIS MATTER

9. In the heads of argument applicant's counsel contended that I, having found at paragraphs 55 and 90 of the judgment that first respondent was clearly in breach of the order and/or at least had failed to comply with the order, that this should have been sufficient in the circumstances to find that first respondent was in fact in contempt of the order.

10. I do not agree for the following reasons. In paragraph 55 of my judgment I stated the principle applicable to the question of an evidentiary burden which attaches to a respondent to demonstrate lack of wilfulness and *male fides* in

³ 2016 (3) SA 317 (SCA).

proceedings such as were before me. In stating that on the face of it first respondent was clearly in breach of the order granted, this was clearly qualified to the extent that *“in the result the existence of wilfulness and male fides is presumed and that evidentiary burden falls to be discharged.”*

11. This did not by any means constitute sufficient as argued, it being clear that it still remained to consider whether first respondent had discharged the evidentiary burden. At paragraph 90 as to costs I found that it was understandable that applicant having heard the contents of the voice notes referred to in the main judgment had good reason to believe that in the absence of an explanation first respondent had failed to comply with the order and was still in possession of the original items referred to. This of course also does not constitute sufficient in the circumstances for a finding of contempt, but was the reason for a costs order being made, the application having been launched in the absence of that explanation which came subsequently.

12. In my fully reasoned and motivated judgment I concluded that on the essential issues before me, in the application, there were real disputes concerning the issues of wilfulness and male fides and that without a determination thereof it was not an application which entitled applicant to the relief that applicant sought. In my view, in essence, the matter remained a contempt application, it came down to a consideration whether the disputes raised, primarily whether the allegation that the items were already handed to applicant before the order was granted, fell to be dismissed in the light of the voice notes referred to, the questions of fact to be decided on the allegations and evidence in the application.

13. I concluded that on the papers and the absence of a referral to oral evidence being sought, it was not possible to decide the crucial issues relevant to the relief sought, this in fact going to whether or not the applicant's original identity document, passport and bank card had been handed back by first respondent to applicant prior to the original application being launched, or whether she had retained these and was in breach of the order given by Van Zyl DJP.

CONCLUSION

14. I have carefully considered the four grounds of appeal in the application for leave to appeal and the arguments made before me by counsel for applicant, and I am of the view that applicant has failed to establish that there is indeed a reasonable prospect that another court may come to a conclusion other than did I.

15. In the result the application for leave to appeal is refused.

ORDER

16. It is ordered that:

1. The application for leave to appeal is refused.
2. Applicant is to pay first respondent's costs in the application for leave to appeal.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant: Mr. C.B. Garvey

instructed by Jacques Du Preez Attorneys,

Port Elizabeth, Mr. Du Preez.

Appearing on behalf of the Respondent: Ms. Morris

instructed by Quinton van den Berg Attorneys Inc.,
Port Elizabeth.

Date heard: 7 December 2022

Date delivered: 24 January 2023

