

SOUTH AFRICA / JUDGMENT

L L v Z J (1274/2019) [2020] ZAFSHC 8 (30 January 2020) [2020] ZAFSHC 8

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

1274/2019

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THE
HIGH COURT OF SOUTH AFRICA
FREE
STATE PROVINCIAL DIVISION
Case
No: 1274/2019
In the matter

between:	LL[1] Applicant and ZJ[2] Respondent
Coram:	Opperman, J
Heard:	29 January 2020
Delivered:	30 January 2020
Judgment:	Opperman, J
Summary:	Application for leave to appeal - Contempt of court – Shifren-principle in maintenance matters where minors involved – evaluation of applications for contempt of court orders in maintenance matters

JUDGMENT

I GROUNDS FOR LEAVE TO APPEAL

[1] The grounds for leave to appeal that crystallised during the hearing of the application are that the court erred to find that Mr LL does not have the right to amend a maintenance order of this court because “he deemed it to be convenient, practical, pragmatic, addressed the maintenance of the minor child in totality and because Ms ZJ did not complain.” In addition, the court erred to rule that he acted in wilful and mala fide contempt of the court order. The error of the court is due to “a failure/neglect to adjudicate the application in accordance with the Plascon-Evans principle i.e. that the respondent’s version falls to be accepted unless it is patently far-fetched or clearly untenable which the respondent submits it is not.”

[2] The application is only against the first order (paragraph 1). The entire order of the court is that:

“1. The respondent is declared to be in contempt of the court order dated 21 October 2010 under case 4839/2010 and committed to imprisonment for a period of ninety days that is wholly suspended for three years on condition that the respondent shall comply with the method of payment as decreed in the court order. The instalment to include the increase and calculated as prescribed in the court order and to be paid on or before the 1st December 2019 and thereafter on or before the first of each subsequent month.

2. The dispute in regard to the specific amount in arrears is referred for trial.

2.1 Trial in this instance not to preclude any process provided for this purpose in the Maintenance Act 99 of 1998.

2.2 The notice of motion in the application shall stand as the applicant’s simple summons.

2.3 The respondents’ answering affidavit shall stand as the respondents’ notice of intent to defend.

2.4 The applicant shall, as plaintiff, within 20 days of the date of this order deliver her declaration.

2.5 The further exchange of pleadings and pre-trial procedures, including discovery and the request for and provision of trial particulars, shall be regulated by the Uniform Rules of the Court.

3. Each party to pay their own costs.”

[3] The issues refer to above were dealt with extensively in the judgment a quo. The finding of the facts, right of the respondent to amend the court order and wilful and mala fide element of contempt must now be adjudicated on the principles for leave to appeal.

II ADJUDICATION OF AN APPLICATION FOR LEAVE TO APPEAL

[4] The right to appeal, as managed by among others, the application for leave to appeal, may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. The Superior Courts Act 10 of 2013 regulates the adjudication for leave to appeal specifically.

[5] Historically the rule was: “In that reasonable prospects exists that another Court, sitting as the Court of Appeal, would come to different findings and conclusion on the facts and the law.” It is now being worded differently in The Superior Courts Act 10 of 2013 per section 17(1)(a)(i) promulgated on 22 August 2013 to read:

“(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

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

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[6] In *Shinga v The State & Another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O’Connell & Others* 2007 (2) SACR 28 (CC) at [53], it was summarised that:

“Applications for leave to appeal is a judicial task of some delicacy and expertise. This task requires a careful analysis of both the facts and the law that provided the basis for the judgement. Presiding officers should approach the question whether another court may reach a different conclusion with “intellectual humility and integrity, neither over-zealously endorsing the ineluctable

correctness of the decision that has been reached, nor overanxiously referring decisions that are indubitably correct to an appellate

Court.”

[7] In *S v Smith* 2012 (1) SACR 567 (SCA) at [7] the court laid down the approach to an application for leave as follows:

“What the test of reasonable prospects of success postulates is 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 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.”

- [8] There cannot be a difference in “that it must be proven that reasonable prospects exist that another Court, sitting as the Court of Appeal, would come to different findings” and “the appeal would have a reasonable prospect of success.” Both refer to “success” and a “prospect” and it is what it is. It is semantic and the weight of the onus has not been raised. It has been codified and the codification to be interpreted to mean that a sound, rational basis for a conclusion that there are prospects for success on appeal must be shown. This has always been the rule and the word “would” simply confirm that it must be proven and it remains a prospect to be evaluated on a sound basis; nothing more and nothing less.
- [9] Section 17(1)(a)(i) did not push the threshold higher as was suggested after *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016). It is only in regard to the context of special leave that the test is more stringent.
- [10] After pondering the matter on the premise that there must be a sound, rational basis for the conclusion that there are prospects of success on appeal I am convinced that an appeal on fact and law will fail.

III THE FACTUAL FINDINGS OF THE COURT AND THE PLASCON-EVANS PRINCIPLE

- [11] The factual finding in the case is in religious conformation to and application of the Plascon-Evans principles. It is based on the version of Mr LL. He admitted that he did not pay in accordance with the order. The final adjudication was an issue of law.
- [12] The law applied on the facts has nothing to do with the Plascon-Evans principle and is the exclusive duty of the court. The finding was that:

“VII

CONCLUSION

- [37] The crucial question the court must decide is whether the minor child had been and is being cared for in terms of the decree in the Constitution of the Republic of South Africa, 1996 read with the law of maintenance and care of minors in South Africa. Included herein is the stability that must exist in law to protect the care of minor children that is proclaimed in the Constitution. The case resorts within the Family Law realm and is definitely not for the protection of commercial assets. Secondly lies the protection of the judicial authority of the court as balanced with the democratically proclaimed freedom of parties to contract. Slotting in herewith is the duty of the High Court as Upper Guardian of all minor children in its jurisdiction to protect these children even against the actions and contracts of their biological parents that were entrusted with their care in terms of the law. Lastly is it for the court to comply with the law of evidence and procedure to ensure an outcome that serves the focus above ultimately.

- [38] The sui generis nature of maintenance matters demands that the court invokes its inherent jurisdiction and refer the matter for trial on the issue of the arrears. Hearing in this instance not to preclude any process provided for this purpose in the Maintenance Act 99 of 1998. It is imperative and in the interest of justice that the matter of the arrears be resolved.
- [39] The applicant is declared to be in contempt of court in relation to the provisions of the order of this court handed down on 21 October 2010 to the extent that the instalment amount of R9000 and the yearly increase was not paid to the applicant directly and on or before the first of each month.

IV THE RIGHT TO AMEND AN ORDER OF COURT

- [13] The likelihood that any court of this country will interpret a maintenance order of the High Court that states:

“2.1 That the respondent shall pay maintenance for the minor child in the amount of R9000,00 per month; the first payment to be on the 1st of October 2010[3] and thereafter before or on the 1st of each successive month. In addition to the above the respondent shall also be responsible for:

2.1.1 All reasonable medical, dentist and eye care expenditures of the minor child.

2.1.2 The tertiary education of the minor child.

2.2 The maintenance in paragraph 2.1 will escalate yearly in accordance with the consumer price index rate. First escalation to be on or before the 1st of October 2011 and thereafter on the 1st of October of each subsequent year”

to mean that it was not to be paid to the applicant directly and in the instalment as ordered; is practically null. More so on the

circumstances in casu and that primary residence was assigned to the applicant.

- [14] Even if on the argument and version of the respondent it was accepted that an inference may be drawn that the maintenance is not to be paid directly to the applicant; the letter of the order stands indubitably to be R9000.00 per month; the first payment to be on the 1st of October 2010 and thereafter before or on the 1st of each successive month and the instalment will escalate yearly in accordance with the consumer price index rate. First

escalation to be on or before the 1st of October 2011 and thereafter on the 1st of October of each subsequent year. It is the factual evidence before court on admission of Mr LL that he did not comply with the order on said terms.

- [15] Worse for Mr LL is that he was a party to the settlement agreement that was made an order of the court that prescribes that no variation of the agreement shall be of any force or effect unless reduced to writing and signed by the parties to this agreement. He agrees that there is not any written agreement that varies the court order.

[16] Even if it is accepted that the order was amended by consensus, the terms of the agreement was impossible to establish. To create a precedent in law that allows amendments of maintenance orders on terms that are unclear is constitutionally untenable. The situation becomes immeasurable and the parties have carte blanche on their rights and responsibilities. It will cause legal uncertainty, chaos and injustice.

V WILLFUL AND MALA FIDES

[17] It is common cause and no issue was taken by Mr LL that the evidence shows that the relationship between the parties in this case is vile and obstructive and that tragically, it is the root of the litigation. The “methodology of payment” and the manner in which it was imposed by the respondent show a subjective intentional disregard for the law.

[18] The respondent was and is fully aware of the illegality of his conduct and persists with it. The ruling and order in this case has given him ample leeway to reconsider his conduct and remedy his attitude without any prejudice or detriment. If he overpaid, he has nothing to fear. If he wants for the original order to be amended, he has remedies in law. It just does not lie in an appeal.

VI ORDER

1. The application for leave to appeal is dismissed with costs.
2. The order dated 29 November 2019 is reiterated and the respondent is ordered to comply with the payment and method as decreed in the court order dated 21 October 2010 under case 4839/2010. The instalment to include the increase and calculated as prescribed in the court order and retrospectively to have commenced on the 1st of December 2019 (if payments have not commenced) and thereafter on or before the first of each subsequent month.
3. The right of the respondent to petition this order shall not suspend his obligation to make the payments as ordered above.

M OPPERMAN, J

For applicant: Leave to appeal ADV. S TSANGARAKIS

Chambers, Bloemfontein

Instructed by:

HONEY ATTORNEYS

Bloemfontein

Ref: A Prinsloo/fk/126897

For respondent: Leave to appeal ADV. F VAN RENSBURG

Instructed by:

HAASBROEK & BOEZAART INCORPORATED

c/o WILLERS ATTORNEYS

- [1] Respondent in the main action and hereafter so referred to.
- [2] Applicant in the main action and hereafter so referred to.
- [3] The date seems to be wrong since the divorce was only granted on 21 October 2010.
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