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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

Case Number 2092/2022

In the matter of:

M[…] M[…]	**Applicant**
and	
TLALENG ALINA MHLEKWA N.O.	**First Respondent**
THE MASTER OF THE FREE STATE HIGH COURT BLOEMFONTEIN	**Second Respondent**
K[…] M[…]	**Third Respondent**
K[…] M[…]	**Fourth Respondent**

CORAM: **NAIDOO, J**

HEARD ON: **30 January 2024 and 6 February 2024**

DELIVERED ON: **19 MARCH 2024**

JUDGMENT - APPLICATION FOR LEAVE TO APPEAL

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[1] This is an application for leave to appeal against the whole of the judgment in this matter, which was handed down on 9 October 2023. The application is opposed by the first, third and fourth respondents. The parties filed Heads of Argument, and the application was considered in Chambers. Adv RJ Nkhahle is on record for the applicant and Mr C Vosloo for the first, third and fourth respondents.

[2] The judgment was assailed on a number of grounds which, in essence, are that the court:

2.1 erred in finding that material disputes of fact have arisen in this case which prevented the court from making a final order;

2.2 misdirected itself in aligning itself with the findings of Molitsoane J that the applicant ought to have joined the biological children of the deceased, as the interest of the children relate to their right to inherit from the deceased's estate;

2.3 made an error in law by relying on the case of Standard Bank of SA Ltd v Swartland Municipality & Others 2011(5)SA 257 (SCA);

2.4 erred in awarding costs against the applicant.

[3] The applicant argues that the respondents' opposition is based on unsubstantiated bare denials in relation to the nature and duration of the applicant's relationship with the deceased. The applicant's

version is supported by three independent people who deposed to confirmatory affidavits about the nature of the applicant's

relationship with the deceased and the role she played in the running of his businesses. With regard to the non-joinder of the biological children of the deceased, the applicant argues that the respondents offer no factual substantiation for joinder other than to

aver that the deceased's descendants have a direct and substantial interest in the subject matter.

[4] With regard to the interests of the applicant's minor child, the applicant argues that the respondents have not pleaded any untoward conduct on the part of the applicant to warrant the appointment of a *curator ad litem* for the child. The applicant similarly argues that the respondents have not raised any material disputes of fact regarding the applicant's case and particularly her relationship with the deceased. Another court would therefore find differently to this court.

[5] The respondents argue that the order of Molitsoane J is still of force and Molitsoane J is *functus officio* in respect thereof. The order has the effect of a final order and is valid until set aside. It has not been set aside or assailed in any way. As such it must be complied with. The respondents also argue that the applicant does not attack the finding of this court that her failure to appoint a *curator ad litem* to represent the minor child was fatal to her application. On that basis alone, the application for leave to appeal should fail. The respondents also attacked the applicant's reliance on the case of *Bwanya v the Master of the High Court*

and Others 2002(3) SA 250 (CC), on the basis that the Constitutional Court (CC) suspended

the declarations of invalidity and unconstitutionality relating to the relevant to the provisions of the Maintenance of Surviving Spouses Act and the Intestate Succession Act for a period of 18 months from 31 December 2021.

[6] The main application was issued on 9 May 2022. The respondents argue that the application was premature as the period of suspension ordered by the CC had not lapsed at that date. No reliance could be placed on Bwanya, as the applicant was not a spouse. I mention that the judgment being appealed against contains full reasons for the order made, and it is not necessary for this court to revisit those reasons.

[7] 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)

[8] 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)*].

[9] 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),* recently came to my attention. The SCA said at para 10 of the judgment that:

"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".

[10] The salient point in this matter is that the applicant has not complied with the order of Molitsoane J referred to above, which has not been assailed or set aside, and is therefore still valid. The legal position with regard to the joinder of parties with a direct and substantial interest in the outcome of a matter seems to be lost on the applicant. In my view, the applicant chooses to ignore the reality of the factors militating against success of her application which are fully set out in the judgment of this court. I am further of the view that the applicant has not established any sound or reasonable basis to assert that she has reasonable prospects of success on appeal

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

The application for leave to appeal is dismissed with costs, such costs to be paid by the applicant.

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S NAIDOO J

On Behalf of the Applicants:	Adv RJ Nkhahle
Instructed by:	NW Phalatsi & Partners 2nd Floor Metroploitan Building 96 Henry Street Bloemfontein (Ref: MBA1/0001)

On Behalf of the 1st, 3rd & 4th Respondents:	C Vosloo
Instructed by:	Vosloo Attorneys 22 Brandwag Park 82 McHardy Avenue Brandwag Bloemfontein (Ref: C Vosloo/TLA45/0001)