

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case Number: 22730/2017**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO

.....

**E.M. KUBUSHI**

**DATE: 02-08- 2021**

In the matter between:

**M[....] D J**

**APPLICANT**

and

**M[....] L**

**RESPONDENT**

---

**JUDGMENT: LEAVE TO APPEAL**

---

**KUBUSHI J**

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 02 August 2021.

[1] The applicant (respondent/plaintiff in the main action) has made application for leave to appeal against the whole order, including costs, handed down on 15 June 2021, under the above case number. The application is opposed.

[2] The application is determined on the papers filed on Caselines without oral hearing as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

[3] The applicant has approached the court for leave to appeal in terms of section 17 (1) (a) (i) and (ii) of the Superior Courts Act 10 of 2013. The section provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be granted, including conflicting judgments on the matter under consideration.

[4] From the case law dealing with the interpretation of the section as regards the test employed for determining whether leave to appeal should be granted, it is evident that the threshold has been raised. The use of the word “would” in the section has been held to denote a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. In terms of the section, that there are reasonable prospects of success, should be in the opinion of the judge(s) whose judgment is sought to be appealed. The applicant in the application for leave to appeal must, as a result, convince the judge(s) involved that there are reasonable prospects of success on appeal.

[5] The gravamen of the applicant’s contention is that the court erred in making an Order wherein the applicant’s entire claim is dismissed, therefore, including all three alternative claims as set out in the amended particulars of claim, without providing the applicant an opportunity to amend such particulars of claim.

[6] The question, therefore, is whether another court on consideration of the matter, might find for the applicant. Put differently, the question is whether another court might provide the applicant an opportunity to amend the particulars of claim.

[7] In the judgment sought to be appealed, the issue of an exception against the applicant's amended particulars of claim, wherein the applicant had pleaded three claims in the alternative, was considered.

[8] The respondent (the excipient in the main action) had excepted to the amended particulars of claim of the applicant on two grounds, namely:

8.1 That the applicant (as a *curator bonis*) "*lacks the necessary locus standi*" to institute divorce proceedings on behalf of the patient, owing to the nature of the proceedings being too personal in nature, with reference to the Court Order dated 29 June 2016 (herein referred to as the "Court Order").

8.2 That the order which purportedly appointed the applicant as the patient's *curator bonis*, has not been complied with, as "*no averment*" is made in the amended particulars of claim that the applicant obtained the necessary approval of the Master of the High Court ("the Master"), to institute action.

[9] It was found in respect of the first ground that the Court Order stands, granting the applicant the necessary *locus standi*. The applicant agrees with this finding and does not seek to appeal it.

[10] The submission, however, is that the court erred in upholding the exception based on the second ground, namely that "*no averment*" has been made in respect of the Master's approval, and that the '*absence of the allegation of this essential element . . . renders the particulars of claim excipiable*'. The contention is that the exception based on the Master's apparent lack of approval should not have been upheld as same should have been allowed to be dealt with in evidence by the trial court.

[11] The applicant's contention, in this regard, is that the court erred in accepting as fact that the applicant lacked the necessary approval to have instituted the action, because an allegation of this nature does not go to the cause of action, but relates to the *facta probantia*, in establishing compliance with the Court Order, which if evidence was led at the hearing of the trial, could have rendered the respondent's contentions moot.

[12] On consideration of the grounds of appeal raised by the applicant in the application for leave to appeal and the arguments for and against such application by all the parties as set out in their respective heads of argument,

I am of the opinion that leave to appeal ought to be granted only in respect of the second ground of exception, that is, on the basis that another court might come to a different conclusion.

[13] Leave to appeal should, also, be granted in respect of the order for costs since it was granted on the basis of both grounds of exception being upheld.

[14] In the circumstances I make the following order:

1. Leave to appeal is granted to the Full Court of this Division only in respect of the second ground of exception relating to the issue of the consent of the Master of the High Court and the cost order.
2. Costs are costs in the appeal.

---

**E.M KUBUSHI**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

Appearance:

Applicant's Counsel	: <b>ADV RIANI FERREIRA</b>
Applicant's Attorneys	: <b>LOOTS BASSON INC</b>

Respondents' Counsel	: <b>ADV D BLOCK</b>
Respondents' Attorneys	: STRAUSS DALY INC
Date of hearing	: 12 July 2021
Date of judgment	: 02 August 2021