

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 20/43969

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

TT

First Applicant

BM

Second Applicant

and

MINISTER OF SOCIAL DEVELOPMENT

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
SOCIAL DEVELOPMENT, GAUTENG**

Second Respondent

**HEAD OF DEPARTMENT, GAUTENG
DEPARTMENT OF SOCIAL DEVELOPMENT**

Third Respondent

SINAH PHIRI	Fourth Respondent
LIVHUWANI MUFAMADI-MALAKA	Fifth Respondent
PEARL HLATSHWAKO	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG	Seventh Respondent
EVELYN MAHLANGU	Eighth Respondent
GOITSEMANG BOTES	Ninth Respondent
SOUTH AFRICAN COUNCIL FOR SOCIAL SERVICE PROFESSIONS	Tenth Respondent
MBC	Eleventh Respondent
TLC	Twelfth Respondent
MT	Thirteenth Respondent
BAT	Fourteenth Respondent
CENTRE FOR CHILD LAW	Amicus Curiae

LEAVE TO APPEAL JUDGMENT

Delivered: This judgement 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 the 25th of January 2023.

DIPPENAAR J:

[1] The parties will be referred to as in the main proceedings. The first to third respondents, collectively referred to as "the Department" sought leave to appeal against the whole of the judgment and order granted by me on 19 November 2022.

[2] The applicants delivered a notice to oppose the application. The eleventh and twelfth respondents, the prospective adoptive parents of B and L, opposed the application for leave to appeal insofar as it pertained to paragraphs 6 and 7 respectively of the order, which impacts on the finalisation of the adoptions of B and L. The amicus curiae did not participate in the hearing.

[3] My judgment is comprehensive and I stand by the reasons set out therein.

[4] In its application for leave to appeal, the applicants raised various grounds for leave to appeal in support of the contentions that there are reasonable prospects of success that another court would grant a different order as envisaged by s 17(1)(a)(i) of the Superior Courts Act¹ (the “Act”). It was also contended that there are compelling reasons to grant leave to appeal as envisaged by s 17(1)(a)(ii) of the Act.

[5] Leave to appeal may only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, which prospects are not too remote². An applicant for leave to appeal faces a higher threshold³ than under the repealed Supreme Court Act.⁴ A sound rational basis for the conclusion that there are prospects of success must be shown to exist⁵.

[6] I have considered the papers filed of record and the grounds set out in the applicant’s application for leave to appeal as well as the respective parties’ submissions and arguments for and against the granting of leave to appeal. I have further considered the authorities referred to by the respective parties.

[7] At the hearing the Department formally on record abandoned the application for leave to appeal in respect of paragraphs 1, 2, 3, 4, 5, 6, 7 and 12 of the order. In my

¹ 10 of 2013

² Ramakatsa and Others v African National Congress and Another [2021] JOL 49993 (SCA) para [10]

³ S v Notshokovu Unreported SCA case no 157/15 dated 7 September 2016, para [2]

⁴ 59 of 1959

⁵ Smith v S [2011] ZASCA 15; MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176, para [17]

view, the approach adopted, was correct. I am in any event not persuaded that the Department established reasonable prospects of success or advanced compelling reasons why leave to appeal these orders should be granted.

[8] At the original hearing of the application, the Department had formally conceded the confidentiality relief contained in paragraphs 1, 2, 3 and 4 of the order. It further gave the express undertaking contained in paragraph 5 of the order.

[9] In relation to the relief granted in paragraphs 6 and 7 of the order, I am not persuaded that the Department would have illustrated reasonable prospects of success. The reasons for the granting of the orders are set out comprehensively in the judgment and it is not necessary to repeat them.

[10] I am further not persuaded that it would have been in the interests of justice or that there are compelling reasons to grant leave to appeal these orders, considering the best interests of the children and the constitutional imperatives of s 28 of the Constitution⁶.

[11] As the judgment had already been provided to the Magistrates in the Children's Court, any appeal against paragraph 12 of the order has become moot and is of no practical effect.

[12] What is left to be determined is whether leave to appeal should be granted in relation to the orders granted in paragraphs 8, 9, 10, 11 and 13 of the order and the portions of the judgment which relate thereto. The Department persisted in seeking leave to appeal in relation thereto.

[13] Whilst expressly not conceding that there are any reasonable prospects of success on appeal, the applicants adopted a different stance at the hearing pertaining

⁶ 1996

to their opposition of the application, save in relation to the orders granted in paragraphs 6 and 7 of the order, which they opposed. They argued that there were indeed compelling reasons to grant leave to appeal in relation to prayers 8, 9, 10, 11 and 13 in terms of s17(1)(a)(ii) and 17(6) of the Act as. The Department agreed.

[14] Whilst I am not persuaded that the Department has established reasonable prospects of success on appeal, that issue was not fully argued before me, given the stance that was adopted by the parties at the hearing. An application for leave to appeal with limited prospects of success may be granted if there are compelling reasons for doing so.⁷

[15] I conclude that there are compelling reasons to grant leave to appeal the orders granted in paragraphs 8, 9, 10, 11 and 13 as envisaged in s 17(1)(a)(ii) of the Act.

[16] The aforesaid orders raise important constitutional issues relating to the fundamental rights of the applicants and issues of national public importance in relation to the Adoption Guidelines. The interpretation of various statutory provisions of the Children's Act are further at issue.

[17] Having regard to the provisions of s 17 (6)(a) of the Act, I conclude that the decision sought to be appealed against involves questions of law of importance and that the administration of justice requires consideration by the Supreme Court of Appeal.

[18] There is no reason to deviate from the normal principle that the costs of this application are to be costs in the appeal.

[19] I grant the following order:

⁷ Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre 2016(3) SA 317 (SCA) at para (23).

[1] Leave to appeal is granted to the Supreme Court of Appeal against paragraphs 8, 9, 10,11 and 13 of the orders granted and the portions of the judgment of 19 November 2022 relating thereto.

[2] The costs of the application are to be costs in the appeal.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 24 January 2023
DATE OF JUDGMENT	: 25 January 2023
APPLICANTS' COUNSEL	: Adv. M Feinstein : Adv. N Stein
APPLICANTS' ATTORNEYS	: Womens Legal Centre
1ST - 3RD RESPONDENTS' COUNSEL	: Adv. C Georgiades SC : Adv. A Mofokeng : Adv. J Daniels
1ST - 3RD RESPONDENTS' ATTORNEYS	: State Attorney
11TH & 12TH RESPONDENTS' COUNSEL	: Adv. L De Wet
11TH & 12TH RESPONDENTS' ATTORNEYS	: Schuler Heerschop Pienaar Attorneys

**13TH & 14TH
RESPONDENTS COUNSEL**

: Adv. L. Makapela

**13TH & 14TH
RESPONDENT ATTORNEYS**

: Clarks Attorneys