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

CASE NO: 2328/1993

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

REVISED: **Yes**

14th October 2022

In the matter between:

M [....], J [....] P [....]

Applicant

and

B [....] (previously M [....]), M [....] 1 A [....]

First Respondent

**THE SHERIFF OF THE COURT,
RANDBURG SOUTHWEST**

Second Respondent

Heard: 14 October 2022 – The ‘virtual hearing’ of this opposed application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 14 October 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 14 October 2022.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal refused.

ORDER

- (1) The applicant's application for leave to appeal is dismissed with costs.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original application for the setting aside of a warrant of execution against the property of the applicant. The applicant is the applicant in this application for leave to appeal and the respondent herein was the first respondent in the said application. The applicant applies for leave to appeal against the judgment and the order, as well as the reasons therefor, which I granted on 22 August 2022, in terms of which I had dismissed, with costs, the applicant's application to have set aside a writ issued against his property for alleged arrear maintenance in terms of a divorce order.

[2]. The application for leave to appeal is mainly against my factual finding that the applicant, in his founding affidavit, did not genuinely and *bona fide* dispute his indebtedness to the first respondent nor the quantum thereof. If regard is had to his version as set out in the founding affidavit, so the applicant contends, it is evident that he manifestly disputes the amount claimed by the first respondent. In my view, this submission misses the point – that being that the first respondent set out in detail how she arrived at the amount claimed and confirmed that the documentary evidence in support of the details of the calculations are available for inspection and

the applicant's response is one of a denial without any engagement with the amounts. How can this translate into a genuine and a *bona fide* dispute, I ask rhetorically.

[3]. The applicant also contends that the court *a quo* erred in finding that he does not dispute that he did not contribute towards the costs of tertiary education of their daughter. I should have found, so the applicant argues, that because their minor daughter, on reaching the age of majority during 2010, told him that 'she wanted nothing to do with him', that the applicant in fact disputed his liability for payment of such tertiary education fees. In any event, so the argument continues, the aforesaid constituted an express waiver of the right to maintenance in relation to the now major child, which in itself constitutes a valid defence to at least a portion of the first respondent's claim.

[4]. Nothing new has been raised by the applicant in this application for leave to appeal. In my original judgment, I have dealt with most of the issues raised and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that, in my view, the applicant's attempt to play 'cat-and-mouse' and to 'kick up enough dust' so as to cloud the issues and draw attention away from the fact *inter alia* that he was liable to pay arrear maintenance, should not be countenanced.

[5]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success'.

[6]. In *Ramakatsa and Others v African National Congress and Another*¹, the SCA held that the test of reasonable prospects of success postulates a dispassionate decision, based on the facts and the law that a court of appeal 'could' reasonably

¹ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

arrive at a conclusion different to that of the trial court. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[7]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. 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.’

[8]. In *Mont Chevaux Trust v Tina Goosen*², the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*³. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v*

² *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

³ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

*Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁴.

[9]. I am not persuaded that the issues raised by the applicant in his application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are no reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeal therefore, in my view, does not have a reasonable prospect of success.

[10]. Leave to appeal should therefore be refused.

Order

[11]. In the circumstances, the following order is made:

- (1) The applicant's application for leave to appeal is dismissed with costs.

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

⁴ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

HEARD ON: 14th October 2022 as a videoconference on
Microsoft Teams

JUDGMENT DATE: 14th October 2022 – handed down electronically

FOR THE APPLICANT: Advocate Ian L Posthumus

INSTRUCTED BY: JNS Attorneys, Randburg

FOR THE FIRST RESPONDENT: Advocate R G Cohen

INSTRUCTED BY: Glynnis Cohen Attorneys,
Emmarentia, Johannesburg

FOR THE SECOND RESPONDENT: No appearance

INSTRUCTED BY: No appearance