



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

CASE NO: 2019/34367

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

7/12/2022
DATE

J Moorcroft
SIGNATURE

In the application between:

CAJIAO, LUIS JAVIER

Applicant

and

CAJIAO, LELANIE EMMARENTIA

Respondent

In re the matter between:

CAJIAO, LELANIE EMMARENTIA

Applicant

and

CAJIAO, LUIS JAVIER

Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal - Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 – Reasonable prospects of success – section 173 of the Constitution of the Republic of South Africa, 1996

Order

[1] In this matter I make the following order:

1. *The application for leave to appeal is dismissed;*
2. *The applicant for leave to appeal is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

INTRODUCTION

[3] This is an application for leave to appeal against the judgment and paragraphs 3 to 7 of the order that I made on 11 October 2023. The order read as follows:

1. *The late filing of the respondent's answering affidavit is condoned;*
2. *The applicant is ordered to pay the costs of the respondent's application for condonation;*
3. *The respondent is found in contempt of court for failing to comply with the order of the Gauteng Division, Johannesburg under case number 34367 of 2019 granted on 28 November 2019;*
4. *The respondent is committed for to imprisonment for contempt of court for a period of thirty days, which committal is suspended on condition that –*

a. the respondent complies with paragraph 5 of the order of 28 November 2019 and makes payment of the arrears maintenance that amounted to R1 301 930 as at 1 March 2022, in monthly instalments of R30 000 commencing on 1 January 2023 until the full outstanding amount payable in terms of the order of 28 November 2019, together with mora interest at the prescribed rate of 9% per annum calculated from the date of this order to date of payment, has been paid and provided that in the event that the order of 28 November 2019 is varied retrospectively by order of court then the amount payable in terms of this order shall be adjusted accordingly;

b. the respondent complies with paragraph 8 of the order of 28 November 2019 by making a contribution towards the legal costs of the applicant in the amount of R150 000.00, together with mora interest at the prescribed rate of 9% per annum calculated from the date of this order to date of payment, before or on 1 November 2022;

5. Nothing in this order shall detract from the continued operation and efficacy of the court order granted on 28 November 2019 and any amounts payable by the respondent in terms of such order, including any amounts payable as from April 2022;

6. Should the respondent fail to comply with this order as set out of in paragraph 4 the applicant may approach this Court on the same papers, amplified if necessary, for an order committing the respondent to imprisonment;

7. The respondent is ordered to pay the costs of the main application..

[4] I refer to the parties as they were referred to in the main application. The applicant for leave to appeal is thus referred to as the respondent, and the respondent in this application is the applicant in the main application and referred to as the applicant.

THE GROUNDS OF APPEAL

[5] The respondent's case is that the application for committal ought to have been

dismissed, or that the parties ought to have been directed to file further affidavits in terms of Rule 6(5)(e), or ought to have directed that the application be postponed until after the finalisation of the respondent's pending Rule 43(6) application.

[6] The remaining grounds read as follows:

2. The learned Judge erred in fact when finding that the respondent provided facts in her founding affidavit sufficient on both a balance of probabilities and beyond reasonable doubt for the Court to find the applicant in contempt of the order dated 28 November 2019.
3. The learned Judge erred in fact when he accepted the version of the respondent in respect of the total amount in arrears in circumstances where it was not clear how the amount was calculated by the respondent being *dominis litis* in her application.
4. The learned Judge erred in law and in fact when he accepted the unaccounted and unexplained amount provided by the respondent in her founding affidavit as sufficient proof on a balance of convenience and beyond reasonable doubt to find that the applicant is in contempt of Court of the order dated 28 November 2019.
5. The learned Judge erred in law and in fact when he did not take into consideration the applicant's current and past financial position when

finding beyond reasonable doubt that the applicant is in *mala fide* and wilful contempt of court of the order dated 28 November 2019.

6. The learned Judge erred in law and in fact when he acknowledged that there is pending Uniform Rule 43(6) proceedings seeking a retrospective amendment to the order dated 28 November 2019 from the date upon which it was granted and proceeded to find the applicant in *mala fide* contempt of court.

THE TEST IN AN APPLICATION FOR LEAVE TO APPEAL

[7] In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*¹ Wallis JA said:

“The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.”

[8] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused.

[9] In *KwaZulu-Natal Law Society v Sharma*² Van Zyl J held that the test enunciated

¹ 2013 (6) SA 520 (SCA) paragraph 24.

² 2017 JDR 0753 (KZP), [2017] JOL 37724 (KZP) paragraphs 29 to 30.

in *S v Smith*³ still holds good:

“In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[10] The test for leave to appeal is more stringent under the Superior Courts Act of 2013 than it was under the repealed Supreme Court Act, 59 of 1959.⁴

THE MERITS OF THE APPLICATION FOR LEAVE TO APPEAL

[11] For the sake of clarity I deal with the arguments presented under different headings.

The respondent’s criticism of the applicant’s calculations of what was paid

[12] In paragraph 11 of the judgment I dealt with the fact that the amounts that have been paid by the respondent in terms of the order were not disputed save for a bald denial. The amounts alleged by the applicant could be evaluated with reference to the

³ 2012 (1) SACR 567 (SCA) paragraph 7.

⁴ *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC), [2014] ZALCC 20 paragraph 6; *S v Notshokovu* [2016] ZASCA 112 paragraph 2. See also Van Loggerenberg and Bertelsmann Erasmus: *Superior Court Practice* RS 16, 2022, A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) paragraph 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 paragraph 5; *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) paragraph 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paragraphs 25 and 26.

annexures to the founding affidavit.

[13] The respondent on the other hand made no attempt to deal with the actual payments made. I held that the applicant's calculations are therefore established.

The discrepancies in the respondent's evidence of his income

[14] In paragraph 14 of the judgment I set out certain discrepancies and contradictions in the evidence presented by the respondent and these discrepancies remain unexplained despite an invitation during argument to deal with this aspect.

The respondent's evidence of income, expenditure, assets and liabilities

[15] I pointed out in paragraph 15 to the judgment that the respondent failed to definitively set out all his income, expenses, assets and liabilities. It is in this context that Rule 6(5)(e) of the Uniform Rules and section 19(b) of the Superior Courts Act, 10 of 2013⁵ are important.

[16] One of the grounds of appeal are that the Court should have directed the respondent to file further affidavits in terms of Rule 6(5)(e). No attempt was made however to seek the leave of the Court to file further affidavits when the matter was argued in October 2022.

[17] Rule 6(5)(e) permits the filing of further affidavits when leave to do so is applied

⁵ See *Shedden v Patrick and Attorney-General* (1869) 22 LT 631 at 634; (1861–1873) All ER 724 (HL) 730g–I; *Deintje v Gratus & Gratus* 1929 AD 1 at 6; *Staatspresident v Lefuo* 1990 (2) SA 679 (A) 691I; *MFV Kapitan Solyanik Ukrainian-Cyprus Insurance Co v Namack International (Pty) Ltd* 1999 (2) SA 926 (NmHC) 932B–C; *Cooperativa Muratori & Cementisti v Companies and Intellectual Property Commission* 2021 (3) SA 393 (SCA) paragraphs 19 to 27.

for by a party.⁶ It is not a mechanism by which the Court will order parties to file further affidavits because the Court believes that the parties will or may benefit from a fourth and fifth set of affidavits.

[18] When the respondent's counsel submitted that the Court should order the parties to file further affidavits, it was not clear what those affidavits would be intended to achieve.

[19] Ms van der Westhuizen who appeared for the respondent indicated at leave to appeal stage that the respondent now intended to seek leave to present further evidence on appeal in terms of section 19(b) of the Superior Courts Act.

[20] The Supreme Court of Appeal has laid down the requirements for the admission of new evidence in a series of decisions, and a Court of Appeal may generally be disposed to admit new evidence when it is material, *prima facie* true, and there is an explanation as to why the evidence was not relied upon at the hearing.⁷

[21] It was not the case for the respondent that new evidence that was not available earlier, had come to light at a later stage and that the failure to present the evidence to court was not due to the negligence or lack of care of the respondent.⁸

The pending Rule 43(6) application

[22] I referred in paragraph 17 of the judgment to the long delay between the initial order by Budlender AJ in 2019 and the respondent's application in terms of Rule 43(6)

⁶ Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* RS 16, 2022, A1-67 to 69.

⁷ Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* RS 16, 2022, A2-71.

⁸ See *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) 19G–H

launched at the end of September 2022 a few days before argument in this matter commenced on 3 October 2022.

[23] The pending Rule 43(6) application is subject to case management and further affidavits are to be filed. The order I made cater for the possibility that the order by Budlender AJ may be amended retrospectively, a question I expressed no view on.

[24] The application was argued a few days after the launch of the Rule 43(6) application but no substantive application for a postponement pending the application was made at the hearing on 3 October 2022. The respondent can not now rely on the failure⁹ of the Court to *mero motu* postpone the application.

Section 173 of the Constitution

[25] Ms van der Westhuizen relied in argument on section 173 of the Constitution of the Republic of South Africa, 1996. The section reads as follows:

173 Inherent power

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

[S. 173 substituted by s. 8 of the Constitution Seventeenth Amendment Act of 2012 (wef 23 August 2013).]

[26] Section 173 must be read in the context of Chapter 8¹⁰ of the Constitution, and of course the whole of the Constitution with particular reference to section 2 that entrenches the supremacy of the Constitution, and the Bill of Rights in Chapter 2.

⁹ It is not necessary in this application to decide the nature of any discretion exercised in the judgment and I refrain from doing so.

¹⁰ Under the heading '*COURTS AND ADMINISTRATION OF JUSTICE (ss 165-180)*'.

[27] South African courts have been successful in fulfilling the obligation imposed by section 173 to develop the common law.¹¹ In doing so the courts are guided by the interests of justice.¹²

[28] The case for developing the common law should be properly pleaded at the first available opportunity.¹³ This the respondent has not done and it is not clear what development is envisaged.

[29] Section 173 is not authority for the view that a Court should deviate from the rules of court¹⁴ or should descend into the arena during application proceedings in order to advise parties that the evidence presented might not be sufficient, and that they should file further affidavits. Parties take advice from their attorneys and if the attorneys and counsel are of the view that further evidence is required, the parties should apply in the normal fashion for leave to present such evidence. The application can then be considered on its own merits and the necessary machinery is already provided for in the Uniform Rules of Court. In this context the following dictum by Jafta J in *Mukaddam v Pioneer Foods (Pty) Ltd*¹⁵ is informative.

"[29] Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the state...."

[30] In Chief Lesapo v North West Agricultural Bank and Another,¹⁶ this court underscored the importance of access to courts in these terms:

¹¹ See also Van Loggerenberg and Bertelsman Erasmus: *Superior Court Practice* RS 16, 2022, A1-50 et seq; *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd* 2016 (4) SA 457 (ECG) paragraph 31; *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari* 2018 (4) SA 206 (SCA); *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) paragraphs 39 & 40; *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) paragraph 32; *Economic Freedom Fighters v Manuel* 2021 (3) SA 425 (SCA) paragraphs 58 to 61.

¹² *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) paragraph 34.

¹³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

¹⁴ The Rules themselves provide much-needed flexibility. See Rule 27.

¹⁵ 2013 (5) SA 89 (CC).

¹⁶ 2000 (1) SA 409 (CC) paragraph 22.

'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.' [Footnote omitted.]

[31] However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the high court. The Supreme Court of Appeal and this court have their own rules. These rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought.

[32] It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. After all, in terms of s 173 each superior court is the master of its process."

[30] When circumstances arise that are not provided for in the rules, section 173 may be relied upon to allow the Court to regulate its own process. This is not such a case. In the context of this matter the necessary machinery is provided for in Rule 6(5)(e) and (g), which must of course be read through the lens of the Constitution.

[31] I have dealt with Rule 6(5)(e) above. In terms of Rule 6(5)(g) the Court may dismiss an application or make such order as it deems fit with a view to ensuring a just and expeditious decision under circumstances where it cannot properly be decided on affidavit. A court should be hesitant however to *mero motu* refer a matter to oral evidence.¹⁷

¹⁷ *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) 428–9; *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) 56F–57B.

COSTS

[32] There is no reason to deviate from the general principle that the cost should follow the result of the order.

[33] I therefore make the order set out in paragraph 1 above.


J MOORCROFT
 ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG DIVISION
 JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **7 DECEMBER 2022**

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7 DECEMBER 2022