

REPUBLIC OF SOUTH AFRICA



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

Case Number: 11676/2018

In the matter between:

S, S F

Applicant

and

S, A J

Respondent

JUDGMENT: LEAVE TO APPEAL

Nkutha-Nkontwana J:

- [1] In this application, the applicant (respondent in the main application) seeks leave to appeal the judgment and order of this Court handed down on 10 October 2023 on several grounds that are articulated in the notice of the application for leave to appeal. The respondent (the applicant in the main application) is opposing the application for leave to appeal and seeks that it

be dismissed with costs *de bonis propriis*. In this judgment, deem it expedient to refer to the parties as cited in the main application.

[2] The respondent filed written submissions wherein the grounds of appeal upon which this application is pegged are succinctly stated and relate to:

- a. The finding pertaining to whether the respondent was in wilful and mala fide non-compliance with the orders;
- b. The finding that the circumstances justified imprisonment; and
- c. The finding that the imprisonment be suspended subject to two conditions and whether-
 - i. The respondent, on the facts before Court, could purge any contempt within three days; and
 - ii. A condition could be imposed in terms whereof future non-compliance with the orders as such would be regarded as a breach of the suspensive conditions and hence lead to immediate incarceration.

[3] The respondent's counsel did not forcefully pursue the first ground of appeal, understandably so. It is apparent from the impugned judgment that the respondent failed to provide this Court with comprehensive information of his financial position so as to excuse his contempt. By the same token, the second ground of appeal is untenable. The respondent is blowing hot and cold. On the one hand, the respondent concedes that he took a liberty with the impugned court orders without proving any evidence of his financial difficulties. Yet, on the other hand, he contends that circumstances did not warrant imprisonment, despite being a repeated contemnor.

[4] 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,¹ the apex court, emphasising the importance of obeying court orders, stated that:

“[C]ontempt of court is not an issue *inter partes* [(between the parties)]; it is an issue between the court and the party who has not complied with a mandatory order of court”. Notwithstanding that this order derives its life force from CCT 295/20, these proceedings are a different creature altogether. We are not required to pursue the same purpose as we did in CCT 295/20: to order Mr Zuma to attend the Commission. Indeed, in *Pheko II*, this Court noted that ‘[a]t its origin the crime being denounced is the crime of disrespecting the courts, and ultimately the rule of law’. Although the harm caused to successful litigants, like the applicant, through contempt of court is by no means unimportant, the overall damage caused to society by conduct that poses the risk of rendering the Judiciary ineffective and eventually powerless is at the very heart of why our law forbids such conduct. Therefore, as I have already said, the mischief I am called upon to address is not that Mr Zuma failed to comply with the summons, but rather, that he failed to comply with the order of this Court.

Notwithstanding this, I might have been persuaded to compel compliance had I been given a single reason to believe doing so would be a fruitful exercise. As it will not be fruitful, I defer to what was said in *Victoria Park Ratepayers’ Association*:

‘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 such 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 guardian of the public interest.’

Indeed, at the core of these contempt proceedings lies not only the integrity of this Court and the Judiciary, but the vindication of the Constitution itself.” [Emphasis added.]”²

¹ [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC).

² *Id* at paras 61-2.

- [5] On the third ground, the respondent places reliance on the order by this Court, per Mdalana-Mayisela J, in *Raath v Raath*.³ In my view, this judgment is evidently distinguishable as the court was not faced with a repeated contemnor. In the present matter, on 20 June 2023, the respondent was found to be in wilful contempt of the impugned orders by Tshombe AJ. Yet, this court still prioritised compelling the respondent's compliance by ordering a suspended committal, contingent on an order compelling compliance with the impugned court orders.⁴
- [6] The stringent conditions imposed are obviously informed by the level of disdain shown by the respondent; the real possibility that the respondent would shirk the indulgence; the constitutional imperative given the vulnerability of the applicant as a woman and cancer survivor who needs medical attention with the costs thereof being covered by the impugned orders; and the fact that the respondent has the means and ability to purge himself of contempt. Thus, the respondent has a choice either to purge himself of the contempt as indulged or, if the indulgence is rendered futile by the respondent's incorrigible contemptuous conduct, the order of committal is an appropriate sanction.⁵
- [7] However, since the order of committal is suspended for 12 months, in the event there is interminable contempt of the impugned orders, the applicant would still have to seek leave to approach this Court on the same papers, or duly supplemented, to seek an order that the suspension be lifted and for the Court to authorise a warrant of arrest and imprisonment of the respondent forthwith in execution of the order.
- [8] It is well accepted that for the leave to appeal to be granted, the applicant should in essence show that the appeal would have a reasonable prospect of success. In *Member of the Executive Council for Health, Eastern Cape v*

³ The parties referred the Court to a judgment handed down by Mdalana-Mayisela J on 26 August 2022, however the judgment is not available on any of the official law reports or SAFLII. The judgment is, however, available on the website "LawLibrary", and can be accessed at:

<https://lawlibrary.org.za/akn/za/judgment/zagpihc/2022/577>

⁴ See *E.K v P.K and Others* [2023] ZAGPPHC 69.

⁵ *Id* at para 34.

Mkhitha and Another,⁶ the court described ‘reasonable prospects of success’ as follows:

“Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

- [9] Having assessed all the grounds of appeal, I am persuaded that there are no prospects that another court would reasonably arrive at a decision different to the one reached by this Court.
- [10] I now turn to the issue of costs. Granted, this application for leave to appeal is unmeritorious, especially given the fact the impugned order is granted in terms of Rule 43. I am, however, disinclined to award costs *de bonis propriis* as sought by the applicant. Still, a cost order is warranted.
- [11] In the circumstances, the application for leave to appeal is dismissed with costs.

P Nkutha-Nkontwana J
Judge of the High Court,
Johannesburg

⁶ [2016] ZASCA 176 at paras [16]- [17]. See also *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para [7]; *Greenwood v S* [2015] ZASCA 56 at para [4]; *Kruger v S* [2013] ZASCA 198; 2014 (1) SACR 647 (SCA) at para [2]; *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489.

Judgment handed down: 27 October 2023

Instructed by: Vardakos Attorneys

