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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO.: 8470/2021

In the matter between:

M[…] S[…] H[…] Applicant

and

J[…] S[…] H[…] Respondent

HEARD ON: FRIDAY, 18 AUGUST 2023

This judgment and Order were delivered electronically by circulation to the parties' legal representatives via email on THURSDAY, 14 SEPTEMBER 2023.

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

MAHER, AJ

[1] This is an opposed application for Leave to Appeal the order granted on 18 July 2023. The Respondent was, inter alia, found to be guilty of contempt of Court. The Applicant seeks leave to appeal this decision to a Full Bench.

[2] Mr Felix appeared for the Applicant,[1] the Respondent in the main application, and Ms Lawrence for the Respondent. I shall, for convenience, throughout refer to the parties as cited in the application for leave to appeal.

LEAVE TO APPEAL

[3] Leave to appeal is now governed by section 17(1) of the Superior Courts Act 10 of 2013 ("the Act"). The section provides that:

(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

[1] Mr Gagiano appeared for the Respondent at the main hearing.

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

[4] Prior to the Act coming into force, the test in an application for leave to appeal was whether there were reasonable prospects that another court may come to a different conclusion. Much debate has ensued as to whether s 17(1) imposes a more stringent and onerous test before leave to appeal can be granted.[2] I am of the view that it is now authoritatively established that the position remains that if there is a reasonable prospect of success, leave to appeal should be granted. The different views and findings in this regard, in my view, essentially are now moot in light of the finding in Ramakatsa and Others v African National Congress and Another.[3]

[5] In Ramakatsa, in interpreting the section, the SCA held[4] that:

'If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are *some* other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal.'

[6] I, accordingly, consider this application for leave to appeal on the basis that leave should be granted if a reasonable prospect of success is established, or if there are some other compelling reasons why the appeal should be heard.

[2] See, for example, The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) and Marschall v.Schleyer and Others 2022 JDR 3343 (GJ) where the Court held that an applicant now faces a higher and more stringent test.
[3] [2021] JOL 49993 (SCA) March 2021.
[4] At paragraph 10.

[7] The Applicant's various grounds of appeal set out in its application for leave to appeal and, in summary form, are that the court erred in respective of practically all its findings.

GROUNDS OF APPEAL

[8] I find myself compelled to state that the Notice of Application for Leave to Appeal is unduly prolix, lacks clarity and does not succinctly set out the grounds of appeal. Mr Felix, who did not draft the Notice and did not appear for the Applicant in the main application disavowed reliance on most of the points of appeal in the Notice at the hearing.

[9] Notwithstanding that Mr Felix confined himself to more limited grounds and raised an additional ground at the hearing, it needs to be said that this 'shotgun' approach in applications for leave to appeal is to be deprecated. Be that as it may, the application is made on a large number of grounds, and because of the prolixity I do not propose to set out the grounds relied upon in support thereof so as not to unduly overburden this judgment. Many of the grounds are repetitive or overlap, nor is it clear why they amount to errors and misdirections that a reasonable of prospect of success is thereby established. The mere prefacing of each sentence with the words 'erred and misdirected' does not suffice to render what is next averred to indeed constitute an appropriate ground or basis upon which to substantiate the averments. In any event most of the grounds stipulated in the Notice were dealt with in detail in the main judgment and do not bear repetition here.

[10] Be that as it may, shorn of its verbiage and repetition, the real issue is the correctness or otherwise of the findings relating to whether the Court erred in finding

that the Applicant did not discharge the evidentiary burden upon him and whether the Applicant was in wilful default.

CONSIDERATION OF THE GROUNDS OF APPEAL

[11] I turn now to the gravamen of the grounds raised by the applicant in his application for leave to appeal.

[12] As already stated, it is a pointless and fruitless exercise to regurgitate the long list of the grounds of appeal and the multiple identifications of all the purported misdirections and errors and deal and then deal with them seriatim, nor did Mr Felix attempt to do so either, concentrating as he did on the issues pertaining to the evidentiary burden and the requirement of wilfulness.

[13] The consistent or common thread running through the various grounds of appeal appear to be that the Applicant did indeed furnish adequate proof of an inability to comply with his financial obligations, and that the Court erred in its findings to the contrary. The difficulty I have with this repeated refrain is that it does not engage with what constitutes proof, bearing in mind that the Applicant bore an evidentiary burden. As pointed out in the main judgment, the Applicant frequently resorted to assertion or th barest of detail without providing facts, adequate evidence and supporting affidavits.

[14] These evidentiary shortcomings are dealt with at length in the main judgment. It is accordingly unnecessary to repeat these here, save to give but a few examples by way of illustration.

[15] In his first sworn statement, the Applicant stated that the loan of R600,000 is "depleted". He indicated that the arrears amount of R262,379.50 and R6509.58 was paid the previous year from the loan and that he used the balance of the money to pay cash maintenance each month and to pay his legal fees, part of which amounted to R8625 to pay advocate Bosman in September 2021 for facilitating a mediation.

This is a woefully inadequate explanation as to what happened to the R600,000 and apart from a dearth of facts and bald assertion, the details furnished do not show in aggregate that the moneys were in fact depleted.

[16] The Applicant filed a second sworn statement and also "reserved the right" to supplement his papers. He duly filed a second affidavit and instead of setting out the relevant facts as regards the purported depletion of the R600,000 he again laconically stated that he used this amount to pay the arrear maintenance and to supplement the monthly maintenance amount. He then states that the amount is "now spent" and that he, "cannot access more credit." No details are provided as to what attempts, if any, he made to obtain further credit and how he arrived at this conclusion or statement 'of fact'. Once again, it is not possible to determine from the facts adduced that the full amount of the loan was indeed used up.

[17] The Applicant has an Old Mutual Max Investments retirement policy which had a closing balance as at 16 January 2021 of R375,721.30. He himself neither disclosed this investment, nor did he disclose whether he approached Old Mutual to ascertain whether he could obtain a loan as against the value of the policy.

[18] The Applicant stated that he is employed in a family business and that the business was severely and negatively affected by the 11Covid lockdown". No details are furnished as to the effect of Covid on the alleged downturn of the business and how this impacted on him or the family business, and the fact that Covid is now behind us is simply ignored.

[19] The Applicant said he did not comply with the maintenance order as he is on a fixed salary and it is insufficient to meet his monthly expenses. In the previous record of proceedings, he stated that his monthly income as the "manager" of HD Jewellers was R16 576.64 and he received a "monthly loan" of R23 700.00 from HD Jewellers. The loan is higher than his salary, which is not explained, nor is it explained why his salary is subsequently much higher and the "loan" no longer appears in his salary advices.

[20] There is no need to add further examples. The fact of the matter is that the Applicant fell woefully short of discharging the evidentiary burden upon him to adduce evidence to refute the allegation of contempt, which he elected not to discharge. Accordingly, his contempt of Court was established beyond any doubt.

[21] The first three elements of the test for contempt were established and having been established, mala fides and wilfulness were presumed as the Applicant did not provide evidence sufficient to create a reasonable doubt as to their existence.

[22] In the circumstances, I am not convinced that a case is made that an appeal has a reasonable prospect of success.

[23] This is not, however, the end of the enquiry as Mr Felix raised an additional ground not included in the Notice of Application for Leave **to** Appeal.

NEW AND ADDITIONAL GROUND OF APPEAL

[24] At the hearing of the application for leave to appeal Mr Felix referred the Court to Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others.[5] Relying on this judgment, he argued that the Court erred in imposing a sanction of periodic imprisonment and/or sanction without affording the Applicant an opportunity to make submissions as regards an appropriate sanction or sanctions.

[25] At the outset it needs to be said that the new ground raised is entirely novel and no basis at all was laid in the Notice for Application for Leave to Appeal for this ground of appeal for this ground of appeal. Both the Court and Counsel for the Respondent were taken by surprise.

[26] In fact, it should be pointed out that not only was nothing contained in the Notice of Application for Leave to Appeal to forewarn that the point would be raised, but it was not even hinted at or alluded to in any manner or form. The result is that neither counsel for the Respondent were even remotely forewarned that it would be argued that the Court erred in not affording the Applicant to make submissions in mitigation of a sentence or sanction.

[27] It is Incumbent on an Applicant to at least give some notice to afford a Respondent an opportunity to consider the point or points not apparent from the Notice of Application for Leave to Appeal, and afford them an opportunity to prepare and to be in a position to address the Court thereanent. This is, particularly so when it is a novel point and, I may add, one of some considerable importance, given that contempt applications are hybrid proceedings that include the imposition of a sanction and the potential for the deprivation of the liberty of a person.

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[5] (CCT 52/21) [20211 ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).

[28] The question arises as to the extent a party is bound to the grounds set out in an application for leave to appeal when regard is had to Rule 49(1)(b)? An applicant seeking leave to appeal is required in peremptory terms to stipulate the grounds of appeal[6] in succinct and unambiguous terms.[7] This enables the Court and the Respondent to assess and consider the merits of the application. The latter is then in a position to prepare and counter the Respondent's case or, if there is merit, choose not to oppose the application. As the Respondent was taken by surprise, there was clearly prejudice to the Respondent as this was not the case she was called upon to meet when opposing the application for leave to appeal.

[29] The failure to specify clearly in unambiguous terms exactly what case the respondent must be prepared to meet meant that the application did not comply with Rule 49(1)(b). An application for leave to appeal may be dismissed on the basis of non-compliance with Rule 49(1).[8]

[30] In Phiri v Phiri and Others,[9] Mavundla J held that '[i]t does not help the applicant to marshal grounds of appeal from the bar which have not been set out clearly and succinctly in the notice of leave to appeal, no matter how meritorious these might be, ... otherwise, there is no need for the Rules." This is a view with which I find myself in respectful agreement, and this view is echoed in several judgments.[10]

[31] As the Applicant's application for leave to appeal does not meet the peremptory requirements of Rule 49(1)(b), the argument raised from the bar ought,

[6] See: Phiri v Phiri and Others (39223/2011) [2016] ZAGPPHC 341 (14 March 2016) at para 9.
[7] Sogono v Minister of Law Order 1996 (4) SA 384 (ECO) at 385-386A.
[8] See: Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission [2006] 2 ALL SA 442 E at 446 I-J.
[9] 39223/2011) [2016) ZAGPPHC 341 (14 March 2016) at para 10.
[10] See, for example, Ntsoereng and Another v Sebofi and Another; In re: Sebofi v Ntsoereng (4518/2012) [2016) ZAFSHC 153 (7 July 2016) at paras 33 and 52 and Kilian v Geregsbode, Uitenhage 1980 (1) SA 808 (A) 808 at 81 5 8-E.

as the current law stands, to be discounted for lack of its inclusion as a ground in the Notice of Application for Leave to Appeal. It follows, as a matter of course, that this additional point is not a valid ground upon which I may, or ought to, grant leave to appeal and falls to be dismissed.

[32] I shall, nonetheless, consider the additional point raised for the sake of completeness as I deem it in the interest of justice not to summarily dismiss this ground of appeal in the event that I am wrong in doing so and also in the light of value that is placed on individual liberty and a right to a 'fair trial' given that contempt proceeds are hybrid in nature, akin to a criminal trial and involve the imposition of a sanction.

[33] I am of the view that the imposition of the sentence and suspended sentences were, contrary to Mr Felix's submissions, procedurally fair. The Applicant received the main application and could have been left in no doubt as to the nature of the relief sought as it was clearly and unambiguously set out in the Notice of Motion. This included a specific notice that, inter alia, his incarceration was sought based on his alleged contempt.

[34] The Applicant duly filed a Notice of Intention to Oppose and filed no less than 2 sworn statements. He, as already pointed out, also purported to reserve the right to file a further affidavit which he indicated he intended to do. The Respondent did not object to the Applicant's intentions in this regard. The Applicant, as it turned, out elected not to file a further affidavit. The upshot of all this is that, having received the application, the Applicant was within his rights to make submissions apropos the relief sought. He chose not to furnish details of his personal circumstances and to include submissions on an appropriate sentence or sanction in his sworn statements should he be found guilty of contempt of Court.

[35] Insofar as the imprisonment of the Applicant was expressly sought in the Notice of Motion and duly addressed in the Respondent's (Applicant in main application) heads of argument, the only submission the Applicant saw fit to make in his heads of argument was to take umbrage that his imprisonment was sought by way of a single statement to register his 'concern' that the Respondent asks, "...the court for relief which includes the respondent's imprisonment, in circumstances where the applicant is fully aware that he is the sole breadwinner for the family." This is followed by a comment that the fact that he is the sole breadwinner is a" ... reality which cannot be changed by seeking an order for the respondent's imprisonment."

[36] The Respondent's heads of argument (which were delivered before the Applicant filed his heads in response thereto) were replete with references that left no doubt whatsoever that an order for the Applicant's committal was sought.

[37] At no stage did the Applicant indicate that he wished to make further submissions in respect of sentencing or sanctioning should the Court be disposed to make an order either for his imprisonment or to impose a suspended sentence of imprisonment or impose any other sanction. The first time that the Applicant asserts this right and says it was denied him, was after he was found guilty and a sanction was imposed. This is a classic example of an afterthought and a belated attempt to relieve the 'pinch of the shoe'.

[38] It was, therefore, unacceptable for the Applicant to belatedly raise this point as a ground of appeal. It is also un-meritorious as the Applicant had every opportunity to make any submissions and adduce any evidence he chose to in order to address the question of the appropriateness, duration and nature of an order for his imprisonment or the inappropriateness thereof. The same applies, mutatis mutandis, to any other non-custodial sanction.

[39] The Applicant's failure to timeously address the issue of an appropriate sanction, and to make submissions in this regard is a predicament in which he now finds himself that is entirely of his own making. There is an element of chutzpah[11] in the Applicant now arguing that the procedure was unfair as he is the author of his own misfortune. Litigation is not a game of 'catch me if you can' where a party who elects not to address an issue is subsequently aggrieved by the consequences of his own choices can then seek to rely on his own remissness to justify a Court coming to his assistance. This approach is not only to be deprecated but it also results in a waste of judicial resources. To resort to a further analogy, the Applicant having elected to 'keep his powder dry' cannot, at this stage, seek to loose his shot.

[40] Moreover, and in any event, to the limited extent that the Applicant did choose to make submissions apropos sentence, the Court duly had regard thereto. Both in his heads of argument and in his address Mr Gagiano stated that imprisonment is inappropriate as the Applicant is the sole breadwinner. The Court took this into consideration and imposed a fine and a suspended period of periodic imprisonment so that, in the event the Applicant chose to once again evince contempt of a Court order he would be incarcerated on weekends and be able to continue to be gainfully employed. No doubt, as it is a family business, he could be accommodated in this regard as he would be available for purposes of work during the week.

[41] Sight also cannot be lost of 2 further facts. Firstly, a rule nisi was issued calling upon the Applicant to show cause, if any, why a final order should not be made, inter alia, that he be sentenced to a period of imprisonment, suspended for a period in the event of non-compliance. Secondly, the term of periodic imprisonment was suspended and will only come into effect in the event that the Applicant does not comply with the Court order made by Le Grange, J (as he was at the time), dated 3 April 2019 in case street 618/2019. The presumption must be that the Applicant will abide the Court order and that the suspended sentence will not be implemented.

[11] A humorous example of the definition of chutzpah is where a son is facing a severe sentence for having murdered his mother and father then begs the court for mercy as he is an orphan.

[42] It is pointing out the obvious that the Applicant was, in the circumstances, afforded ample opportunity to make submissions apropos an appropriate sanction and to furnish his personal circumstances et cetera. He was expressly called upon **to** show cause why he should not be imprisoned, and he elected not to do so and chose instead to address only the issue of his guilt or otherwise apropos the allegation of contempt of Court.

APPEAL AGAINST THE COSTS ORDER

[43] I exercised my discretion and ordered the Applicant to pay the costs of the application on a punitive scale because of the Applicant's serial non-compliance with an order of Court. In light of his contempt, I cannot see another Court awarding costs on any other scale.

CONCLUSION

[44] After careful consideration, I am of the view that the numerous of grounds of appeal lack merit.

[45] I was not convinced during argument that I erred in any way, nor was I convinced that in the exercise its discretion another Court would interfere with the costs order. I am of the view that there is no reasonable prospect of another Court coming to a different conclusion.

[46] As there are no compelling reasons why leave to appeal should be granted, and none were raised, leave to appeal cannot be granted on this basis.

[47] As regards costs, I refer to my comments and findings in the main judgment and I cannot, in the circumstances, and in the exercise of my discretion conclude otherwise than that the Applicant should again be liable for the costs on the same scale and for the same reasons.

[48] In the event, the following order is made:

1. The application for leave to appeal is refused with costs on an attorney-and client scale.

AD MAHER

Acting Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO.: 8470/2021

Before the Honourable Mr Acting Justice Maher At Cape Town on Thursday, 14 September 2023

In the matter between:

M[…] S[…] H[…] Applicant

and

J[…] S[…] H[…] Respondent

ORDER

HAVING HEARD Counsel for the Applicant and the Respondent, it is ordered that:

1. The application for leave to appeal is refused with costs on the scale as between attorney-and-client.

BY ORDER OF THE COURT

COURT REGISTRAR

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