

SOUTH AFRICA / JUDGMENT

A.R.S v M.S.S (Leave to Appeal) (7305/2021) [2024] ZALMPPHC 128 (9 September 2024) [2024] ZALMPPHC 128

COURT

Limpopo High Court, Polokwane

BEFORE

Sikhwari

CASE / FILE NUMBER

7305/2021

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REPUBLIC

OF SOUTH AFRICA

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THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: 7305/2021

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:09/09/2024

SIGNATURE: A[...]
R[...] S[...]
PLAINTIFF
(BORN
K[...] T[...])
and
M[...]
S[...]
S[...]
DEFENDANT

JUDGMENT

[LEAVE TO APPEAL]

This judgment is delivered electronically by way of dispatching same to email addresses of the parties' legal representatives and publishing same on SAFLII. The date of delivery of this judgment is deemed to be 9 September 2024.

SIKHWARI AJ

[1] This court has previously granted an order in the main action in the following terms:

1. That the divorce decree is granted for the dissolution of a marriage between A[...] R[...] S[...], born K[...], of identity number 6[...] and M[...] S[...] S[...] of identity number 6[...].
2. That the plaintiff's prayer for forfeiture of benefits arising from the marriage in community of property in respect of the plaintiff's

pension benefits from the Government Employees Pension Fund ("GEPF") and in respect of the parties' immovable properties is hereby dismissed.

3. The plaintiff and the defendant shall retain full parental responsibilities and rights over the minor child, T[...] M[...] S[...], a boy born on 3 January 2011, inclusive of acting as guardian, to care for and to maintain contact with and contribute to the maintenance of the minor child.
4. The plaintiff shall have the following specific parental responsibilities and rights in respect of the said minor child, to wit guardianship, and daily care and residence of the minor child.
5. The defendant shall have specific parental responsibilities and rights of the minor child; such contact rights shall include having the minor child with him during alternative weekends and/or every alternative short and long holiday.

6. The defendant is ordered to pay to the plaintiff a sum of R5 000.00 (five thousand five hundred rand) per month as maintenance for the parties' aforesaid minor child, T[...] M[...] S[...], with the first payment due on or before the seventh day of February 2024, and thereafter on or before the seventh day of each succeeding month until the minor child is self supporting or this maintenance

order is duly varied or set aside by the competent maintenance court with jurisdiction over the aforesaid minor child.

7. That it is ordered that the defendant is entitled to fifty percent (50%) of the plaintiff's pension interests and/or benefits held at the Government Employees' Pension Fund ("GEPF"), the pension holder or administrator on behalf of the plaintiff's employer, which pension benefits must be calculated as at the date of the divorce decree herein, being 30 January 2024.

8. An order directing the manager or administrator of the said pension scheme/fund, the GEPF, that:

8.1. He/she must endorse the records of the aforesaid Pension Fund to reflect the defendant's aforesaid entitlement to the pension benefits of the plaintiff,

8.2. He/she must pay to the defendant, alternatively, to a preservation fund nominated by the defendant an amount equal to fifty percent (50%) of the defendant's pension interests in the said pension fund, calculated as at the date of the divorce hereof, such payment to be made within sixty (60) days of the defendant notifying them in writing, which of the two options she elects.

8.3. He/she must furnish written proof of the endorsement referred to in (h)(1) and (h)(2) above to the assistant registrar of this Honourable Court within one month of receipt of the notification hereof.

9. That the remainder of the parties' joint estate, including their immovable property, be divided equally between the parties.

10. That the plaintiff is ordered to pay the costs of this action on party and party scale.

[2] Aggrieved by the order of this court, the applicant filed an application for leave to appeal. It is trite law that application for leave to appeal is regulated in terms of Section 17 of the Superior Courts Act 10 of 2013, which provides that:

17.(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;

(b) the decision sought on appeal does not fall within the ambit of section 156(2)(a); and

- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."
- [3] Courts have interpreted the above new provisions of the Act in several decisions and distinguished same from the previous test of "reasonable prospects of success" on appeal. The use of the word "would" in section 17 (1) (a) of the Act above in the new test has risen the bar to a very higher standard in that the test now is that the applicant for leave to appeal must demonstrate some level of certainty that the appeal may succeed, NOT that it may succeed, NOT that it is arguable, NOT that another court may arrive at a different decision.
- [4] The new test in terms of section 17 (1) (a) of the Act was first confirmed, and explained thoroughly, in the case of *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6, where Bertelsman 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, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. 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."

- [5] The *Mont Chevaux Trust* test on leave to appeal was later followed by the court as good current law in the case of *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*, (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at para 25, the full court of the Gauteng Division in Pretoria, per Ledwaba DJP, Pretorius J and Mothle J (as he then was) held that:

"The Superior Courts Act has raised the bar for granting leave to appeal ..."

- [6] In the case of *FairTrade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 246 (24 July 2020) at para 6, the full court of the Gauteng Division in Pretoria per Mlambo JP, Molefe J and Sasson J considered the abovestated decisions on interpreting section 17 (1) (a) of the Act, and correctly held that:

"As such, in considering the application for leave to appeal, it is crucial for this court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal."

- [7] The aforesaid new test was further confirmed as good current law by the Supreme Court of Appeal (SCA) in respect of section 17 (1) (a) of the Act in the case of *Smith v S* 2012 (1) SACR 567 (SCA) at para 7, where Plasket AJA held that:

"What the test of reasonable prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[8] In another case of MEC of Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016] ZASCA 176 (25 November 2016, at paragraphs 16 and 17, Schippers AJA reaffirmed the SCA's disapproval to the granting of leave to appeal where the new threshold of a higher test was not met when the unanimous judgment of the SCA held that:

"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

"[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a prospect of success on appeal."

[9] The facts of the case are fresh in the parties' mind and same have been fully captured in the main judgment and the parties' heads of argument in this application for leave to appeal. I need not repeat same. The power of the court to order forfeiture is derived from section 9 (1) of the Divorce Act 70 of 1979, as amended.

[10] This court has correctly interpreted and applied the abovementioned statute, particularly the three requirements for forfeiture. Allegations of misconduct against the respondent are unfounded and/or unsubstantiated by the evidence placed before the court. The contribution of the respondent was lower to that of the applicant in financial terms, but fairly proportional to his income which is lower to that of the applicant.

From the date of marriage up to the date of divorce, the applicant was fully aware that the respondent earns lower income than hers. Therefore, that fact cannot be used as a ground for forfeiture. The respondent did contribute to the pension fund of the applicant by way of being her husband, assisting in handy work at home as well taking the kids to school. The fact that he was not conversational, in view of the of the kids, is not a material factor to consider on forfeiture.

[11] It is the view of this court that the respondent will not benefit unfairly if forfeiture is not granted. There will be no undue benefit to the respondent in the circumstances of this case. The vehicles purchased by the applicant are part of the joint estate. They were purchased out of proceeds of the joint estate. There was no substantial misconduct on the part of respondent which will arise to undue benefit.

[12] In the circumstances, the application for leave to appeal must fail, with costs on party and party scale, on Scale C.

[13] Accordingly, the following order is made:

1. That the application for leave to appeal is dismissed with costs on scale C.

MS SIKHWARI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

For Applicant

Ms MC De Klerk

Instructed by

DDKK Attorneys Inc

For Respondent

Adv TD Sibiya

Instructed by

Makgoba Kgomo Makgaleng Inc

Date of hearing

03 May 2024

Date of Judgment

09 September 2024

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