IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 2471/2020

Date heard: 17 June 2021
Date delivered: 20 July 2021

In the matter between

EXPRESS PETROLEUM (PTY) LTD	**Applicant**
and	
ROPAX INVESTMENTS 10 (PTY) LTD	**First Respondent**
RIO RIDGE 1387 (PTY) LTD	**Second Respondent**
GRANT COTTERELL	**Third Respondent**
ADRIAN PRICE	**Fourth Respondent**
ISHMAEL NCHOLU	**Fifth Respondent**
NOMA MAGAGAMELA	**Sixth Respondent**

JUDGMENT

KRüGER AJ

[1] On 20 May 2021, I delivered judgment in an application brought by Express Petroleum (Pty) Ltd ('Express') to hold Ropax Investments 10 (Pty) Ltd, Rio Ridge 1387 ((Pty) Ltd, Grant Cotterell and Adrian Price ('the respondents')[1] in contempt of court for non-compliance with a court order granted 4 December 2020 by Nhlangulela DJP under case number 2471/2020. The order of Nhlangulela DJP required the respondents to source fuel exclusively from the applicants following an application to retain the *status quo ante* in compliance with the commercial agreement between the parties.

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[1] For the sake of convenience, I refer to the parties as 'Express' and 'the respondents'.

[2] I found the respondents to be in contempt of court and ordered them to purge their contempt within a specified period of time by making payments to Express on outstanding invoices. The order further permitted Express to re-enrol the matter on an urgent basis should the contempt not be purged, and to address pertinent points on re-enrolment. The respondents seek leave to appeal against this judgment to the full court, alternatively to the Supreme Court of Appeal. Counsel for both parties indicated that leave to the full court of this division would be appropriate.

[3] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal should be granted where the judge concerned is of the opinion that the appeal would have reasonable prospects of success, or that some other compelling reason exists that requires it to be heard.

[4] Mr *de la Harpe*, for the respondents, referred me to the unreported judgment of the Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhitha*[2] in which the court held that the standard required by section 17(1)(a) requires an applicant for leave to appeal to convince the court on proper grounds that reasonable prospects of success on appeal exist, or that it has a realistic chance to succeed on appeal, and that there is not merely a possibility of success.[3]

[5] Mr *Epstein,* for the applicant, referred me to *Mont Chevaux Trust v Goosen*[4] in which the Land Claims Court per Bertelsmann J held:

> 'It is clear that the threshold for granting leave to appeal against the judgment has been raised by the new act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion. The use of the word "would" in the new statute indicate a measure of certainty that another Court will differ from the court whose judgement is thought to be appealed against.'[5]

[6] The requirement that an applicant for leave to appeal has to show a measure of certainty that another court would find differently sets the bar high. Mr *de la*

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[2] (1221/2015) [2016] ZASCA 176 (25 November 2016).
[3] Paras 16-17.
[4] 2014 JDR 2325 (LCC).
[5] Para 6.

Harpe helpfully referred me to the judgment of Smith J in *Valley of Kings*[6] which, in my view, explains the standard required by an applicant for leave to appeal appropriately:

> 'It seems to me the contextual construction of the phrase reasonable prospect of success still requires of the judge whose judgment is sought to be appealed against to consider objectively and dispassionately whether they are reasonable prospects that another Court may well find merit in the arguments advanced by the losing party.'[7]

[7] The primary ground raised by the respondents in its application for leave to appeal concerns what it regards as an impermissible extension of the reach of the order granted by in Nlangulela DJP. This ground mirrors the submission of the respondents in the contempt application. That is, that the order of the court Nhlangulela DJP was unambiguous and clear, and that it simply required the respondents to source fuel from Express, and that they complied with the order. The absence of any ambiguity in the wording of the order, in the view of the respondents, meant that no extraneous information or evidence should have been considered in the interpretation of that court order. But for my extended, and in the respondent's view impermissible, interpretation of the court order of Nhlangulela DJP, no finding of contempt of court would have been competent. The respondents further questioned the finding that the third and fourth respondents were in contempt of court since the order of Nhlangulela DJP directed the first and second respondent to source fuel from Express exclusively.

[8] In interpreting the order of the court, I relied on *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[8] *Novartis v Maphil Trading (Pty) Ltd*[9] and particularly on *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd,*[10] to demonstrate that the precedent the respondents relied upon to limit the interpretation of a court order to the text of the executive part of the judgment

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[6] *Valley of the Kings Thaba Motswere (Pty) Ltd v Al Mayya International* 2016 JDR 2120 (ECG).
[7] Para 4. See also *S v Kruger* 2014 (1) SACR 647 (SCA) para 2 where the court expressed the view that a sound rational basis must exist for the conclusion that there are prospects of success on appeal.
[8] 2012 (4) SA 593 (SCA) paras 18-19 (references omitted). See also *Bothma-Batho Transport v Bothma & Seun Transport* 2014 2 SA 494 (SCA) paras 11-12; *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* 2012 JDR 1734 (SCA) para 15.
[9] 2016 (1) SA 518 (SCA).
[10] 2019 (3) SA 441 (SCA).

alone,[11] has evolved in line with the new approach to interpretation. Interpretation of any legal text requires the consideration of language and context in a unitary exercise.[12] This means that interpretation of the executive part of a judgment is not limited to grammatical meaning of the words used therein.

[9] Mr *Epstein*, in support of my interpretation of the court order, referred to the recent endorsement of the unitary contextualised approach to interpretation as set out in *Endumeni* by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary.*[13] While that matter concerned the interpretation of contractual terms, the highest court endorsed an approach to interpretation which considers the context and language together, and which does not limit the consideration of context only to instances where ambiguity arise.[14] Context is always relevant in determining the meaning of a legal text.

[10] Insofar as the unitary approach to interpretation of legal texts is concerned, I am not convinced that another court will find the approach to be lacking. In particular, I do not think that another court will find that ambiguity is required to trigger the consideration of context in the interpretation of a legal text, including a court order.

[11] But, an approach to interpretation and its application are distinguishable. Mr *de la Harpe* referred to my reliance on evidence provided in the contempt application in determining the scope of Nhlangulela DPJ's order as extending context to the impermissible.

[12] In *University of Johannesburg v Auckland Park Theological Seminary,* as in *Tshwane City v Blair Atholl Homeowners Association*[15] the highest courts explained that recourse to external evidence is not limitless. The judgment of a court leading to an order will certainly provide context for the interpretation of

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[11] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D-E; *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 716A-C.

[12] Paras 29-32 of my judgment.

[13] (CCT 70/20) [2021] ZACC 13 (11 June 2021).

[14] Paras 65-67.

[15] 2019 (3) SA 398 (SCA)

the order of court as in *Elan Boulevard.* It is not evident whether anything beyond the judgment should be taken into account in determining context.

[13] Given the above, I am of the view that it is reasonably possible that another court may find that I construed the context too generously in the interpretation of Nhlangulela DJP's order. In interpreting that order, I considered the purpose of the proceedings before Nhlangulela DJP and relied on evidence presented in the contempt application to determine the price the respondents were required to pay in terms of the court order. Further, as my finding that the respondents are in contempt of court depends on my interpretation of the court order, that finding should also be considered by the court of appeal, inclusive of the findings in relation to the third and fourth respondents being in contempt in the absence of the order of the court *a quo* placing particular obligations on them.

[14] Mr *de la Harpe* submitted that the part of my order limiting the right of access to court of the respondents in the event of them not purging their contempt had no basis in the papers or argument and should thus not have been included. While I took my guidance in determining this second-level safeguard (i.e. only to considered by the court hearing the matter on re-enrolment) to ensure compliance with the order from *Burchell v Burchell*[16] where Froneman J formulated a similar second-level safeguard, this was not canvassed in argument or requested by Express, and I accept that another court may regard the stipulation of second-order safeguard such as this inappropriate.

[15] I make the following order:

a. The respondents are granted leave to appeal to the full court of this division against my judgment dated 20 May 2021;
b. Costs of this application are to be costs in the appeal.

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16 *Burchell v Burchell* [2005] ZAECHC 35 (3 November 2005).

R KRüGER
ACTING JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant: Adv *Epstein* SC
Instructed by: Fairbridges Wertheim Becker c/o Neville Borman & Botha, Mr Powers

Appearing on behalf of the Respondents: Adv *de la Harpe* SC and Adv *Watt*
Instructed by: Sharp Crisp Inc c/o Netteltons, Mr Nettelton