IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 7333/2024

In the matter between:

E[...] W[...]	Applicant
and	
V[...] T[...] H[...]	Respondent
And in the matter between:	
V[...] T[...] H[...]	Applicant
and	
E[...] W[...]	Respondent

Request for Judgment in Leave to Appeal:	14 February 2024
Date of Judgment:	11 April 2025

JUDGMENT - LEAVE TO APPEAL

PARKER AJ

Introduction

[1] This is an application for leave to appeal to the full bench, alternatively, the Supreme Court of Appeal in terms section 17 (1)(a)(i) of Superior Court's Act No. 10 of 2013 ("the Superior Courts Act"), in that the appeal would have reasonable prospects of success. The appeal by the respondent is against the judgment delivered on 14 October 2024, wherein the respondent was declared to be in contempt of the court order granted by the Honourable Justice Steyn on 7 November 2022, under case number 257/ 2022.

[2] The sanction imposed upon the respondent was for a committal to imprisonment for a period of 30 days to be served as periodic imprisonment during weekends between 17h00 hours on Friday and 6h00 am on Monday. This sentence was suspended on condition that the respondent complies with the court order by paying the full arrears for rental, maintenance, health and educational needs within 60 days, and continues to comply with the court order until the final determination of Part B of the application, alternatively until it is varied. Furthermore, the respondent is to rectify his contempt before he can be heard in respect of this counter application for a variation. Costs were awarded against the respondent.

[3] The appeal was heard, however, judgment was suspended at the request of the parties for settlement. On 14 February 2025, following a breakdown in settlement, I was asked to pen the judgment.

[4] The Applicant in the application for leave to appeal (being Mr H[...]) will in addition be referred to as the Respondent whilst Ms W[...], as applicant as per the main application. The several grounds of appeal sought and listed here are, in a nutshell that the court erred;

4.1 In having regard to the order of Judge Gamble granted on 22 August 2024 and should have held that such order was irrelevant to the merits of the applications which were before the Court. The Court should not have had regard to that order.

4.2 In paragraph [12] of the judgment in construing Mr H[...]'s conduct as seeking to "portray" his non-compliance with the Order as being due to a withdrawal of the matter. The evidence before the Court was that: such argument was presented on legal advice, at the time Mr H[...] did in fact comply with the Order and such argument was not persisted with at the hearing.

4.3 In concluding that Mr H[...] was wilful and mala fide in his non-compliance with the Order, beyond a reasonable doubt. In particular:

4.3.1 The Court erred in stating that Mr H[...] sought to shirk his obligations in terms of the Order and that he did not bring an application for a variation timeously. The evidence before the Court established that Mr H[...]'s attorneys indicated to Ms W[...]'s attorneys that he was in the process of preparing such an application when Ms W[...] launched a contempt application.

4.3.2 Court also erred in finding that Mr. H[...] only launched a variation application in response to a contempt application. The evidence was that it was Mr. H[...] who indicated that a variation application would be launched which prompted Ms. W[...] to launch a contempt.

4.4 In finding that Mr H[...]'s change in financial circumstances was not reliable based on the allegation that the relief which he proposed in his variation application was similar to that which he had previously sought in the maintenance Court.

4.5 The Court erred in concluding that Mr H[...]'s change in financial circumstances was contrived and a tactic to avoid complying with the Order. There was no evidence to support such a (serious) finding and certainly none which was established in terms of the law applicable to determining disputed facts in application proceedings.

4.6 The Court erred in finding that Mr H[...] was required to purge his contempt in order for a variation to be heard. Such a finding supposed that he was in contempt (which the Court erred in finding) but would be unfair and legally impermissible, particularly in respect of Mr H[...]'s Constitutional rights generally and in particular his right of access to Court.

4.7 The Court erred in finding that Mr H[...] had failed to adequately explain his “role, shareholding and involvement in the web of businesses and trusts ...”. The evidence before the Court was that all of Mr H[...]’s income, assets and liabilities were set out in detail. The Court should have found that his financial position had been set out in great detail and sufficiently.

4.8 The Court erred in finding that Mr H[...] did not answer questions or that he “may” have other sources of income which were not accounted for. The Court should not have made those findings at all and certainly not beyond a reasonable doubt.

4.9 The Court failed to assess, or to adequately assess, the evidence presented by Mr H[...] regarding his changed financial circumstances and failed to apply the principles governing the assessment of evidence in respect of disputed facts in application proceedings.

4.10 The Court should have found that Ms W[...]’s application was an abuse of process both in respect of the procedural background to the application, the unfounded allegations made by Ms W[...] and the fact that the relief sought by Ms W[...] would result in Mr H[...]’s inability to comply with the Order.

The two applications

[5] What initially served before me was an application for the contempt of the respondent as well as a counter application for the variation of the order. In respect of the variation application, it is clear from the order that the respondent had to first purge his contempt before the variation application would be considered and the reasons for arriving at the conclusion was set out in my judgment.

[6] Upon reviewing the grounds of appeal, it is asserted that the court erred in finding that the respondent was in contempt of two court orders and failing to consider the variation application. The judgement dealt with the earlier order handed down by Judge Steyn whilst the order by Judge Gamble was referred to in the judgment.

[7] The essence of the argument advanced by the respondent is that the court conflated the two applications namely that of contempt proceedings and the application for a variation of a court order. Respondent contended that the variation application was relevant because it related to a change in circumstances which would also constitute in itself a potential defence to the contempt application. The challenge here lies in the findings, which include that of a lack of jurisdiction.[1] Secondly, the judgement under appeal was clear -the respondent needed to purge his contempt before he could be heard regarding the variation application.

[8] The applicant agreed with the findings that the court was correct in holding that the power to vary interlocutory orders should be exercised with caution and should only be exercised by the judge who initially granted the order or by another court exercising the same jurisdiction. The Steyn J order hinged significantly in the determination that the judge who initially granted the order, or another judge exercising the same jurisdiction, is the court responsible for deciding whether to vary an order.

[9] The view that the previous court, hearing the application, possesses knowledge of the facts and the circumstances under which the Steyn J order was

[1] Because of the Steyn J order

granted to determine whether a good cause exists to vary same. In this regard the applicant relied on the findings and reasoning presented in my judgement at paragraph [18] thereof and the findings in *South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Ltd*[2], *Sandell and Others v Jacobs and Another*[3] and *Technical Systems (Pty) Ltd and Another v RTS Industries and Others* [4], where the court specifically held that the power to vary these orders should not be lightly exercised and as an invitation to all, should be approached with considerable diffidence.[5]

[10] Applicant argued that this court was not in a position to determine whether good cause existed to vary the order because this court did not have the facts and the allegations that were taken into account in granting the initial order before this court. Accordingly, this court correctly proceeded with caution and did not vary the order. I need not repeat my findings here as it is apparent from the judgment.[6]

[11] As such the order could not be varied as I was unable to ascertain whether good cause existed to vary it. I could not compare what was before the court when it granted the initial order, to what is before me when I heard the matter. At paragraph [24] of the judgment, reference was made to a Constitutional Court judgment[7] on which authority I relied upon , that varying the court order was not in this matter one which in my view, was in the interests of justice. For this reason, it was my view that the respondent had to first purge his contempt.

[12] The respondent is unhappy with the court dismissing the variation application, which in itself, it says, stands as a basis for leave to appeal to be granted based on the prospects of success on appeal.

[13] Regarding the contempt application, it was argued that the onus is one of criminal contempt beyond reasonable doubt, since the applicant was pursuing a criminal conviction. To be able to hold the respondent in contempt the respondent's

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[2] 1977(3) SA 534 (A)
[3] 1970(4) SA 630 (SWA)
[4] 2024 JDR 0046 (WCC)
[5] Referenced at para {19) of my judgment
[6] See para [20}
[7] *Zondi v MEC, Traditional and Local Government affairs* 2006 (3) SA 1 (CC)

version had to be so untenable on the papers that it could be rejected. Respondent argued that the undisputed facts on application of the Plascon Evans test would be applicable, and favoured the respondent and therefore the application for contempt had to be dismissed.

[14] In contempt applications, the burden of proof is significantly greater, as the applicant must demonstrate material noncompliance and establish that there was willful and mala fide disobedience. The respondent argues that the change of financial circumstances and his conduct leading to this contempt application, endured by the respondent would lead to the conclusion that he was not in willful default of the court order.

[15] The respondent took issue regarding the references made in the judgment at paragraphs 5 and 32 thereof, where Judge Gamble found the respondent to be in contempt of court on an alternative basis. The respondent avers that this was significant, and because of that contempt, I found a basis for this conviction in which this appeal is sought. The respondent stated this was inadmissible and unfair, because he had been found guilty of contempt in this matter based on the Gamble J order for which he did not have an opportunity to argue and therefore this alone constituted a good reason for the appeal. In the conclusion in my judgment I stated that his conduct is fraught with risk and it is significant that Gamble J has already found him to be in contempt opting to reserve judgment on the penalty.

[16] The question then is, whether my judgement was based on the order of Gamble J. That, of course, is not the case. I applied my independent mind and mentioned it in the judgment to show the conduct of the respondent. I certainly did not rely on it for the justification of holding the respondent in contempt. The grounds relied upon for the respondent's contempt appear clearly from the judgment.

[17] Much was made on paragraph 5 of the judgment in respect of the notice of withdrawal. In the judgement the notice of withdrawal was characterized as an argument raised by the court to justify respondent's conduct of noncompliance with the order.

[18] Turning to the timing of the variation application, in this regard, the applicant argued that the court correctly held that respondent must purge his contempt before the variation application can be heard. It was clear that the timing of the variation application was a step to evade compliance with the order. In this respect the respondent argues that the court did not have an appreciation of the facts giving rise to the application and the timing thereof**.**

[19] Respondent articulated a detailed account of the history, starting with the order which was granted in November 2022 and subsequently amended in a minor way in December 2022. Some two years or more later on the 21 February 2024, the respondent, through his attorney, informed applicant's legal representative that there was a change in his financial position, therefore calling for a reduced maintenance. Numerous correspondence exchanges ensued between the parties' legal representatives culminating in a warning from the applicant stating that if payment was not made by the 22 March 2024, an application for contempt would be brought on 12 April 2024. This reaching out to the applicant, respondent says, was his proactive measure in drawing the attention to his change in financial circumstances. Furthermore, he indicated that he would bring a variation application before 19 April 2024, as he was still awaiting his accountant's report.

[20] The respondent fails to mention that he has, only been paying a cash maintenance in the amount of R22 500 per month instead of R112 000.00. Additionally, he has only covered the children's school fees and has not contributed to their educational expenses. He has also not contributed to the medical aid expenses apart from the medical aid premium and has refused to pay the rental due in respect of the former family home.[8] Since these expenses were urgent, including the potential of the applicant and the children being evicted from the family home persuaded me not to hear the variation order. His failure to pay crèche fees for the children, thereby prejudicing them because they are no longer attending aftercare. What more could the applicant do apart from bringing an urgent application? Again in this regard the judgment sets out that the confidence in the legal system hinges on the meaningful exercise of a litigant's constitutional right to access courts,

[8] See para [8] of the judgment

particularly when seeking enforcement against recalcitrant individuals whose noncompliance jeopardizes children's access to essential maintenance, health and educational provisions.[9]

[21] The ground of appeal that the application for contempt proceedings is an abuse. The respondent argued that a declaration of contempt will severely impact his employability of pursuing work on tender. Respondent argues that the application constituted an abuse aimed at coercing payment, asserting it was not about achieving compliance with the order but rather, there were other motives. Since the judgment did not deal with the abuse argument, this constitutes a ground for leave to appeal and the application for contempt should have been dismissed in the first place. The respondent is not satisfied with the periodic imprisonment imposed upon him as he avers it adversely affects his ability to participate meaningfully in tender processes**.**

[22] The possibility of the appointment of a curator for the children in circumstances where a committal was ordered, was according to the respondent not dealt with in the judgment. The respondent says this is important as the interests of the child is of paramount importance in terms of section 9 of the Children's Act 38 of 2005 as well as the judgment in Du Toit and Another v Minister of Welfare and Population Development and Others [10] which it relied upon, where the Constitutional Court held- where there is a risk of injustice with reference to a minor child, the court is obliged to appoint a curator to represent the best interests of the minor children. Therefore, this court should have considered such appointment especially relating to the abuse argument that if a criminal conviction is made there will be a loss of income and the children will then suffer as a result of incarceration.

[23] However the appointment of a curator, was not canvassed in the respondent's opposing affidavit, but merely raised in argument in the leave to appeal application. Since no affidavits were filed in this regard by the respondent in the main application, this argument falls flat.

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[99] See para [34]

[10] (CCT40/01) [2002] ZACC 20; 2002 (120) BCLR 1006;2003(2) SA 198 (CC) (10 September 2002) para [3]

[24] Even if the appointment of a curator was not raised by the respondent, the court acting as the uppermost guardian of minor children, has a discretion to safeguard the rights of children and protect their interests. However, in my view this avenue was not warranted as there were no circumstances that drew my attention to perceived prejudice to the children. Respondent ought to have been aware that he was facing contempt proceedings in this matter and did nothing about these alleged circumstances and belatedly raise this in this argument. In any event, I was not in a position to determine whether it is in the best interest of the children or not to appoint a curator, without hearing from a childcare expert, the children themselves, or the Office of the Family Advocate. Needless to say the appointment of a curator was not justified

[25] The order granted was such that a suspended periodic imprisonment would follow on weekends only for a period of 30 days to allow respondent to meet his obligations. The necessity for a curator in this situation is unclear given that the respondent had 5 days in the week to attend to his financial and care responsibilities and obligations.

[26] In argument it was contended that paragraph 9.2 of my judgment relating to failure to pay has obvious implications and effects. When I heard the application, it was clear that the respondent unilaterally stopped the payment for additional medical expenses and various therapies, after care fees for the minor children. This was not in the best interests of the children. It was conceded in argument that his unilateral cessation of the tutoring services was at his sole behest although, on his version and his defense a tutor was never required.

[27] Finally, in respect of the contempt application, respondent reiterated that the court failed to take his changes in circumstances, assets and income into consideration and that I found the respondent was contrived. It was argued, to make such a finding the court had to engage with the evidence which was presented by the respondent in respect thereof. The respondent misreads the judgment on a narrative he persists with. The judgment was clear, the respondent is required to firstly purge his contempt before the court could hear the variation application.

[28] Respondent's argument that the applicant failed to ask for relief that the respondent is required to first purge his contempt and since it was not sought by the applicant as such, the court could not arrive at such a decision. The respondent fails to recognize that the basis for a civil contempt is to impose a penalty that will vindicate and uphold the integrity and honour of the court.[11]

[29] In Kotze v Kotze,[12] the court stated that the matter at hand is one of public policy which is, obedience to court orders and the principle that people should not be allowed to take the law into their own hands. Accordingly, there was no need for the applicant to ask the court to order the respondent to purge his contempt before he can be heard. This is so because it is a matter of public policy that court orders must be adhered to, and the court is empowered to have made such a finding despite applicant not seeking same in her application.

The stringent test

[30] In terms of Section 17(1), the threshold required for granting of leave to appeal has become more stringent. In Caratco (Pty) Limited v Independent Advisory (Pty) Limited,[13] an applicant for leave argued that the appeal would have reasonable prospect of success or that there are some other compelling reasons why the appeal should be heard;

> *"If the court is unpersuaded of the prospects of success, it must still inquire whether there is a compelling reason to entertain the appeal. A compelling reason includes any important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive"*

[31] In the result the purging of contempt is within the discretion of the court, which is exercised independently based on the circumstances of the case, those

[11] Pheko and others v Ekurhleni City (no 2) 2015 (5) SA 600 (CC); 2015(6) BCLR 771 (CC); [2015] ZACC10 para 1-2 ; 25-37
[12] 1953 (2) SA 184 (C)
[13] 2020(5) SA 35 (SCA) para [2]

circumstances being whether a person should or should not be heard. After hearing the respondent, the discretion was exercised not to hear the respondent in his variation application as the latter was contrived to avoid contempt.

[32] In the final analysis the judgment duly considered the appropriate sanction in contempt proceedings and the requirements laid down in accordance with Pheko.[14] At paragraph 29 of the judgment it was made clear that the applicant and the minor children were at risk of being evicted from their home which was not in the best interests of the children. In my view the respondent did not demonstrate a significant change in circumstances rendering him unable to comply with the court order.[15]

[33] After considering the legal principles which requires the consideration of the reasonable prospects of success on appeal, it is my view that a court of Court of Appeal acting reasonably would not come to a different conclusion, and that the respondent has no reasonable chance of success on appeal.

[34] Having duly considered the submissions made by the applicant and the respondent and the applicable legal principles, it is my view that the threshold for section 17(1) has not been met and accordingly leave to appeal is refused.

Costs

[35] There is no reason for me to consider a different cost order apart from stating that of course, costs follow the result. However, I do not think it is prudent to grant an attorney-client cost order. I am of the view that a party and party costs order on scale A would be appropriate as there was nothing complex or new about this appeal and in the preparation for argument.

[36] Accordingly it is ordered:

a) The appeal is dismissed.

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[14] Supra para [36]
[15] See para [31]

b) The respondent shall pay the applicant's costs incurred on a party and party scale A.

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PARKER AJ

Acting Judge of the High Court

Appearances

Counsel for the Applicant:	Adv Deneys van Reenen
Instructed by:	BDP Attorneys
Counsel for the Respondent:	Adv Adri Thiart
Instructed by:	Maurice Phillips Wisenberg

This judgment was handed down electronically by circulation to the parties' representatives by email.