

SOUTH AFRICA / JUDGMENT

C.W and Another v Potgieter and Others (88660/2019) [2024] ZAGPPHC 262 (14 March 2024) [2024] ZAGPPHC 262

COURT

North Gauteng High Court, Pretoria

BEFORE

Holland-Muter

CASE / FILE NUMBER

88660/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 88660/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED 14/03/2024

DATE: 14/03/2024

ADVOCATE L C HAUPT SC, NO:

In her capacity as curatrix ad litem for the minor children:

M[...] W[...] (born 12 June 2009)

R[...] W[...] (Born 7 May 2015)

IN RE:

In the matter between:

C[...] J[...] W[...]

First

Applicant

B[...] W[...]

Second

Applicant

and

SCHALK JACOBUS POTGIETER First

Respondent

HELEN ISABEL POTGIETER

Second

Respondent

LESEGO VILAKAZI NO

Third

Respondent

(In her capacity as nominee for ABSA Trust Ltd,

The duly appointed trustee of the Charles

James W[...] Testamentary Trust)

ABSA TRUST Fourth

Respondent

A C EMPLOYEE BENEFITS (PTY) LTD

Fifth Respondent

MASTER OF THE HIGH COURT Sixth

Respondent

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL: FIRST RESPONDENT

(The matter was heard in open court but judgment was reserved and handed down by uploading it onto the electronic file of the matter on CaseLines and electronically forwarded to the parties. The date of uploading is deemed to be the date of Judgment)

Before: HOLLAND-MUTER J:

- [1] The matter was heard on 27 September and 5 October 2023 and judgment was handed down on 2 January 2024. The First Respondent filed applications for Condonation and Leave to Appeal on 26 February 2024, 22 days out of time. The reasons set out in an application for Condonation for the late filing of the application for leave to appeal are inter alia that the Second Respondent passed away on 25 January 2024 and was laid to rest on 2 February 2024. I herewith convey my condolences to the First Respondent and the rest of the family in this regard.
- [2] In view of the above, I deemed it not necessary to dwell into the delay to file the application within the prescribed 15 days and therefore granted condonation for the late filing thereof.
- [3] For purposes of this judgment I am satisfied that I dealt with all relevant aspects complained about in the original judgment and do not intend to repeat what was already stated. I however deem it necessary to deal with certain other aspects raised and allegations made in the application for leave to appeal and the affidavit by the First Respondent accompanying the application.
- [4] The Allegation is made that the court erred in not finding certain paragraphs of the order issued by Avvakoumides AJ unconstitutional

and failing to suspend the aforesaid orders issued by Avvakoumides AJ. Being a court of first instance and having the luxury of the dismissed appeal by the First and Second Respondents earlier by the full court in Pretoria, I fail to come to terms with this allegation. Mr Geyer rather reluctantly conceded that this ground was without any merit during arguments.

- [5] The appeal against the judgment of Avvakoumides AJ was struck from the roll by the full court in Pretoria. The result thereof is that the judgment of Avvakoumides AJ stands and my judgment at large was to compel the First and Second respondents to comply with that judgment pending finalisation of the pending Part B of the original application. My judgment is therefore another interlocutory

judgment

and in principle not appealable.

- [6] The First Respondent however made rather strident and harsh-sounding allegations towards the Curatrix ad Litem, the First Applicant and the court in par 11 & 12 of his affidavit in the application for Condonation. He states in par 11 that the Second Respondent was suffering from “shingles” caused by stress and/or stressful conduct experienced by her. He continues in par 12 that, “the second respondent contracted “shingles” because of the enormous amount of stress inflicted upon her, inter alia, the conduct of both the first applicant (Renier W[...]) and the Curatrix, ... and the judgment of the court”(my emphasis). The only reasonable inference to be made from this rather unfounded and with respect reckless statement is that the second respondent’s death is upon the hands of the mentioned parties.

In my view the legal team who assisted the First Respondent in drafting this statement, ought to have advised the First Respondent carefully and professionally against making such strident remarks without any proof thereto.

- [7] A glaring lack of any expert medical proof in this regard illustrates the level of litigation which the First Respondent is willing to continue with. His allegation in par 12 that “Our doctor opined that the continued litigation over a period of four years indeed exacerbated the second respondent’s health issues” is without any substance and is dismissed with contempt. The fact is that the curatrix was appointed at most two years ago and this

court first heard the matter on 27 September 2023. This is a clear misguided statement made without any consideration. It is rejected

with the contempt it deserves.

- [8] The allegation of bias by the court is rejected with contempt. I have no hesitation to state my previous relationship as member of the Pretoria Society of Advocates with Adv Haupt SC and Adv Ferreira. I served two terms on the Pretoria Bar Counsel with Adv Haupt and at least 14 years on the training committee of the Bar with Adv Ferreira. This was in line of duty towards the Pretoria Society of Advocates. There is nothing untoward in this regard. The fact that I ordered the First Respondent’s counsel to comply with the earlier directive of my brother PHOOKO AJ to file the answering affidavit on behalf of the respondents and my directive to comply after his unacceptable arguments in respond to why it was not done, cannot be seen as being bias. It is rather indicative of the attitude of Mr Geyer displayed towards this court and the previous directive by PHOOKO AJ.

- [9] I have dealt in my judgment with the position of the Curatrix not being anyone’s pawn to merely follow the appetite of the First Respondent and the children, and that she will from time to time issue directives contrary their liking. The fact that the First Respondent disagrees with some of the directives does not result in the Curatrix being bias. She has a duty towards the court and no reason was advanced that she breached this duty.

- [10] I considered all relevant aspects before making my judgment and considered the Rule 35(12) & (14) request and the application to remove the Curatrix. I stand by the reasons given in the initial

judgment.

- [11] The bench mark for an applicant to convince a court to grant leave to appeal to a superior court is set out in section 17 of the Superior Court Act, 10 of 2013. The test is whether the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. Having heard the arguments advanced by Mr Geyer in this regard I am of the view that there is no reasonable prospect of success or any other compelling reasons to grant leave to appeal. Leave to appeal is therefore refused.

[12] The parties (via their respective legal teams) agreed and consented thereto that the order granted on 2 January 2024 be amended as follows:

12.1 By deleting any reference to the “Second Respondent” and

12.2 By amending paragraph 8 to read:

“As from date of this order, the Fifth Respondent will make payments from the monthly pension amounts in favour of the minor children to the Third Respondent. The First Respondent will provide written estimated monthly expenses towards the minor children as budgeted for by the First Respondent to the Trustees of the Third Respondent. The Trustees of the Third Respondent will budget and approve such estimated monthly expenses. The Third Respondent will make such monthly payments to the First Respondent to the extent of the estimated expenses as approved by the Trustees for the benefit of the minor children”.

12.3 By substituting “ACA EMPLOYEE BENEFITS (PTY) LTD” with “ABSA PENSION FUND” as THE Fifth Respondent.

12.4 In view of the consensus between the parties the amendment is granted.

[13] The Curatrix requested the court to consider that the order granted on 2 January 2024 (amended as aforesaid) be operational and executable pending the finalisation of the appeal process in this Division or in any higher Court(s), for as long as the minor children reside with the First Respondent. Having heard all the parties in this regard there can be no prejudice if so ordered. The crux of such order is to have the relationship between the minor children and the First Applicant restored in the long term in view of the greater picture (although it is one of the grounds of the leave to appeal in par 2 thereof). It goes without any saying that this is the ultimate goal of the whole process. The First Respondent is in advanced age and if the unforeseen occurs, the wish of the late father of the children is that his brother (the First Applicant) then becomes the guardian of the minor children. The objection thereto is stillborn.

COSTS:

[14] The Curatrix moved for an order de boniis propriis against the First Respondent and Grohovaz Attorneys (the First Respondent’s instructing attorneys and of Mr Geyer) jointly and severally. After serious consideration I am of the view that the correct costs order will be that the First respondent pay the costs of the application for leave to appeal on an attorney and client scale.

[15] The First Respondent is an educated but very stubborn person and ought to control himself under the circumstances. His continuous

conduct to defy all directives by the Curatrix and court orders should be discontinued. It is not in the interest of the minor

children that he remains on a war path at all costs.

ORDER:

1. The application for condonation for late filing of the application for leave to appeal is granted.
2. The application for leave to appeal is refused.
3. The court order granted on 2 January 2024 is amended as follows:
 - 3.1 By deleting any reference to the “Second Respondent”.
 - 3.2 By amending par 8 thereof to read:
 - 3.3 By substituting “ACA EMPLOYEE BENEFITS (PTY) LTD” with “ABSA PENSION FUND” as the Fifth Respondent.
4. The order granted on 2 January 2024 (amended as foresaid) shall be operationable and executable pending the finalisation of appeal process in this Division or any higher court(s), for as long as the minor children reside with the First Respondent.
5. The First Respondent is to pay the costs of the application for leave to appeal on an attorney-and-client scale.

HOLLAND-MUTER J

JUDGE OF THE PRETORIA HIGH COURT

Heard on 11 March 2024

Judgment

handed down on 14 March 2024

APPEARANCES:

ADV LC HAUPT SC

Curator ad Litem obo minor children

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Prepared on 9 October 2026 · Esheria