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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 24555/2016**

- (1) REPORTABLE: **NO**  
(2) OF INTEREST TO OTHER JUDGES: **YES**  
(3) REVISED.

27 September 2016

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DATE

SIGNATURE

In the matter between:

**G, A. C.**

Applicant

And

**G, D. M.**

Respondent

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**JUDGMENT- LEAVE TO APPEAL**

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**SPILG, J:**

**INTRODUCTION**

1. The parties will be referred to as per the original application.

2. The applicant sued the respondent for divorce in 2013. The trial was postponed last year and the applicant is therefore still obliged to rely on the interim orders granted for maintenance in respect of the two minor children and her until the trial proceeds. The prevailing order is a Rule 43 variation granted by my brother Meyer J on 13 August 2015 (there is a typographical error in my judgment recording the year as 2016).
3. In the meantime the respondent has attempted, so far unsuccessfully, to vary that order before the maintenance court while failing to pay the maintenance as ordered and in respect of which he remains substantially in arrears.

The respondent does not seriously dispute that he is in arrears but contends that his circumstances have changed. Before Carstensen AJ he claimed to be earning R 1 779.71 per month while before me *Adv Garvey* said from the Bar that his client now earns no income because he cannot do even a day's work by reason of being brought regularly before the courts by the applicant; a contention which on its mere raising can be rejected having regard to the respondent still maintaining his business interests or not disclosing that he has disposed of any and if so for what amount.

4. In the judgment I dealt with how the respondent has played the judicial system inter alia to the prejudice of the minor children.
5. The issue was whether or not the respondent had paid the maintenance in terms of Meyer J's order and if not whether it could be proven beyond a reasonable doubt that he was in contempt of court.
6. Aside from contending that Meyer J got it wrong in dealing with the applicant's income (which is irrelevant with regard to the respondent's ability to pay) he pleaded poverty post that judgment.
7. I rejected his pleas of poverty on the papers before me (see at paras 25 to 27 and 29). I also alluded to the judgment of Carstensen AJ which accurately recorded the respondent's version or what was not disputed by him and quoted the learned judges conclusion which I fully endorsed by reason of

what was before me or what the parties referred me to in other sets of papers between the same parties and which was not objected to.

8. The respondent was represented by counsel who was fully alive to the possible sanction, as it was specifically asked for. Moreover Carstensen AJ had already committed him to imprisonment for contempt of court if he failed to make payment.
9. In the present case it was for the respondent to suggest a sanction other than the one requested since he deliberately failed to respect the orders previously made, challenged every attachment made and a fine appeared pointless considering the access he clearly has to substantial funds while still refusing to pay amounts, as demonstrated before me during the previous hearings, such as the school fees when due and despite the threat of suspension of tuition, subsequent maintenance when it fell due and medical fees.

## **GROUND OF APPEAL**

10. I have set the foregoing out in the introduction since some of the grounds for leave to appeal appear to rely on the process I allegedly applied to reach my decision including a claim that the respondent was not afforded an opportunity to deal separately with the appropriate sanction once I had found him to be in contempt.
11. A separate hearing was required in *Lin and Another v Cathay Pacific Airways Ltd and Another*, 2015 (4) SA 197 (GJ) and [2016] 1 All SA 543 (GJ) because there was not enough before me to make an informed decision regarding an appropriate sanction. This is clear from the information I required.
12. In the present case the respondent has persisted with the untruthful assertion that he had no access to funds despite failing to give any acceptable explanation as to what happened to his business interests and the substantial funds that had been in a current account less than a year earlier. I had regard

*inter alia* to his ability to access funds, the interests of the children and the applicant with regard to their respective rights to receive maintenance and in particular the consequences to the children, as well as the interests of society to ensure that court orders are respected unless varied. I also had regard to his ability to frustrate the ordinary processes of execution attempted by the applicant so far with limited success and at considerable inconvenience including having to contest inter-pleader proceedings. In the meantime the respondent litigates at leisure paying attorneys and counsel to contest court orders through to appeal stage while claiming that he has no income to maintain his own children. This should be evident from the judgment.

13. The respondent was not deprived of his right to deal with an appropriate sanction. His counsel is not a novice and expressly confirmed to a direct question asked by the court that his client understood that the applicant was seeking to hold him in contempt. The failure to suggest any sanction other than paying under pain of incarceration, without an explanation indicates that the respondent understood that there was none to offer without exposing himself to suggesting the payment of a sum of money as a fine which would run counter to the line he decided to take with the court that he had no money and was effectively living on handouts .
14. The respondent has a simple option. He can pay the R30 000 arrears within the time and thus avoid a custodial sentence. It is evident from the facts that were placed before me and the submissions made, reinforced by the judgment of Carstensen AJ that the respondent is using the withholding of maintenance as a weapon and I am concerned that, unless explained on some unresolved personal issues he has with the applicant, the respondent is attempting to wear her down so that she will submit to an unreasonable settlement.
15. If in so doing he wished to jeopardise the rights of his children to maintenance under his duty of support, then so be it. But it comes at a consequence. He has a straight forward decision to make. Pay with funds that are clearly accessible to him or face imprisonment. It is his election.

16. The application for leave to appeal is a further instance of the respondent abusing the judicial system and had the applicant been legally represented I would have considered granting a punitive order for costs.

17. Save for certain earlier observations which may not appear ex facie my judgment, I am satisfied on reading the lengthy grounds raised for leave to appeal and re-reading my judgment that that an appeal would not have reasonable prospects of success and no other ground for appealing the decision exists.

## ORDER

18. Since the applicant is unrepresented there is no cost order.

19. The application for leave to appeal is dismissed.

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SPILG J

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DATE OF HEARING: 26 September 2016

DATE OF JUDGEMENT: 27 September 2016

LEAGL REPRESENTATION:

FOR APPLICANT: In person

FOR RESPONDENT: Adv CB Garvey

Masilo Freidmond Inc