CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 247/16

In the matter between:

S S Applicant

and

V V-S Respondent

Neutral citation: *S S v V V-S* [2018] ZACC 5

Coram: Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J and Zondi AJ

Judgments: Kollapen AJ (unanimous)

Heard on: 29 August 2017 / 8 November 2017

Decided on: 1 March 2018

Summary: non-compliance with maintenance obligations — rule 46(1)(a)(ii) — writ of execution against immovable property — non-compliance with court orders.

Proceedings analogous to formal contempt — *Biowatch* principle on costs not applicable — costs on attorney client scale — punitive cost order.

ORDER

On appeal from the Supreme Court of Appeal:

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the respondent's costs in this Court on an attorney and client scale, excluding costs relating to the 29 August 2017 postponement.

JUDGMENT

KOLLAPEN AJ (Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Madlanga J, Mhlantla J, and Zondi AJ concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the High Court of South Africa, Gauteng Division, Pretoria, (High Court) per Magardie AJ. The High Court granted an order authorising the issue of a warrant of execution against the applicant's immovable property. The warrant issued was in respect of maintenance obligations due by the applicant to the respondent in respect of the minor child born of the erstwhile marriage between the parties.

Parties

[2] The applicant is the former husband of the respondent.

Background facts

[3] The applicant and respondent were married in 2007 and a child, K, was born

during that marriage in September 2008. The marriage was of limited duration as divorce proceedings were initiated in March 2008. On 29 October 2010, an order of divorce was granted by the High Court which incorporated the terms of a settlement agreement between the applicant and respondent (Order). That agreement deals substantially with the interests of the minor child including matters relating to guardianship, care and contact, and maintenance. The terms of the Order in so far as maintenance is concerned, provide that:

> "The [applicant] shall pay the [respondent] the sum of R2500 (two thousand five hundred rand) per month for the maintenance of [K] (the basic maintenance payment);
>
> a) The above amount will be paid monthly in advance of the last day of each month. The basic maintenance payment will be deposited into the [respondent's] bank account;
> b) The basic maintenance payments shall increase by the consumer price index on the anniversary of the signing of this agreement and on all subsequent anniversaries thereafter;
> c) In addition to the basic maintenance payments, the [applicant] shall be liable for half (50%) of [K's] crèche / school fees and the [respondent] shall be liable for the remaining half (50%);
> d) Each party will be liable for half (50%) of all costs of [K's] text books, school uniforms, reasonably required extra lessons, extra mural activities and uniforms, equipment, school outings and tours and other necessarily related educational expenses and the like;
> e) The [applicant] will be liable for 50% of [K's] medical, dental, pharmaceutical, ophthalmic, specialist and other related medical expenses reasonably incurred that are not covered by the [applicant's] medical aid scheme."

[4] The agreement clearly distinguishes between what it describes as the basic maintenance amount and then what may be described as the additional amounts, the latter relating to the educational and medical expenses in respect of the minor child. The dispute which arose relates to the applicant's alleged failure to honour his maintenance obligations under the Order's terms. The precise extent of his default was unclear from the record but some clarity, though not sufficient, emerged during

the course of this Court's first hearing of the matter.

[5] The respondent and K moved temporarily to the United States of America (United States) and resided there from May 2010 to January 2014. On 18 February 2014, and upon her return from the United States, the respondent caused a warrant of execution to be issued out of the High Court against the applicant in the sum of R 306 550.18. The warrant issued was in respect of the movable goods of the applicant.

[6] The issue of the warrant was supported by an affidavit filed with the Registrar by the respondent in which she purported to particularise the applicant's default in the sum of R306 550.18 under the different heads of maintenance. The respondent detailed that maintenance owing was the "increase [in] the maintenance by [6%] in October 2011" and subsequently "the maintenance again increased by 5.6% in October 2012 [and] . . . [t]he [applicant] has failed, since November 2005 to February 2014, to pay any maintenance whatsoever". She annexed various lists to the affidavit which provided a monthly breakdown of what she alleged was in arrears and detailed the non-payment of maintenance, school fees, medical expenses, and extra mural activities. The respondent provided no corroborative evidence for the school fees, medical expenses, and extramural activities in the form of receipts, vouchers, invoices, tax returns or bank statements.

[7] The Sheriff of the High Court, Pretoria East (Sheriff), attempted to execute the warrant issued by the Registrar and on 22 February 2014 issued a *nulla bona* (no goods) return, thereby confirming that the applicant had no movable assets to satisfy the amount set out in the warrant.

[8] The applicant disputes the correctness of the *nulla bona* return and offers a different account of what transpired during the attempt by the Sheriff to execute upon the warrant, but nothing turns on that dispute and no more need be said about it.

Litigation history

[9] The applicant brought an application before the High Court to set aside the warrant of execution issued during February 2014. That application was dismissed with costs on 11 November 2014.

[10] In January 2015, the respondent proceeded with an application in terms of rule 46(1)(a)(ii) of the Uniform Rules of Court,[1] seeking to execute against the applicant's immovable property.

[11] The application was opposed by the applicant who raised two preliminary points, the first being the non-joinder of the bondholder in respect of the property against which execution was sought and the second that a proper case had not been made out in terms of rule 46(1). In particular, the applicant contended that the respondent had not set out all the material and relevant considerations that the Court was obliged to consider in the granting of the relief sought.[2]

[12] On the key question of the maintenance arrears which was central to the respondent's case, the stance of the applicant was somewhat ambivalent. In paragraph 2.3 of the applicant's answering affidavit, he conceded that:

> "The application is aimed at recovering maintenance arrears which I currently owe to the [respondent]. I have fully acknowledged my indebtedness to the [respondent] in this regard."

[1] Rule 46 reads:

> "(1)(a) No writ of execution against the immovable property of any judgment debtor shall issue until—
>
> . . .
>
> (ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."

[2] The material and relevant points being those articulated in *Jaftha v Schoeman, Van Rooyen v Stoltz* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at paras 59-60 and *Gundwana v Steko Development CC* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) at para 54.

However, when one considers the tenor of his stance taken throughout the dispute then it may be fair to say that, while the applicant does not dispute his legal obligation to pay both the basic and additional maintenance, his view was that the additional maintenance amounts were not properly quantified by reference to vouchers and proof of payment. The latter approach is more in accord with what I would describe as the applicant's general basis of opposition and his admission in paragraph 2.3 of his answering affidavit must be considered in this broader context. Fairness and justice would certainly support such an approach.

[13] On 19 August 2015, the High Court ordered execution against the applicant's immovable property and, in doing so, made reference to what she regarded as the "revolting attitude towards the [respondent] and the minor child as well as his elaborate efforts aimed at frustrating compliance with his maintenance obligations".

[14] An application for leave to appeal was dismissed with costs on 2 March 2016 and a similar fate befell the application for leave to appeal to the Supreme Court of Appeal.

In this Court

[15] The applicant applied for leave to appeal, which was opposed by the respondent. This Court requested written submissions and, following receipt of these from the parties, this Court issued further directions on 10 May 2017 in the following terms:

> "1. The application for leave to appeal is set down for hearing on Tuesday, 29 August 2017 at 10h00 in regard to the following issues:
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> a) Leave to appeal.
>
> b) Appeal:
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> i) whether the amount of R306 550.18 was a judgment debt and whether, therefore, the applicant and the respondent had a

judgment debtor-judgment creditor relationship in respect of that amount; and

ii) whether the High Court used the Rule 46(1)(a)(ii) execution process as a measure of last resort."

[16] The matter proceeded to hearing on 29 August 2017. During the course of the hearing it emerged that the applicant, even though he disputed the quantification of the additional maintenance amounts, was in substantial arrears with his basic maintenance obligations. In particular, he did not pay maintenance for the period since the respondent returned to South Africa from the United States in early 2014, right up to and including August 2017 when the matter was first before this Court – a period of almost four years.

[17] This concession inevitably led to a discussion as to whether the applicant's conduct in failing to pay the undisputed maintenance obligation warranted this Court to proceed with the hearing of the matter.[3] There was a live and open question whether it would undermine this Court's integrity to hear the dispute while the applicant remained in default with his admitted maintenance obligations.

[18] While it is so that the proceedings in this Court on 29 August 2017 were not contempt proceedings, the concession of non-payment of the basic maintenance obligations, which was never in dispute, cannot simply pass without consequence. The judicial authority vested in all courts,[4] obliges courts to ensure that there is compliance with court orders to safeguard and enhance their integrity, efficiency, and effective functioning. To this extent, the views expressed by our courts on compliance with court orders remain relevant in these proceedings.

[19] In *Matjhabeng*, this Court expressed itself on the matter in the following terms:

[3] Section 173 of the Constitution affords this Court, the Supreme Court of Appeal, and the High Court of South Africa the "inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".

[4] Section 165 of the Constitution provides that "[t]he judicial authority of the Republic is vested in the courts".

> "Section 165 of the Constitution, indeed, vouchsafes judicial authority. This section must be read with the supremacy clause of the Constitution. It provides that courts are vested with judicial authority, and that no person or organ of state may interfere with the functioning of the courts. The Constitution enjoins organs of state to assist and protect the courts to ensure, among other things, their dignity and effectiveness.
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> To ensure that courts' authority is effective, section 165(5) makes orders of court binding on 'all persons to whom and organs of state to which it applies'. The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority."[5] (Footnotes omitted.)

[20] Further in *Fakie*, the Supreme Court of Appeal, per Cameron JA, held:

> "It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'."[6] (Footnotes omitted.)

[21] The applicant does not face the consequences of either a finding of civil or criminal contempt but his conduct, if left unaddressed by this Court, would undermine judicial integrity. Analogous considerations to formal contempt proceedings arise. In this regard, counsel for the applicant was certainly amenable to the matter being postponed to enable the applicant to remedy the consequences of his failure to pay. It was a stance which was wisely and correctly taken given the significant and ongoing nature of the failure by the applicant to comply with his maintenance obligation towards his minor child. A court's role is more than that of a mere umpire of technical rules, it is "an administrator of justice . . . [it] has not only to direct and

[5] *Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC) (*Matjhabeng*) at paras 47-8.

[6] *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (*Fakie*) at para 6.

control the proceedings according to recognised rules of procedure but to see that justice is done".[7]

[22] A further factor which fortifies the conclusion that this Court was not only entitled but obliged to have raised and dealt with the non-compliance with the Order by the applicant, lies in the nature of the obligations that the Order and the settlement agreement which accompanied it evidenced.

[23] All court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all. Those interests include the protection of the rights of children and the collective ability of our nation to "free the potential of each person"[8] including its children, which ring quite powerfully true in this context.

[24] Thus, when courts act as the upper guardian of each child they do so not only to comply with the form that the Constitution enjoins us to be loyal to, [9] but with the very spirit that is encapsulated in the provisions of section 28(2) of the Constitution that "a child's best interests are of paramount importance in every matter concerning the child".

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[7] *Take & Save Trading CC v The Standard Bank of SA Ltd* [2004] ZASCA 1; 2004 (4) SA 1 (SCA) at para 3, referencing *R v Hepworth* 1928 AD 265.

[8] See Preamble of the Constitution.

[9] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC) at para 64 states that:

> "In South Africa, in addition to section 28(2) of the Constitution, the common law principle that the High Court is the upper guardian of children obliges courts to act in the best interests of the child in all matters involving the child. As upper guardian of all dependent and minor children, courts have a duty and authority to establish what is in the best interests of children."

The Children's Act 38 of 2005 at section 45(4) further states that "[n]othing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children".

[25] This is precisely such a matter. The Order was about ensuring the best means of protecting and enhancing the interests of the minor child, and the scope and the breadth of the provisions of the settlement agreement appear to compellingly underscore that objective. The High Court, when it granted the decree of divorce, must then have been satisfied that the interests of the minor child were well catered for.

[26] When those interests are imperilled or when the obligation undertaken by either parent to the child is not diligently complied with, then courts are enjoined to interfere in a manner that best protects those interests. In *Bannatyne*, this Court dealt with the significance of maintenance obligations and the duty of courts to ensure compliance therewith. The Court articulated itself on the matter in the following terms:

> "Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.
>
> It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system."[10]

[27] Reverting to the proceedings of 29 August 2017, this Court, presented with the common cause evidence of the non-compliance with the basic maintenance obligations that the applicant had undertaken to pay, made the following order:

> "1. The matter is postponed to Wednesday 8 November 2017 at 10h00.

[10] *Bannatyne v Bannatyne* [2002] ZACC 31; 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC) at paras 27-8.

2. The applicant must pay the respondent's costs of postponement.

3. The applicant must pay to the respondent's attorneys, for the benefit of the minor child, an amount of at least R150 000 on or before 30 September 2017.

4. In addition to this payment, the applicant must make monthly payments in respect of the maintenance obligations and other expenses of the minor child in accordance with the order of the High Court."

[28] This 29 August 2017 order (August Order) responded to the pressing need both to respect K's best interests and safeguard against potential damage to this Court's integrity. This Court's integrity would be jeopardised if it failed to uphold its solemn constitutional obligation under section 28, to protect the best interests of children.

The proceedings in this Court of 8 November 2017

[29] When the hearing of the matter resumed on 8 November 2017, a necessary and anterior issue to be determined was whether the applicant had complied with the August Order. It was particularly important that this Court was satisfied that he had, especially given that the matter had previously not proceeded on account of the failure by the applicant to pay his basic maintenance obligations. The paramount question was whether the applicant had remedied his default and allayed this Court's earlier concerns that continuing to resolve this dispute while the basic maintenance remained unpaid, would undermine judicial integrity by ignoring K's best interests.

[30] The question raised was important in the context of determining what sanction, if any, this Court would consider in the event of failure by the applicant to establish that he had remedied his conduct.

[31] In *Burchell*, the High Court, upon finding that a party was in contempt of an order of court, ordered as part of the relief it granted that, unless the offending party purged his contempt, he faced the risk of being precluded from continuing with any

litigation in the High Court.[11] Such a sanction, which may at first sight appear to run counter to the right of access to courts enshrined in section 34 of the Constitution,[12] is in my view wholly appropriate in circumstances when one is dealing with conduct that may be described as contemptuous of the authority of the order issued by a court. It can only be described as unconscionable when a party seeks to invoke the authority and protection of this Court to assert and protect a right it has, but in the same breath is contemptuous of that very same authority in the manner in which it fails and refuses to honour and comply with the obligations issued in terms of a court order. The High Court, in *Di Bona*, supports the view that a court may refuse to hear a party until they have purged themselves of the contempt by coming to the following conclusion:

> "The consequences of the rule are that anyone who disobeys an order of [c]ourt is in contempt of [c]ourt and may be punished by arrest of his person and by committal to prison and, secondly, that no application to the [c]ourt by a person in contempt will be entertained until he or she has purged the contempt."[13]

[32] In his response to the question whether he had complied with the August Order, the applicant offered, through his counsel, an explanation from the Bar of the steps he had taken in furtherance of the order. No affidavit was filed by the applicant setting out the manner of compliance with the August Order and in any event the explanation offered from the Bar was the subject of contestation from the side of the respondent. The applicant's counsel submitted that the applicant paid R150 000, the minimum amount prescribed in the August Order. Counsel conceded that the applicant failed to honour the term that he "must make monthly payments in respect of the maintenance obligations and other expenses of the minor child in accordance with the order of the High Court". The applicant's counsel sought to postpone the hearing a second time to allow the applicant to depose to an affidavit explaining the non-compliance. The reason for non-compliance offered, advanced from counsel, was that the R150 000

[11] *Burchell v Burchell* [2005] ZAECHC 35 at para 35.

[12] Section 34 of the Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

[13] *Di Bona v Di Bona* 1993 (2) SA 682 (C) at 688F-G.

was more than the calculated amount of basic maintenance owing, and that the respondent had agreed to allow a portion of the R150 000 as a set off for the monthly payments owing since the August Order. Respondent's counsel disagreed that any agreement had been concluded.

[33] Notwithstanding the existence or otherwise of any agreement, this was not an adequate and proper reason for non-compliance with the August Order. Given the serious nature of the conduct that was conceded, it is hardly acceptable or appropriate for this Court to engage in speculation or an oral contestation from counsel in respect of such a significant issue. Further, considering the relief that the applicant was seeking, he should have proceeded with greater care in ensuring that he was in compliance with the August Order. As mentioned earlier, this matter does not deal with formal contempt proceedings and the requirement of purging related contempt. However, the principle need to preserve the integrity of justice is present here, and there is an undoubted need to assess whether conduct that could compromise that integrity is remedied.

[34] Under the circumstances and for the reasons given, I conclude that on what is before us, there is no evidence that the applicant had remedied his conduct. This conclusion then leads to the question as to whether the interests of justice are served by allowing the applicant to ventilate his argument in respect of the merits of the appeal.

[35] Those interests will not be best served and will be undermined if the applicant is allowed to proceed and deal with the merits of the appeal in the absence of him remedying his conduct by complying with the August Order. It will dilute the potency of the judicial authority and it will send a chilling message to litigants that orders of court may well be ignored with no consequence. At the same time, it will signal to those who are the beneficiaries of such orders that their interests may be secondary and that the value and certainty that a court order brings counts for little. For all these reasons, and in particular that the subject matter of this litigation involves the best

interests of the child, the interests of justice strongly militate against the applicant's pursuing his application. Proceeding with the hearing of this matter, where adequate compliance with the August Order, which sought to ensure payment of the basic maintenance for K, is in doubt, would create "[c]ontinued uncertainty . . . [which] cannot be in the interests of the child"[14] and does not further the interests of justice.

[36] This Court enjoys wide jurisdiction to hear matters involving a constitutional issue or where an issue is connected with a decision on a constitutional matter.[15] Notwithstanding the significance or otherwise nature of the constitutional issue raised, an overriding consideration must always remain whether the interests of justice dictate that a matter be heard.[16] Those interests are not confined to those of the applicant but extend and include all the parties before this Court as well as those of the public at large. Those interests, properly contextualised and considered, also stand against leave to appeal being granted.[17] This Court granting leave to appeal in this matter would clearly run counter to the interests of justice, given the cumulative effect of the applicant's failure to respect K's best interests by paying the basic maintenance and his continued failure to respect this Court's integrity by flouting the August Order.

Costs

[37] While it was submitted on behalf of the applicant that the Court should not make any order as to costs in the event of the application being dismissed, the principle in *Biowatch* should not apply.[18] This is precisely the kind of case that should invoke the exception to *Biowatch* for litigation that is "frivolous or vexatious, or in

[14] *Fraser v Naude* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 9.

[15] Section 167(3)(c) of the Constitution.

[16] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 29-30.

[17] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[18] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at paras 26-7 referencing *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) and *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd* [2006] ZACC 5; 2006 (6) SA 103 (CC), 2006 (6) BCLR 669 (CC).

any other way manifestly inappropriate".[19] In light of the totality of circumstances at the two hearings before this Court, and the applicant's wanton conduct, my view is that the litigation was "manifestly inappropriate". Given the applicant's conduct compromising K's best interests and this Court's integrity, his continued application can be viewed as "so unreasonable or out of line that it constitutes an abuse of process".[20] As this Court aptly stated in *Limpopo Legal Solutions*, "although *Biowatch* changed the costs landscape for constitutional litigants, it gives no free pass to cost-free, ill-considered, irresponsible litigation" and applicants "seeking to vindicate constitutional rights must respect court processes".[21] Accordingly, the applicant is directed to pay the respondent's costs in this Court for the application.

[38] What remains to be determined is the scale of such costs. Counsel for the respondent urged the Court to impose a punitive cost order as a measure and indication of its displeasure at the manner in which the applicant has conducted this litigation.

[39] In *Nel*, the High Court held the following in relation to punitive cost orders:

> "A costs order on an attorney and client scale is an extraordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation.
>
> As such, the order should not be granted lightly, as courts look upon such orders with disfavour and are loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have."[22] (References omitted.)

[19] *Biowatch* id at para 24.

[20] *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) at para 20.

[21] *Limpopo Legal Solutions v Eskom Holdings SOC Limited* [2017] ZACC 34 at para 41.

[22] *Nel v Davis SC N.O*. [2017] JOL 37849 (GP) at paras 25-6.

[40] The Labour Appeal Court, in *PCASA*, emphasised the view that punitive cost orders are "extraordinary" in nature and they will not be easily granted:

> "The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."[23]

[41] This is the kind of matter where a punitive order of costs would be justified. Neglecting to respect K's best interests and the failure to honour the August Order, that sought to ensure those interests are protected and preserve this Court's core integrity, is precisely the kind of "extraordinary" conduct worthy of a court's rebuke with punitive sanctions. Adding to those transgressions, the manner in which the applicant failed to apprise this Court of any efforts to remedy his conduct and sought to improperly admit oral evidence on these efforts from counsel, disregarding the appeal process and transforming the hearing into a factual inquiry – absent appropriate leave – is a further basis warranting punitive costs in this matter. The applicant must accordingly pay the costs of the respondent in this Court on an attorney and client scale. However, this cost order is applicable only to the proceedings that took place on 8 November 2017, the earlier cost order in respect of the August Order still stands.

A concluding observation

[42] This case involves, in the narrowest sense, a dispute about the payment of a maintenance obligation. There is little doubt that the payment of maintenance is an important factor in the ability of a custodian parent to provide for the needs and interests of a minor child. Those needs and interests are, however, best served when a child is able to enjoy the recognition of its parents and the love and care that is almost symptomatic of being a parent. When that is missing, one can only speculate about the manner in which it redounds on the wellbeing of a young child. It was, accordingly, with some dismay that this Court noted a request in October 2017 by the

[23] *Plastic Converters Association of South Africa (PCASA) obo Members v National Union of Metalworkers Union of South Africa* [2016] JOL 36301 (LAC) (*PCASA*) at para 46.

applicant to have the child undergo a paternity test. This coming some seven years after the divorce was finalised and following two paternity tests conducted by independent pathologists, which showed with 99.999994% certainty that the applicant is K's father, raises in the sharpest and most concerning of terms the attitude of the applicant towards the minor child rooted, as it appears to be, in a belief that the child is not his.

[43] Impressive as its powers are, no court can direct a parent to love and recognise a child, critical as that may be to the full development of a child. What we can do and are enjoined to do, is to point out that every child is deserving of the love and care that is necessary for their development and that the duty to provide that rests primarily on the parents of the child. We can only hope that in the young life of the minor child whose interest is the subject of this litigation, that that transpires in the fullness of time.

Order

[44] The following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the respondent's costs in this Court on an attorney and client scale, excluding costs relating to the 29 August 2017 postponement.

For the Applicant:	D Z Kela instructed by Ndumiso Voyi Inc
For the Respondent:	G T Avvakoumdies and T Mogale instructed by Snyman De Jager Inc Attorneys