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

CASE NO: 2022/482
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
30 May 2022

In the application for leave to appeal by -

M [....]1 J[....] B[....] Applicant

and

M [....]2 M[....]3 G[....] C[....] Respondent

In re the matter between:

M [....]2 M[....]3 G[....] C[....] Applicant

and

M [....]1 J[....] B[....] Respondent

JUDGMENT

MOORCROFT AJ:

Order

[1] This is an application for leave to appeal. I make the following order:

1. The application for leave to appeal is dismissed;

2. The applicant for leave to appeal is ordered to pay the costs of the application.

[2] The reasons for the order follow below.

Introduction

[3] The application for leave to appeal arises out of an order I made on 20 April 2022 after hearing argument in the Urgent Court that day. I handed down a written judgment with reasons for the order on 28 April 2022.

[4] The applicant for leave to appeal was the respondent in the application. For the sake of clarity I refer to the parties as they were referred to in the main application, i.e. to the applicant for leave to appeal as the respondent and to the respondent in this application as the applicant.

[5] The order sought to be appealed reads as follows:

> 1. The Applicant is entitled to enter, occupy and reside in the property situated at [....] B [....] Road, Glen Austin, Midrand ("the former matrimonial home").
>
> 2. The Respondent is not to prevent the Applicant from entering, occupying and/or residing in the former matrimonial home.
>
> 3. Claire O'Mahony ("O'Mahony") is appointed to investigate and provide a report setting out her findings and recommendations regarding the Applicant and Respondent's exercise of their respective parental responsibilities and rights in respect of the minor children.
>
> 4. The Respondent is directed to cooperate with O'Mahony, to the full extent required by O'Mahony, including but not limited to, attendance at interviews and assessments with O'Mahony, individually and/or with the

minor children and/or with the Applicant as O'Mahony may, during the course of her investigation, require.

5. The Respondent's consent for the children to be interviewed, assessed and evaluated for the purposes set out in paragraph 4 above is dispensed with insofar as same is required by O'Mahony.

6. The Applicant and the Respondent shall be liable for the fees charged by O'Mahony in equal shares, which fees shall be paid by each party directly to O'Mahony.

7. In the interim, pending finalisation of the assessment by O'Mahony and a further approach to this Honourable Court or agreement between the Applicant and the Respondent:

7.1. The children shall reside with the Applicant and the Respondent at the former matrimonial home;

7.2. Subject to the children's educational, extramural and social activities, the Applicant and the Respondent shall equally share the responsibility and right to primarily care for and have contact with the children on a weekly rotational basis such that:

7.2.1. Each party primarily cares for and has contact with the children every alternate week from a Sunday afternoon at 18:00 until the following Sunday afternoon at 18:00;

7.2.2. The party whose responsibility and right it is to primarily care for and have contact with the children in any particular week shall exercise contact with the children in the former matrimonial home or anywhere else;

7.2.3. The party whose responsibility and right it is to primarily care for and have contact with the children in any particular week shall ensure that the children are taken to and collected from

school and/or extramural activities and/or social activities on a daily basis; and

7.2.4. Any other contact agreed to between the Applicant and the Respondent.

8. The Respondent pay the costs of this application, on an attorney and client scale.

[6] The respondent was not represented when the application was heard in the urgent court. He is now again represented by his former attorneys who had been involved in events leading up to the urgent application, and senior counsel was briefed to argue the application for leave to appeal.

The applicable principles in an application for leave to appeal

[7] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused.

[8] In *KwaZulu-Natal Law Society v Sharma*[1] Van Zyl J held that the test enunciated in *S v Smith*[2] still holds good:

> *"In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

1 [2017] JOL 37724 (KZP) para 29.
2 2012 (1) SACR 567 (SCA) para 7.

[9] In an *obiter dictum* the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*[3] held that the test for leave to appeal is more stringent under the Superior Courts Act of 2013 than it was under the repealed Supreme Court Act, 59 of 1959. The sentiment in *Mont Chevaux Trust* was echoed by Shongwe JA in the Supreme Court of Appeal in *S v Notshokovu*.[4]

The grounds of appeal:

First ground: The Court ignored the best interest of the children by ordering that the parties can live together in the same house

[10] The settlement agreement in the divorce action provided for the parties to live together on a temporary basis, and both parties agreed to the arrangement in the best interests of their children.

[11] There would appear to be no reason why both parties should not again place the interests of their children first and it was not suggested in argument that either of them would act in a manner to prejudice their children. When the matter was initially argued the respondent understood that the rights of the children must be given preference and there is no reason to suggest that he would not do so now.

Second ground: The Court erred in not finding that the respondent had forfeited the right to live in the matrimonial home by vacating it

[12] The parties had entered into a nesting arrangement after the divorce in terms of which they both stayed at the matrimonial home, either together or during alternate weeks.

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3 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6.

4 [2016] ZASCA 112 para 2. See also Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5; *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26.

[13] The applicant had not given up the right given to her in the settlement agreement that was made an order of court, to also reside at the home. She never voluntarily vacated the home.

Third ground: The Court failed to analyse the existing court order and incorrectly amended the order

[14] It was foreseen in the settlement agreement entered into by the parties that amendments might be required from time to time, either by agreement or by order of a court. Children grow older and circumstances change, and it is unavoidable that an arrangement that is suitable for a child at present might no longer be appropriate when the child is five or ten years older.

[15] The order did not bring about fundamental changes to the parties' access to the minor children.

Fourth ground: The Court erred in appointing Ms O'Mahony under circumstances where the respondent indicated that he could not afford the costs

[16] The respondent contended that the function of Ms O'Mahony should be fulfilled by the Family Advocate. There are sound reasons as set out in the judgement as to why it was in the best interests of the children that Ms O' Mahony carry out investigations. It is also provided for and foreseen in clause 7 of the settlement agreement that it might be necessary for the Court to appoint someone to this role.

[17] It is in the best interest of the children to do so and their interests must be paramount.

Fifth ground: The Court erred in amending the terms of contact between the respondent and the children without regard for the children's best interests

[18] The judgment in respect of which leave to appeal is being sought was based on the best interests of the children as it appeared from the papers. The respondent

was unable to point out aspects of the order that neglected the best interests of the children.

Conclusion

[19] I am of the view that there are no reasonable prospects of success and I make the order set out in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **30 May 2022**

COUNSEL FOR THE APPLICANT FOR LEAVE TO APPEAL:	H KNOPP SC
INSTRUCTED BY:	MICHAEL KRAWITZ & CO
COUNSEL FOR THE RESPONDENT IN APPLICATION FOR LEAVE TO APPEAL:	Ms S LIEBENBERG
INSTRUCTED BY:	CLARKS ATTORNEYS
DATE OF THE HEARING:	17 May 2022
DATE OF JUDGMENT:	30 May 2022