

SOUTH AFRICA / JUDGMENT

Steenkamp and Another v Du Preez (Leave to Appeal) (388/2024)

[2024] ZANCHC 99 (4 October 2024)

[2024] ZANCHC 99

COURT

Northern Cape High Court, Kimberley

BEFORE

Tyuthuza

CASE / FILE NUMBER

388/2024

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IN

THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE
DIVISION, KIMBERLEY)

Case

Number: 388/2024

Heard: 24/07/2024

Delivered on: 04/10/2024

In

the matter between:

PIETER
STEENKAMP
First Applicant
JEBEKO
FARMING
CC
Second Applicant
and
SANETTA
HENDRIETTA DU
PREEZ
Respondent

Coram:

Tyuthuza AJ

JUDGMENT

ON APPLICATION FOR LEAVE TO APPEAL

Per Tyuthuza AJ

INTRODUCTION

1. The first and second applicants seek leave to appeal an order granted by myself on 23 February 2024 (“the main application”) and the judgment granted by myself on 24 May 2024 (“the contempt application”) to the full court of this Division, alternatively, the Supreme Court of Appeal.
2. Pursuant to a request for reasons, I have dealt with my reasons for the order granted in February 2024, by way of written reasons delivered on 9 May 2024. Subsequent thereto the applicant launched an application for contempt, wherein my judgment was delivered on 24 May 2024. The applicants seek leave to appeal in respect of both the main application and the contempt of court application. The applications are based on the grounds as stated in the applicants notices dated 26 February 2024 and 30 May 2024.
3. I do not intend herein to traverse the reasons for my findings, as I have done so in my written judgments and will refrain below as far as possible from repeating my reasoning.
4. For convenience’s sake, I will refer to the parties as they were referred to in the main application.

TEST FOR APPEAL

5. Applications for leave to appeal are regulated by Section 17 (1) of the Superior Courts Act 10 of 2013 which provides as follows:

"17 Leave to appeal

- (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. The Superior Courts Act now provides for leave to appeal to be granted only in two circumstances, the first circumstance is where the Judge concerned is of the opinion that an appeal would have a reasonable prospect of success and secondly, where there are some compelling reasons why the appeal should be granted.
7. In MEC Health, Eastern Cape v Mkhitha and Another[1] the Supreme Court of Appeal said the following:

"Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable

prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear 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; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

8. In Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020
- (5) SA 35 (SCA), the Court observed thus:

"In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii)[2] of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive."

APPEALABILITY OF INTERIM ORDERS

9. Section 18 of the Superior Courts Act 10 of 2013 ("the Act") provides as follows:

"(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal."

- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.”
10. Regarding the appealability of interim orders the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and others*

[2012] JOL 29422 (CC) stated the following at paragraph 25:

“This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is “the interests of justice”. To that end, it must have regard to and weigh carefully all germane circumstances.

Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a

relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess

whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.”

11. The Supreme Court of Appeal in *RTS Industries and Others v Technical Systems (Pty) Ltd and Another*[2] confirmed the above approach to determining the appealability of interim interdicts and stated the following: “The crux of the matter is firstly, whether this order was ‘final in effect’ and was therefore appealable even if its stated character was interim. Secondly, whether the interests of justice warrant that an appeal against the order in issue should be entertained.”

DISCUSSION

12. The respondents seek leave to appeal on the basis that the interdict is final and irreversible and cannot be revisited by the court adjudicating the divorce action. Furthermore if the interdict is final in effect, it has the irresistible effect that the contempt application was wrongly decided and even if the interdict is not final in effect, the respondents truly believed that the order was suspended.
13. The applications are vehemently opposed by the applicant, on the basis that an interim order, particularly an anti-dissipation order will only be appealable in the event of it being shown to be final in effect and if it is in the interests of justice to do so. Secondly the applicant argues that even if the interim order is appealable due to the interests of justice,

the order is not within the purview of section 18(1) of the Superior Courts Act and in terms of section 18(2) remains operative until the Court under exceptional circumstances orders otherwise. Thirdly that the respondents have failed to meet the prescripts of section 17(1) in that they have failed to satisfy the test for leave to appeal to be granted.

14. When deciding on the nature and appealability of the order granted in the main application, I have to consider the circumstances that led to the urgent application. The applicant and the first respondent were married in community of property in November 2011. In April 2023, the first respondent instituted divorce proceedings against the applicant. The applicant launched the urgent application to seek urgent interdictory relief pending the finalisation of the divorce proceedings to interdict and restrain the respondents from utilizing an amount equal to 50% of the nett proceeds of the sale of Farm Jebeko and to pay the amount equal to 50 % of the nett proceeds into the applicant or the first respondent's attorneys' trust account. The applicant contends that the first respondent is intent on frustrating her claim or diminishing the value of her claim in the divorce action, in that he refuses to account to her regarding the sale of livestock, his spending of the joint funds and he has failed to disclose details regarding the sale of the farms Jebeko and Gamuip. The applicant avers that the first respondent's conduct is indicative of his intent to frustrate her claim or at the very least, to significantly diminish the value of her claim. The applicant alleges that the first respondent will alienate and dissipate her share of the joint estate. The conduct of the first respondent was the basis for the relief sought by the applicant.
15. The first respondent having opposed the urgent application contended that there is no evidence of him either selling or squandering the communal assets or that he has any intention to do so. He further contended that farm Jebeko is an asset belonging to the second respondent and that the second respondent is at liberty to deal with its assets as it deems fit. It is the first

respondent's case that the proceeds from the sale of the Jebeko Farm will be utilised to increase the value of the estate and therefore the applicant cannot suffer any prejudice if the relief is not granted.

16. Having again considered the circumstances, I am of the considered view that there can be no prejudice whatsoever if the interim order continues to operate, and further that if the first respondent were allowed to continue to dispose of assets and do as he wishes regarding the 50% which ought to be preserved, his actions would likely prejudice the applicant.
17. The relief sought by the applicant is in the form of an anti-dissipation order. In the main judgment, the nature of the interim anti-dissipatory interdict pendente lite was comprehensively discussed. I concluded then that the interdict granted is interim and interlocutory, and does not have final effect.
18. This conclusion brings into operation, section 18(2) of the Act for purposes of the present case. The effect thereof will be that, the Superior Courts Act does not suspend the operation of an interlocutory order, not having the effect of a final judgment, pending the outcome of

the application for leave or the appeal itself. The respondents have not brought an application in terms of section 18(3) of the act, for an order directing that the operation and execution of the order granted on 24 February 2024 shall not be suspended pending the respondent's application for leave to appeal. The respondents have made out no case why an order in terms of section 18(2) should be granted.

19. An important fact for consideration when deciding whether the interest of justice necessitates the granting of this application is that the respondents in August 2023 undertook to retain 50% of the sale of the farm in their attorneys trust account, however, it has become clear that despite this undertaking, the respondents were performing transactions which impacted the 50%. As a result of the urgent application, certain information regarding how the money was used and various transactions came to light, had the respondents played open cards with the applicant, there would not have been the need to launch this application.
20. In my view an anti-dissipation order such as the one that I granted on 23 February 2024, is not a final judgment for purposes of section 18(1) of the Superior Courts Act, it is an interlocutory order not having final effect as envisaged in section 18(2) of the Act. I am therefore of the view that it would not be in the interests of justice to appeal the order.

CONTEMPT APPLICATION

21. In respect of the application for leave to appeal in relation to the contempt order which I made on 24 May 2024, one of the issues I had to determine was whether the respondents' failure to comply with the order was willful or mala fide. The respondents argue that the order was not final in effect and thus their non-compliance was not willful or mala fide. Accordingly, it is asserted on behalf of the respondents that the applicant was forewarned in letters of its view regarding the

interdict being suspended by the application for leave to appeal. The respondents further contend that they are not bound by the order and that the second respondent is thus entitled to carry on as if the order does not exist.

22. Despite the nature of the order being a contentious issue amongst the parties and even after I had delivered my reasons, wherein I dealt with the nature and effect of the order, the respondents failed to bring an application in terms of section 18 prior to this hearing, and neither was an argument made for me to consider an application in terms of section 18 of the Act.
23. In order to resolve any difficulties which, the parties might have regarding the effect of the order, in my 24 May 2024 judgment, I further declared that the operation and execution of the order granted by this Court on 23 February 2024 shall not be suspended pending the finalisation of the application for leave to appeal and subsequent applications/petitions for leave to appeal that order.

24. The respondents submit that it is impossible to be in contempt of an order which has been suspended and which is inoperative in that the order granted falls within the purview of section 18 (1) of the Superior Courts Act. The respondents aver that they hold a strong and bona fide view that the order has the effect of a final judgment, therefore, they cannot be in wilful disobedience. The respondents further

submits that there are very good prospects of success in appealing the order and that the prospects of being unsuccessful on appeal are therefore slim.

25. Willful non-compliance with an order of a court amounts to contemptuous behaviour. It is trite that intent or willfulness is required to hold a party in contempt for disobeying a court order. Thus, there should be a deliberate intentional act to disregard the court order. Despite the respondents arguing that it had a bona fide view that the order was final, the respondents completely ignored the order and continued to make an interim proposal to the applicant wherein the respondents tendered to register a mortgage bond in favour of the applicant, thus circumventing the order. The respondents completely disregarded the order, even after my reasons were granted, wherein I pronounced that the order was interim in nature and did not dispose of any issue or any portion of an issue in the divorce proceedings.

26. In light of the respondents' conduct, I find it difficult to conclude that the respondents did not willfully disobey the order. The respondent ought to have brought an application in terms of section 18(2), to suspend the operation of the order but failed to do so.

27. I am of the view that the respondents have not discharged their evidential burden of placing facts before the court that would disturb a conclusion that, on a balance of probability, their conduct in failing to comply with the order granted in February 2024, was willful and mala fides.

28. In conclusion, there is nothing that persuades me that the two appeals launched by the respondents would have reasonable prospects

of success. Neither are there any compelling reasons why leave to appeal should be granted in both applications.

29. The remaining issue is the issue of costs. The applicant asked this Court to dismiss the applications and grant costs on an attorney and client scale, having regard to my findings in the main application and the contempt application, in my view a punitive cost order is warranted.

I therefore make the following order:

1. The application for leave to appeal against the order granted on 23 February 2024 is dismissed.

2. The applicants in the application for leave to appeal referred to in paragraph 1 above are ordered to pay the costs jointly and severally from each other, the one paying the other to be absolved pro tanto on an attorney and client scale.
3. The application for leave to appeal against the order granted on 24 May 2024 is dismissed.
4. The applicants in the application for leave to appeal referred to in paragraph 3 above are ordered to pay the costs jointly and severally from each other, the one paying the other to be absolved pro tanto on an attorney and client scale.

T TYUTHUZA

ACTING JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the 1st and 2nd Applicants: Adv D van Den Bogert SC On the instruction of: CJ Willemse & Babinszky Attorneys c/o Roux Welgemoed Du Plooy Att. On behalf of the Respondent: Adv JG van Niekerk SC On the instruction of: Cluver Markotter Inc. c/o Engelsman Magabane Inc.

[1] (1221/2015) [2016] ZASCA 176 (25 November 2016) at paras 16-17.

[2] (145/2021) [2022] ZASCA 64 (5 May 2022) at para 23.

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