

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

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2025-038486

DATE: 8 OCTOBER 2025

In the matter between:

N[...] **J[...]** **S[...]** (Formerly **I[...]** **H[...]**)

Applicant

and

E[...] **H[...]**

Respondent

Neutral Citation: *S[...]* v *H[...]* (2025/038486) [2025] ZAGPJHC --- (8 October 2025)

Coram: Adams J

Heard: 8 October 2025 – ‘virtually’ as a videoconference on *Microsoft Teams*

Delivered: 8 October 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 13:00 on 8 October 2025.

Summary: Application for leave to appeal costs order – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold –

The requirements for civil contempt of court are well established – an applicant who seeks a committal order must establish *inter alia* wilfulness and *mala fides* – proof beyond reasonable doubt is required – convictions for civil contempt of court axiomatically very serious – for this reason the standard of proof is one beyond reasonable doubt –

Leave to appeal granted.

ORDER

- (1) The applicant's application for leave to appeal succeeds.
 - (2) The applicant is granted leave to appeal to the Full Court of this Division.
 - (3) The costs of the applicant's application for leave to appeal shall be costs in the appeal.
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JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original opposed application by the applicant for *inter alia* an order to have the respondent declared to be in contempt of an order of this Court (per Thobane AJ) dated as far back as 22 May 2015. The applicant is the applicant in this application for leave to appeal and the respondent herein was the respondent in the said application, which came before me in the Family Court on 28 May 2025.

[2]. On 30 May 2025 I handed down an *ex-tempore* judgment in that application and granted an order in the following terms:

- '(1) The respondent is declared to be in breach of the order of this Court (per Thobane AJ) dated 22 May 2015, in terms of which a settlement agreement concluded between the parties was made an Order of Court, in that: -
- (a) He failed to substantially comply with paragraph 4.1 of the settlement agreement, in terms of which he was ordered to pay maintenance in respect of the minor children in the amount of R13 011 per month;
 - (b) He failed to substantially comply with paragraph 4.2 of the settlement agreement, in terms of which he was ordered to pay the outstanding school fees to S[...] J[...]s C[...] not covered by the applicant's staff discount;
 - (c) He failed to earmark the proceeds of the Oasis Investment policies for the tertiary education of the minor children as per paragraph 4.4 of the settlement agreement.

- (2) The respondent be and is hereby ordered and directed to purge his continuous and ongoing breach of the said court order and to fully comply with the letter and the spirit of the court order dated 22 May 2015 and its terms, failing which the applicant is granted leave to approach the Court on the papers in this application (duly supplemented, if necessary) for a contempt of court order.
- (3) The respondent shall pay the applicant's costs of this application on the party and party scale, including costs of counsel on scale 'B' of the tariff applicable in terms of the Uniform Rules of Court.'

[3]. The applicant applies for leave to appeal against the whole of my aforesaid judgment and the said order granted by me, as well as the reasons therefore, on the basis that I had erred in fact and in law in finding that, whilst the respondent was in breach of the 2015 Court Order, it had not been demonstrated that he (the respondent) was in contempt of the said court order. I erred, so the submission goes, in my finding that the respondent was not in wilful and *mala fide* contempt of the court order. I should have found, so the applicant argues, that, viewed objectively and on his own version, the conduct of the respondent was wilful and *mala fide*.

[4]. The case on behalf of the applicant is furthermore that the contempt by the respondent lies therein that for a long period of time he made no attempts to comply with the clear and unambiguous terms of the court order. He then, at the eleventh hour, attempted to cure his contempt by launching a variation application in the Maintenance Court. I erred, so the contention continues, in finding in effect that the launching of the maintenance court application is an indication that subjectively the respondent lacked the requisite *mens rea* necessary for contempt of court.

[5]. In conclusion on this aspect of the matter, the applicant argues in sum that I erred by disregarding the evidence which, according to the applicant, establishes that the respondent's conduct amounted to wilful and *mala fide* contempt of court.

[6]. There are further grounds raised on which the application for leave to appeal is based, such as a claim that I should have granted a punitive costs order against the respondent. Moreover, the applicant argues that my order 'does not dispose of all the issues in the case' and works against a prompt resolution of the real issues between the parties. My order, so the contention goes, does not deal with the amount by which the respondent is in breach of the 2015 Court Order nor does it deal with the date on or before which the breach of the said order ought to be purchased.

[7]. The point about this matter and that made in my judgment is that, if regard is had to the evidence as a whole and the version of the respondent, it cannot be said with any conviction that it has been demonstrated that he is in contempt of court. That position going forward may change. However, as things stood at the time of the hearing of the matter, contempt of court had not been proven by the evidence before me.

[8]. The respondent explained in his answering affidavit that the reason for his non-compliance with the court order is not because of a wilful and *mala fide* disregard of the order, but because the maintenance is unaffordable to him due to material changes in his circumstances. It is for this reason that he had launched proceedings in the Maintenance Court for a variation of the maintenance payable.

[9]. In *Cathay Pacific Airways Ltd v Lin*¹, the Supreme Court of Appeal held as follows: -

'[26] The requirements for civil contempt of court are well established. An applicant who seeks a committal order must establish the following:

- (a) that a court order was made;
- (b) that the order had been served;
- (c) non-compliance with the order;
- (d) wilfulness and *mala fides*.

¹ *Cathay Pacific Airways Ltd v Lin* 2017 JDR 0585 (SCA).

Proof beyond reasonable doubt is required. But, once the applicant has adduced sufficient evidence to prove requirements (a), (b) and (c), the respondent bears an evidentiary burden in respect of requirement (d). A failure by the respondent to adduce evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, will mean that *civil contempt will have been established beyond reasonable doubt.*' (Emphasis added).

[10]. On the basis of this authority, I had concluded that contempt of court had not been established beyond a reasonable doubt. As pointed out by the SCA in *Cathay Pacific*, convictions for civil contempt of court are axiomatically very serious. For this reason the standard of proof is one beyond reasonable doubt. The point is that, in coming to the conclusion I did in my judgment, I applied the well-established principles laid down in *Fakie*, *Tasima* and *Phoko*. Importantly, I applied, as I was required to do, the proper approach to disputes of fact where final relief was being sought.

[11]. As for the applicant's objection to the costs order made in paragraph 3 of the Court Order, it needs to be borne in mind that, in granting the impugned costs order, I exercised a 'true' or 'narrow' discretion, which was, in my view, done judicially. I cannot be said that I erred simply because, in the exercise of my discretion, I ordered costs 'in a fair, just and reasonable manner taking into account the undisputed facts of the application'.

[12]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides 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'.

[13]. In *Ramakatsa and Others v African National Congress and Another*², the SCA held that 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. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[14]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. 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.’

[15]. In *Mont Chevaux Trust v Tina Goosen*³, the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*⁴. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable

² *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

³ *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

⁴ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance in Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁵.

[16]. Whilst I remain of the view that wilfulness and *mala fides* on the part on the respondent have not been demonstrated, I am persuaded that the issues raised by the applicant in her application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. The appeal has, in my view, reasonable prospects of success.

[17]. Leave to appeal should therefore be granted.

Order

[18]. In the circumstances, the following order is made:

- (1) The applicant's application for leave to appeal succeeds.
- (2) The applicant is granted leave to appeal to the Full Court of this Division.
- (3) The costs of the applicant's application for leave to appeal shall be costs in the appeal.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

⁵ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

HEARD ON:	8 October 2025
JUDGMENT DATE:	8 October 2025 – judgment handed down electronically
FOR THE APPLICANT:	R Orr
INSTRUCTED BY:	Thomson Wilks Incorporated, Cape Town
FOR THE RESPONDENT:	No appearance
INSTRUCTED BY:	Schreuder Attorneys, Kenilworth, Cape Town