



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

2022-09-16

DATE

SIGNATURE

Case Number: 24537/2015

In the matter between:

WILLEM

JACOBUS

BABEN

Applicant

and

MADELEEN BOTHA N.O.

First Respondent

PHILLANA OBERHOLZER

Second Respondent

JUDGMENT

POTTERILL J

[1] The Applicant [first respondent in the main application], Mr Baben, filed an application for leave to appeal against the finding of contempt of court, the remedy imposed and the punitive cost order granted. At the hearing Mr Baben's legal representative abandoned the appeal against the finding of contempt of court, but persisted with the appeal against the direct imprisonment and punitive costs order. The *curatrix* and Ms Oberholzer opposed the application for leave to appeal.

The remedy

[2] As a basic principle a court is loath to restrict the personal liberty of a person.¹ Perhaps even more so, where a father is imprisoned in relation to non-compliance of a court order involving his children.

[3] This matter was brought on an urgent basis and required a speedy judgment in order to prevent further derailment of the envisaged process. I did consider every factor raised by the respondents as reasons for the contempt, albeit not every factor is listed in the judgment.

¹ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC) par [55]

- [4] I also factored in every fact on which I could exercise my discretion to come to impose a remedy. The first question was how would it further affect the children, but the children's therapists submitted it would not in this process be detrimental to the children. Mr Baben was not prepared in his opposition of the application to commit to in future adhere to the court order, rendering suspension on condition that the court order is complied with futile. There is not a single fact put before me that if Mr Baben is not part of the envisaged process how it would negatively impact the process. He has not displayed *bona fides* by purging his default of the payments he was ordered to make.
- [5] Mr Baben had in the application for leave to appeal not shown what factors, even in exercising a very wide discretion, I should have taken into account. Losing his job is a reality when committal is sought. However, he has not been paying as ordered and this factor is thus a neutral fact. A court of appeal will not have new facts or factors to consider and there are no prospects that another court would come to another conclusion.
- [6] Mr Baben had requested a punitive order against the *curatrix* and cannot now assert that a punitive order was not just. His conduct and his assertions rendered such order appropriate.
- [7] I thus make the following order:
The application for leave to appeal is dismissed with costs.

S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NUMBER: 24537/2015

HEARD ON: 14 September 2022

FOR THE APPLICANT: ADV. D. POOL

INSTRUCTED BY: Coetzee & Jansen van Rensburg Attorneys

FOR THE FIRST RESPONDENT: ADV. S.D. WAGENER SC

INSTRUCTED BY: M Botha Attorneys

FOR THE SECOND RESPONDENT: ADV. L.C. HAUPT SC

INSTRUCTED BY: Wynand du Plessis Attorneys

DATE OF JUDGMENT: 16 September 2022