THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-Reportable

Case no: 285/2018

In the matter between:

NEVILLE CHARLES COOPER **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Cooper v The State* (285/2018) [2019] ZASCA 50 (1 April 2019)

Bench: Tshiqi, Saldulker, Dambuza and Mocumie JJA and Mokgohloa AJA

Heard: 13 March 2019

Delivered: 1 April 2019

Summary: Criminal Procedure – appeal against convictions and sentence – leave to appeal refused by magistrate – petition refused by the court a quo – the test is whether the

appellant has shown reasonable prospect of success on appeal against the convictions and sentence.

ORDER

On appeal from: Western Cape Local Division, Cape Town (Dlodlo J and Thulare AJ sitting as court of appeal):

1 The appeal is upheld to the extent reflected herein below:

2 The order of the high court dismissing the applicant's petition for leave to appeal against count 1 is set aside and substituted with the following order:

'The applicant is granted leave to appeal to the Western Cape Division of the High Court, Cape Town against his conviction in respect of count 1 and the sentence imposed in the Magistrate's Court, Cape Town.'

JUDGMENT

Mocumie JA (Tshiqi, Saldulker and Dambuza JJA and Mokgohloa AJA concurring):

[1] This is an appeal against the refusal of a petition for leave to appeal by the Western Cape High Court, Cape Town, (Dlodlo J and Thulare AJ) (high court). The applicant, Mr N C, was charged in the Magistrates Court, Cape Town with two counts of contempt of court. It was alleged that he contravened ss 305(1)*(q)* and *3*95(6) of the Children's Act, 38 of 2005 (the Children's Act): Count 1 related to the contravention of the Children's Court order during the period between 21 November 2014 and 15 April 2015. In count 2, it was alleged that he contravened the Children's Court order from 16 April 2015. On 21 November 2014 he was found guilty on both counts. The two counts

were taken as one for purposes of sentence and he was sentenced to 'undergo a period of periodical imprisonment, for a period of one (1) year periodical imprisonment to be served from 17h00 on every Friday until 6h00 on Monday thereafter.' Subsequently, the magistrate referred the matter to the high court for special review in terms of s 304(2)*(a)* of the Criminal Procedure Act, 51 of 1977 (the CPA), on the basis that he had erred in not imposing a periodical imprisonment sentence. The high court reviewed the sentence and altered it in terms of s 304(2)*(c)*(ii) of the CPA. It ordered the appellant 'to serve a periodical imprisonment for a cumulative period of 2000 (two thousand) hours'. The applicant, aggrieved by this, sought leave to appeal against both convictions and sentence. The magistrates' court dismissed his application for leave to appeal. He then petitioned the high court for leave to appeal against the conviction and sentence. His petition was refused. This court subsequently granted special leave to appeal, to this court, against the refusal by the High Court.

[2] The factual background to this matter is summarily as follows. The complainant and the applicant (the parties) were in a love relationship. Out of the relationship one child was born. In August 2014 the complainant moved to Melkbosstrand. When the child was five years old, a dispute arose between the parties regarding which school the child should attend. The dispute was referred to a facilitator. On 3 November 2014 the facilitator issued a directive that the child should attend at Melkbosstrand Private School. It was accepted by both parties that the directive was binding on them. On 14 December 2012, a parenting plan concluded between the parties was made an order of the court.

[3] On 21 November 2014 the Children's Court issued an interim order in the following terms:

'In terms of ss 48 (1) (a) read with ss 7;45(1) (d) and (k) Act 38/2005 it is hereby ordered that the father of the child, Mr N C must pay any additional amount over and above the current school fee amount of R1700,00 for the enrolment; registration; development and user fees; actual school fees and after care fees (up to 18h00) to ensure the enrolment of the child at Melkbosstrand Private School immediately upon the above fees becoming payable and to continue doing so until/in lieu of any of the following eventualities:

- A Maintenance court order
- An agreement in terms of s 72 of Act 38/2005;
- A variation of the Parenting Plan- dated 14/12/2012 in terms of s 34(5) Act 38/2005 or the review of this order on 17/04/2015.'

This meant that the appellant had until 17 April 2015 to anticipate the return date. He could, if he so wished and was advised, bring any application if not satisfied with any part of this order. He did not do anything.

[4] In order to succeed in an application for special leave to appeal against the convictions and sentence, the appellant has to show that there is a reasonable prospect of success on appeal against the convictions and sentence.[1] In order for the appellant to be found in contempt of court of the two counts it was incumbent on the State to prove beyond reasonable doubt three requisites, namely (a) the order; (b) service or notice on the accused; and (c) non-compliance by the accused. As the Constitutional Court held in *Fakie NO v CCII Systems*:[2]

'[O]nce the applicant has proved the order, service or notice and non-compliance, the respondent bears the evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.'

[5] For the reasons that follow, leave to appeal must be granted in respect of count 1 and must fail in respect of Count 2.

Count 1

On 25 November 2014 the applicant filed a notice of appeal seeking to appeal the order of 21 November 2014. On 8 April 2015 the applicant's attorneys wrote to the magistrate of the Children's Court notifying him that the applicant did not intend to proceed with the appeal, but had instead brought an application to the Western Cape High Court to have the directive of the facilitator set aside. On 15 April 2015, the children's court made an

[1] *Mdluli v S* [2015] ZASCA 178 para 3.
[2] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 42.See also *Pheko & others v Ekurhuleni Metropolitan Municipality* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) para 32 and 36. (See *S v Smith* 2012 (1) SACR 567 (SCA) para 7, quoted with approval, in *Famanda v S* [2018] ZASCA 139 para 4.)

order suspending its order dated 21 November 2014. On 22 June 2015 that application was dismissed by the high court. On 16 July 2015 the Children's court reinstated the order of 21 November 2014. As the above sequence shows, that order was suspended for the period 21 November 2014 until 8 April 2015 when the applicant withdrew the notice of appeal. It was again suspended by the order of the Children's Court on15 April 2015. Although the purported appeal and the review processes were ill-advised and lacked merit, it is not disputed that the applicant had acted on the advice of his legal representative. It can thus not be concluded that the requisite malice was proved. During argument in the hearing before this court, counsel for the State was constrained to concede this point.

Count 2

In respect of count 2, the argument was that because the appellant was ordered on 16 July 2015 to comply with the court order by 17 July 2015, it was impossible to do so within a day. This argument does not assist the applicant. He did not ask for time to comply with the order albeit at a later stage. Instead, on 3 September 2015 he wrote an e-mail to the complainant stating that 'this place [referring to the school] is so bad and I won't allow C to attend such an inferior place of education.' During argument his counsel conceded that this email, coupled with his subsequent conduct after the 16 July 2015, clearly showed that he was not prepared to comply with the court order. The fact that he visited the school and filled in the forms was not enough to cover what the children's court termed 'do everything' to comply with the order.

[6] It is also significant that the applicant's default was not occasioned by lack of affordability. What the applicant wanted was for the child to attend a private school of his choice, Parklands Private School, which was closer to his home. He gave no due regard to the fact that this school was far from the complainant who was the primary care giver of the minor child. He was therefore wilful and mala fide with regards to the order of the Childrens' Court. There are thus no reasonable prospects of success that another court will come to a different conclusion regarding count 2.

Sentence

[7] As leave has been granted only in respect of count 1, it is prudent to grant leave to appeal against sentence as well; to enable the high court to determine what an appropriate sentence should be.

[8] In the result, the following order is granted.

1 The appeal is upheld to the extent reflected herein below:

2 The order of the high court dismissing the applicant's petition for leave to appeal against count 1 is set aside and substituted with the following order:

'The applicant is granted leave to appeal to the Western Cape Division of the High Court, Cape Town against his conviction in respect of count 1 and the sentence imposed in the Magistrate's Court, Cape Town.'

_____

B C Mocumie

Judge of Appeal

APPEARANCES

For Appellant:	M A Ipser
	Instructed by: Arnold & Associates, Cape Town Symington & de Kok Attorneys, Bloemfontein
For Respondent:	M O Julius
	Instructed by: The Director of Public Prosecutions, Cape Town The Director of Public Prosecutions, Bloemfontein