

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

- | | |
|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: ✓ |

Date: **4th August 2023** Signature: _____

CASE NO: 015642/2022

DATE: 4th August 2023

In the matter between:

D, T L

Applicant

and

G, B

Respondent

Neutral Citation: *D, TE v G, B (015642/2022) [2023] ZAGPJHC ---* (04 August 2023)

Heard: 03 August 2023

Delivered: 04 August 2023 – 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 10:00 on 04 August 2023.

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 respondent's application for leave to appeal is dismissed with costs.
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JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original application by the applicant against the respondent for relief relating to parental responsibilities and rights in respect of their eight-year-old boy. The respondent is the applicant in this application for leave to appeal and the respondent herein was the applicant in the said application. The respondent applies for leave to appeal against paragraphs [30] (2) (a), (b), (c), (d), (e), (f), (h), (j) and (3) of the order, which I granted on 13 July 2023. In order to get an understanding of the application for leave to appeal, it may be apposite to cite in full the said order, which reads in the relevant part as follows: -

'(2) Pending the finalisation of the action instituted in this Court under case number: 015642/2022,

- (a) Save for paragraphs 37, 37.1, 37.3, 42, 44, 45, 46, 47, 48 and 49, the order granted by Moosa J on the 5th of June 2020 under case number: 28072/2016 be and is hereby suspended with immediate effect.
- (b) The applicant is awarded full parental responsibilities and rights in respect of the minor child, [M] ("the minor child").
- (c) Primary residence of the minor child shall vest with the applicant.
- (d) The respondent is granted specific parental responsibilities and rights only.
- (e) The minor child shall not have any contact with the respondent for a period of three months from date of this order and while the minor child is undergoing the therapy process outlined below.
- (f) Upon the expiration of the three-month period referred to in subparagraph (e) of this order, the minor child may have contact with the respondent on a supervised basis for two hours twice a week and two hours on the weekend.

- (g) Once the treating psychologist confirms that the minor child is ready, the respondent may be reintroduced into the minor child's life under controlled and monitored conditions and safeguards in place to prevent a repeat of the past years of conflict and alienation.
- (h) The contact referred to in subparagraph (e) above, shall be supervised by a suitably qualified social worker, which social worker shall be nominated by the Chairperson for the time-being of the Gauteng Family Law Forum. The respondent shall make payment of all costs associated with the appointment of and supervision by the social worker.
- (3) The respondent shall pay the costs of this application and the costs of his counter application.'

[2]. The application for leave to appeal is against my factual findings and legal conclusions. It is contended by the respondent that I erred and misdirected myself 'in making final orders which have extreme, fundamental and immediate consequences and effect on the interests of a minor child without first subjecting the various versions averred to by the parties and advanced by the *Curator ad Litem* to oral evidence'. In doing so, so the respondent further argues, I did not have proper regard for the minor child's best interests. As for the legal conclusions reached by me, it is the respondent's case that there are conflicting decisions concerning the notion of 'parental alienation syndrome' and the appropriate and proper intervention that may be undertaken by a court considering the best interests of a minor child allegedly subject to the syndrome.

[3]. It is furthermore contended on behalf of the respondent that the court *quo* did not adequately and properly consider the complex history of the matter and all the circumstances which gave rise to the application and the counter application which were relevant to its determination.

[4]. There are further grounds on which the respondent's application for leave to appeal is based, it is however not necessary for me to detail those in full in this judgment. One such further ground which does however require special mention is the averment by the respondent that I erred in finding that the respondent's counter application was purposed to seek an order, which would have restarted the whole process as was commenced by this court previously. The purpose of the counter-application, so the respondent submits, was in fact purposed to ensure the proper verification of the findings and recommendations of the psychologist, Mr Carr, with a view to avoiding prejudice to the minor child.

Importantly, the respondent contends that the Court *a quo* erred by accepting, without more, the expert opinion of Mr Carr.

[5]. Nothing new has been raised by the respondent in this application for leave to appeal. In my original judgment, I have dealt with most, if not all of the issues raised by the respondent in this application for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I said in my judgment, namely that very little, if any, purpose would be served by a so-called ‘critique report’ in relation to the report by Mr Carr, whose expert opinion, in my view, is well-reasoned and based on sound premises.

[6]. 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’.

[7]. 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 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.

[8]. 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

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

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.'

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

[10]. I am not persuaded that the issues raised by the respondent 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.

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).

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).

[11]. There is, in my view, another reason why the respondent's application for leave to appeal should not succeed and that relates to the fact that the judgment and the order I granted on 13 July 2023 is not appealable.

[12]. As was held by the Supreme Court of Appeal in *Zweni v Minister of Law and Order of the Republic of South Africa*⁵, for a judgment or an order to be appealable the following requirements must be complied with: (a) The decision must be final in effect and cannot be altered by the court of first instance; (b) It is definitive of the rights of the parties; and (c) It has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[13]. Put another way, as was said in *Jacobs v Baumann NO*⁶, the test for appealability is to say that an order will be appealable when it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'. Moreover, as was more recently held by the SCA in *Nova Property Group Holdings Ltd v Cobbett*⁷, in deciding whether a decision is appealable, the interests of justice are of paramount importance.

[14]. The order which the respondent seeks to have taken on appeal does not comply with any of these criteria. The said order is not appealable as, by any stretch, it is not final in effect – all it does is to suspend, for a period of three months, the respondent's contact with the minor child. Moreover, the relief that was sought in the original application is not what the trial court will ultimately be called upon to determine and that is whether the order granted by Moosa AJ, namely shared residency and joint decision-making, should prevail.

[15]. Therefore, and howsoever one views this matter, my order of 13 July 2023 is not final in effect and same is accordingly not appealable.

[16]. For all of these reasons, the respondent's application for leave to appeal should therefore be refused.

⁵ *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A);

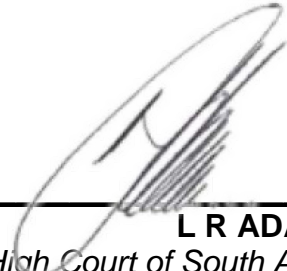
⁶ *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA);

⁷ *Nova Property Group Holdings Ltd v Cobbett* 2016 (4) SA 317 (SCA) at 323B – D;

Order

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

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



L R ADAMS

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

HEARD ON:	3 rd August 2023
JUDGMENT DATE:	4 th August 2023
FOR THE APPLICANT:	Advocate F Bezuidenhout
INSTRUCTED BY:	Etienne Cloete Attorneys, Southdale, Johannesburg.
FOR THE RESPONDENT:	Advocate R Rosenberg SC
INSTRUCTED BY:	Cuthbertson & Palmeira Attorneys Inc, Sandton
<i>CURATOR AD LITEM</i> FOR THE MINOR CHILD:	Advocate M L Haskins SC
