Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/ NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.:1334/2018

In the matter between:

M[…] S[…] **APPLICANT**

And

P[…] S[…] **RESPONDENT**

CORAM: **NAIDOO J**

HEARD ON: **4 MARCH 2024**

DELIVERED ON: **5 MARCH 2024**

JUDGMENT - LEAVE TO APPEAL

[1] This is an application by the applicant, M[…] S[…], for Leave to Appeal against the judgment in this matter, which was delivered on 7 July 2023. The respondent opposed this application. Adv R Van Der Merwe represented the applicant and Adv M Louw represented the respondent.

[2] The judgment was assailed on various aspects, which in essence, are that the court erred in:

2.1 finding that the respondent had discharged the onus of proving that his non-compliance with the order of this court dated 16 October 2019 was not wilful or *mala fides*;

2.2 finding that respondent's maintenance obligation arising from the Deed of Settlement, which was made an order of court (as part of the divorce order) on 16 October 2019 be suspended, pending the applicant approaching the Maintenance Court to determine her need for maintenance and the respondent's reciprocal obligations in relation thereto;

I mention that on each of the grounds listed above, the applicant set out detailed reasons for her view that the court erred, which is not necessary for me traverse in this judgment. The judgment being appealed against contains full reasons for the order made.

[3] it is by now trite that section 17 of the Superior Courts Act 10 of 2013 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)

[4] It has been held in a number of cases that an applicant was, previously, 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(I), 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.

[See in this regard *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC,* which was cited with approval in a number of cases, such as *Matoto v Free State Gambling and Liquor Authority (4629/2015) [2017] ZAFSHC 80 (8 June 2017)*, a decision emanating from this Division, and also a Full Court decision in *Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/2009) [2016] ZAGPPHC 489 (24 June 2016)*]

[5] The court was referred, in the applicant's Heads of Argument, to a decision of the Supreme Court of Appeal (SCA) in the case of *Ramakatsa and Others v African National Congress and Another*

(724/2019) [2021] ZASCA 31 (31 March 2021), where the following extract from para 10 of the judgment was quoted:

> I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. 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. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.

[6] The judgment in this matter sets out fully the court's reasons for the order it has made. The terms of the Deed of Settlement are common cause between the parties, save that there is a dispute as to the interpretation of clause 1.2, which provides that *"The maintenance is subject to review and/or suspension after calculation of the accrual"* As set out in the judgment, the respondent accepted the calculation of the accrual done by Mr Weihmann on 15 December 2021. The applicant nor the respondent objected to it, and in terms of the Deed of Settlement, if no objection was received from either party within 15 court days of receipt thereof, the account shall be deemed to be confirmed by the parties (clause 4). It was on this basis that the respondent considered that the accrual to have been finally calculated and attempted twice to tender the accrual amount reflected on the calculation of 15 December 2021. When he

received no response from the applicant or her legal representatives, he paid the amount of R600 000.00 in an attempt to bring the matter to finality.

[7] Hence the point I make that the interpretation of clause 1.2 seems to be in issue. The conduct of the applicant, the respondent and their legal representatives was considered and fully set out in the judgment. In the interests of justice, and of bringing the matter to finality, the order made was considered to be the fairest and most expedient. The applicant clearly seeks strict compliance with the terms of the Deed of Settlement, without consideration of all the surrounding and pertinent circumstances. Given the history of the matter, consideration had to be given to the possibility that the finalisation of the accrual calculation would have been delayed for a few more years, while the respondent would have been obliged to continue paying maintenance for an indefinite period, without the matter being resolved.

[8] Neither party followed the correct legal procedures in this matter (in respect of the appointment of another Receiver and confirmation of the accrual calculation), which is also discussed in the judgment, and which still remains to be done. Hence the nature of the order, which would give clearer guidance in respect of a further or final order to be made in respect of maintenance. I should also mention that the court had to decide on the respondent's state of mind at the time that he took the various steps that he did, in order to determine if he acted in wilful disobedience of the court order which incorporated the Deed of Settlement, and whether his actions were *mala fides.*

[9] With regard to prospects of success on the grounds set out in the Notice of Appeal, I am not satisfied that the appellant has made out a compelling enough case that she enjoys reasonable prospects of success on appeal, and I would refuse leave to appeal on that basis. However, I have noted what the SCA in the Ramakatsa case said further in para 10 of its judgement, that a court should take into consideration the provisions of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013, and even "*if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive"*

[10] Both counsel were asked to address the court on whether the facts and circumstances of this matter raise any questions of law or any matter of public importance, which demand the attention of either a Full Court of this Division or the SCA. Mr Van der Merwe was of the view that the arguments raised in respect of the contractual relationship created by the Deed of Settlement, the respondent's failure to adhere thereto and the grounds raised in assailing the court's judgment raise issues which constitute the compelling reasons envisaged in section 17(1)(a)(ii) of the Superior Courts Act. Mr Louw disagreed, arguing that there is no special case or compelling reasons for the matter to be referred to the Full Court or the SCA. The court will always have to decide if, objectively speaking, the contemnor has wilfully disobeyed the court order. I am in agreement that the matters raised are based on the facts of this case and do not implicate issues of law or of public

importance. It is clear that such issues must, of necessity, be decided on a case- by-case basis.

[11] In the circumstances, I make the following order:

The application for leave to appeal is dismissed, with costs.

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S NAIDOO, J

On behalf of Applicant	:	Adv R van der Merwe
Instructed by	:	McIntyre Van der Post 12 Barnes Street Westdene Bloemfontein (Ref: BCS352/LHW Cato/ldv)

On behalf of Respondent	:	Adv MC Louw
Instructed by	:	Steyn Attorneys Inc 71 Durban Street Worcester c/o Hill, McHardy & Herbst Inc 7 Collins Road A xrboretum Bloemfontein (Ref: Pieter Schuurman)