



**IN THE HIGH COURT OF SOUTH AFRICA  
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

**CASE NO. 603/2009**

**In the matter between**

**MATSHIDISO JEANETTE TLHOLE**

**APPLICANT/DEFENDANT**

**Versus**

**JAMES KGOSIETSILE TLHOLE**

**RESPONDENT/PLAINTIFF**

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**CORAM: NAIDOO J**

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**HEARD ON: Heads of Argument filed 26 November and 2  
December 2021**

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**DELIVERED ON: 6 DECEMBER 2021**

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**JUDGMENT – LEAVE TO APPEAL**

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- [1] This is an application by the respondents for Leave to Appeal against the whole of the judgment of my colleague M Voges AJ, who is no longer available to deal with this matter. The judgment was delivered on 5 August 2021. The parties filed Heads of Argument for the court to consider the matter in Chambers, without the necessity of hearing oral arguments. Mr M Khang is on record for the applicant (who was the respondent in the main application before Voges AJ and plaintiff in the divorce action) and, Adv LW Mohale is on record for the respondent (applicant before Voges AJ and defendant in the divorce action). For convenience, and in order to avoid confusion, I will refer to the applicant, in this matter as Mr Tlhole and the respondent in this matter as Mrs Tlhole.
- [2] The main application (before Voges AJ) was for an order varying or amending the divorce order. The parties were married in community of property on 12 April 2001 and were divorced on 6 August 2013 by a decree of divorce granted by this court. The divorce order dissolved the bonds of marriage and, in addition, stipulated "That the joint estate between the parties is to be dissolved". Mrs Tlhole brought the main application to give effect to this latter mentioned order by including and specifying the manner in which the parties' respective pension interests, movable and immovable property should be dealt with. Mr Tlhole opposed the application and raised a number of points *in limine* and dealt with the rest of the Founding Affidavit as set out in the judgment of Voges AJ.

[3] The judgment was assailed on a number of grounds, which in essence were a repetition of the points *in limine* raised by Mr Tlhole in his Answering Affidavit. The court *a quo* delivered a detailed and comprehensive judgment, which sets out the court's reasoning in detail and I do not propose to repeat those reasons here. The court dealt with each point *in limine*, together with the law pertaining thereto and dismissed each point *in limine* as having no merit, and granted the relief sought by Mrs Tlhole

[4] Section 17 of the Superior Courts Act 10 of 2013 (the Act), now regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

“(1) Leave to appeal may **only** be given where the judge or judges

concerned are of the opinion that

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

[5] Previously, an applicant was merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(1), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success. In the unreported

matter of *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC*, Bertelsmann J held that:

“It is clear that the threshold for granting leave to appeal against a judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion....The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

Mont Chevaux has been followed in a number of decisions. See *Matoto v Free State Gambling and Liquor Authority (4629/2015) [2017] ZAFSHC 80 (8 June 2017)*, The Full Court in *Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/2009) [2016] ZAGPPHC 489 (24 June 2016)* also cited Mont Cheveau with approval.

[6] I cannot fault the reasoning of the court *a quo*, nor its application of the law to the facts in this matter. Mr Tlhole failed to set out any grounds upon which, or any reasons why another court would decide differently. He equally did not deal meaningfully with his prospects of success on appeal. It is my view that this application is without merit, and based on the reasons I have set out, another court would not come to a different conclusion. It is, further, my view that Mr Tlhole does not enjoy a reasonable prospect of success on appeal.

[7] In the circumstances the following order is made:

The application is dismissed with costs

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**S NAIDOO J**

On behalf of the Applicant:

Mr M Khang

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On behalf of the Respondent:

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(Ref: T.G/cv1707/p)