

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

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 20/27078

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| (1) | REPORTABLE: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |
| (2) | OF INTEREST TO OTHER JUDGES: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |
| (3) | REVISED: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |

Date: 22 November 2023 WJ du

In the matter between:

S[...], M[...] F[...]

APPLICANT

and

S[...], N[...]

RESPONDENT

JUDGMENT: LEAVE TO APPEAL

DU PLESSIS AJ

[1] The defendant in the divorce, Mr S[...], filed an application for leave to appeal on 20 September 2023, the day after the judgment was delivered via email and uploaded onto CaseLines. For ease of reference, the parties will be referred to as they are in this application for leave to appeal: the Applicant (the defendant in the trial) and the Respondent (the Plaintiff in the trial).

- [2] As is the custom, I instructed my registrar to find a suitable date to hear the leave to appeal online. On Friday 13 October 2023, she sent an email to inquire about a suitable date the following week. The Respondent's attorneys indicated that counsel is available on Wednesday and Friday. They also informed my registrar (with the Applicant copied into the email) that no notice of leave to appeal has been served on their offices.
- [3] No reply was forthcoming from the Applicant. When my registrar followed up the following week, Thursday 19 October 2023, the Applicant indicated that he was available the next Friday, 27 October (not one of the options given), at 12 pm. Counsel for the Respondent replied that she is not available on the Friday, but that she is available on the Monday, Tuesday and Wednesday.
- [4] A 31 October and 1 November date was proposed, and it was decided on 1 November 2023. The Applicant then requested a date in mid-November to enable him to get data and a laptop. My registrar informed the Applicant that he could make arrangements with the usher supervisor of the court to assist him with access to a computer for self-represented litigants at court.
- [5] A link was sent to the parties for the matter to be heard on 1 November 2023, and the matter was set down. The Applicant rejected the meeting invitation almost immediately. The Applicant then indicated that he cannot make the date of 1 November 2023.¹ He requested other dates, including 16 November 2023, when all parties agreed they were available. The matter was then set down for 16 November 2023, 9:00 am. A meeting invitation with a link to the Teams platform was emailed to all the parties on 6 November 2023.
- [6] The meeting invitation was not "accepted" by the Applicant. I have then taken guidance from the Constitutional Court in deciding how to proceed. In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture*,

¹ I have requested that the Applicant file an affidavit to attest to his unavailability on 1 November 2023, which affidavit, without an explanation, was received on 16 November 2023.

*Corruption and Fraud in the Public Sector Including Organs of State*² the court stated that

Whilst that matter correctly emphasises the importance of a party's presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, *ipso facto* (by that same act), plead the "absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).

[7] On Tuesday, 14 November 2023, two days before the hearing of the leave to appeal, my registrar sent an email reminding the parties of the scheduled meeting and informing the parties that should they not respond to the email or avail themselves for the matter to proceed, that it will be decided on the papers. Counsel for the Respondent replied and confirmed her availability. The Applicant did not reply.

[8] After some connectivity issues on the court's side on 16 November 2023, the matter proceeded around 9:30 am. The Applicant was not on the Teams platform and did not inform my registrar that he could not be on the call then. The matter proceeded. At 10:48 am, the Applicant sent an email explaining that he had connectivity issues and proposed that the court sit at 1 pm. My registrar informed him that the matter proceeded in his absence, and the judgment for leave to appeal was reserved.

[1] Leave to appeal

[9] The Superior Courts Act in s 17(1)(a) sets the threshold for leave to appeal to be granted. Leave to appeal may only be granted where the judge concerned is satisfied that (1) the appeal would have a reasonable prospect of success or (2) there are other compelling reasons why the appeal should be heard. The test is whether the appeal *would* have reasonable prospects of success, not whether it

² [2021] ZACC 28.

might have prospects of success as previously required. Recently, the Supreme Court of Appeal³ stated that leave must not be granted unless there truly is a reasonable prospect of success. This cannot be a mere possibility or an arguable case but requires a sound rational basis to conclude that there is a reasonable prospect of success on appeal.

- [10] The Applicant filed an application for leave to appeal dated 20 September 2023 and another application for leave to appeal dated 20 September 2023 and 16 October 2023. From a document uploaded on CaseLines called “Proof of service”, it seems the first application was emailed to the Respondent personally. From the document, it looks like the first application for leave was not sent to the attorneys. The second application was sent to many recipients, and it is not immediately apparent to the court that it was sent to the Respondent’s attorneys. For the reasons given below, this is not fatal to the application.
- [11] The main thrust of the first application relates to the Applicant’s unhappiness with my assessment of the evidence and the division of the assets. The second application is a continuation of voicing his disagreement with my judgment without setting out the grounds of appeal that he relies on.
- [12] In my judgment, I set out in detail how the assets should be divided and the care of the children. It need not be repeated here. I gave the order after exercising my judicial discretion as governed by legal principles, based on the evidence introduced in the court proceedings in terms of the rules, and attested to either on sworn affidavit or under oath.
- [13] I have considered the arguments in the application for leave to appeal. Neither of the applications state coherent grounds of appeal other than that the Applicant is aggrieved by the outcome, which he vehemently disagrees with. No sound and rational reasons are offered on which the leave to appeal *would* succeed. There is thus no reasonable prospect of success.

³ *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 at paras 16 to 17.

[2] Order

[14] I, therefore, make the following order:

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

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:

Ms Rambachan-Naidoo

Instructed by:

Houghton Harper Attorneys and
Conveyancers

Counsel for the Respondent:

Self-represented

Date of the hearing:

16 November 2023

Date of judgment:

22 November 2023