

SOUTH AFRICA / JUDGMENT

S.A.V v H.J.V (Leave to Appeal) (2138/2021) [2024] ZAGPPHC 1299 (29 November 2024) [2024] ZAGPPHC 1299

COURT

North Gauteng High Court, Pretoria

BEFORE

M Snyman

CASE / FILE NUMBER

2138/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2138 / 2021

- 1) REPORTABLE: YES/NO
- 2) OF INTEREST TO OTHER JUDGES: YES/NO
- 3) REVISED: YES/NO

SIGNATURE:

DATE: 29 November 2024

In the matter between :

S[...] A[...] V[...]

Applicant

and

H[...] J[...] V[...]

Respondent

This Judgment was handed down electronically by circulation to the parties and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be at 10h00 on 29 November 2024.

JUDGMENT – LEAVE TO APPEAL

M SNYMAN, AJ

[1] Before me is an application for leave to appeal. A plethora of issues have been raised as grounds for leave to appeal.

[2] In the matter of Songono v Minister of Law and Order[1] the court held that:

“The grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. This subrule is peremptory in this regard.”

[3] The Applicant's voluminous application supported by an affidavit and annexures comprising 392 pages does not adhere to the requirements of Rule 49(1)(b).

[4] The application for leave to appeal in my view could be dismissed for an abuse of the process, simply that it does not comply with the requirements of being succinct and to the point.

[5] The application in itself was drawn in the form of a notice of motion supported by affidavit. The reasoning behind this, so counsel for the applicant contends is the fact that extraneous factors needed to have been placed before court such as the transcription of the argument.

[6] This, so it was argued was necessary because the applicant was of the view that I conducted the hearing in such a manner that inter alia his right in terms of section 34 of the constitution guaranteed a fair hearing and he was not afforded such a hearing. That is clearly not so. The view of applicant's legal representative was that she wanted to address the court on what she deemed important despite informing her that I read the application as well as the heads consisting in excess of 150 pages. The view was simply that she should be allowed to address the court in a way she wanted to, failing which I would be disregarding her client's rights to a fair hearing.

[7] Despite the foregoing and the fact that I would be entitled to dismiss the application for leave to appeal for not being succinct and complying with the requirements as set out in the Superior Courts Act, I find to be only relevant in respect of costs.

Test applicable to an application for leave to appeal

[8] The provisions of section 17(1) of the Superior Court Act, Act 10 of 2013 (“Superior Court Act”) provides therefore that:

“Leave to appeal may only be given where the judge or judges are of the opinion that

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(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 judgements on the matter under consideration;”

[Emphasis added]

[9] If leave is granted against an order of a single judge in terms of the provisions of subsection 2(a) or (b), the judge granting leave must direct that the appeal be heard by the full court of that division unless:

“(i) the decision to be appealed involves a question of law of importance ...;

(ii) that the administration of justice requires consideration by the Supreme Court of Appeal.”

[10] The test was reconfirmed in the matter of Ramakatsa and Others v African National Congress and Another[2] where the Supreme Court of Appeal stated that:

*“Turning the focus to the relevant provisions of the Superior Courts Act [*Section 17(2)(d) Act 10 of 2013] (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable*

prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice.[*Nova Property Holdings Limited v Cobbett & Others [2016] ZASCA 63: 2016 (4) SA 317 (SCA) para 8] This Court in Caratco [*Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd

[2020] ZASCA 17; 2020

(5) SA 35 (SCA)], concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that 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’. [*Ibid, para 2] 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. [*See Smith v S [2011] ZASCA 15; 2012

(1) SACR 567 (SCA); MEC Health, Eastern Cape v Mkhitha [2016] ZASCA 176 para 17]”

[Emphasis and footnotes added *]

[11] I am of the view that despite being of the view that the applicant has no prospects of success, I am of the view that the decision in respect of the date of the divorce order needs be ruled upon by a court of appeal.

[12] I granted a number of orders on December 2022, essentially dismissing the application of applicant and granting the counter application. The orders granted were the following:

1. “The applicant’s application is dismissed.
2. It is declared that the date of divorce for purposes of calculating the 40% share to be transferred to the respondent is 19 August 2020;
3. Marthinus Jacobus Bekker of Nicolaas Bekker Trustees are appointed as receiver and distributor of the estate of the applicant, subject to the following powers and duties as set out in paragraphs 8.1 to 8.16 of the notice of counter application dated 26 February 2021;
4. Pending the finalisation and transfer or payment of 40% of the assets as determined by the receiver, the rule 43 order of this court dated 8 May 2015 is reinstated and shall remain operative except if set aside or amended by court. The first payment to take place on or before 31 December 2022 and thereafter monthly on or before the last day of each succeeding month thereafter until the transfer of the assets of the applicant as ordered is finalised;
5. The receiver and distributor are granted the specific power and duty to pay the amount ordered in respect of the rule 43 order or any substitution or amendment thereof to the respondent monthly as ordered with the explicit power to realise any asset/s to fulfill such obligation as well as any costs orders granted earlier or herein if unpaid;
6. The receiver is ordered to in his distribution also transfer such amount of interest on the 40% determined calculated at a rate of 9,75% per annum from 19 August 2020 to date of payment;
7. Applicant shall pay all costs, fees and expenses of Mr Bekker, the receiver which shall include the costs of valuers, if needed;

8. Applicant shall pay the costs of the application on a scale as between attorney and client, such costs to include the costs of senior counsel and two counsel where so employed and which shall include the costs of the attorneys appointed for the attorneys of respondent, Couzyn Hertzog and Horak, Inc and employment of senior counsel in that regard;
 9. The costs referred to in paragraph 8 shall further include the costs of the condonation application as well as the costs of both applications to strike out parts of the affidavits and annexures dated 26 February 2021 and 5 May 2021 on a scale as between attorney and client;
 10. Apart from the orders above, all other applications or requests are dismissed, which shall specifically include the request that the matter be postponed and referred to case management, the costs of an application or request to pay the costs of the application de bonis propriis against both the respondent's attorney and the attorney appointed by him to protect his interests."
- [13] It is the second order that I will address first. The applicant and respondent were married out of community of property before 1 November 1984. At the time of the divorce proceedings being instituted the applicant was in a care facility and respondent residing in the former common home. The applicant after having been diagnosed inter alia with anxiety disorder and bipolar disorder was medically unfit to work and also suffered two strokes by the time the opposed divorce was heard in 2017.
- [14] Applicant could not give evidence and his evidence was presented by affidavit before Petersen, AJ as he then was. In dispute was essentially the claim in terms of section 7(3) of the Divorce Act of 1979. The parties were ad idem what the marriage relationship had irretrievably broken down.
- [15] The court granted an order for divorce and declared that respondent was entitled to 50% of the assets of respondent.
- [16] Applicant sought and was granted leave to appeal the whole of the order order including both the decree of divorce and the claim in terms of section 7(3).
- [17] On appeal, which was only heard in 2020 an order setting aside the whole of the order of Petersen, AJ and replaced it with an order for divorce and an order that respondent is entitled to 40% of the assets of applicant. This order was handed down on 19 August 2020.
- [18] After having heard the application I granted the order set out above.
- [19] At the nub of the matter is the date of divorce. Quite important is the fact that the applicant reached the age of retirement and the pension benefits fell due, as I understand the evidence, in 2019. It will immediately be noted that this date is after the initial divorce order, but before the order on appeal.

[20] The value of the estate may change when this happens due to the fact that inter alia retirement annuities and pension interests are deemed to form part of the estate of a person. However once a person retires, the deeming provisions falls away and now fall in the estate. As such parts of a pension may be paid out as a lump sum and part will only fall inside the estate as a contingent right or claim.[3]

[21] The applicant's view was that the date of divorce was 2017 and the respondent was that it was 2020. A number of factors was considered by me when determining that the date of divorce was 2020 and not 2017. They were inter alia:

1 The fact that the applicant's representatives, despite claiming that the extent of the estate was determined during the hearing in 2017, claimed that two assets were not included during evidence. Those were the value of a car and the value of the money in a bank account held at ABSA bank;

2 Secondly I also took into account the fact that the applicant's own calculations when approaching the court in 2021 to determine the value, inter alia placed before court the 2020 values of a number of policies;

3 Thirdly the whole of the order was appealed against and not only the claim in respect of section 7(3) of the Divorce Act;

[1] Songono v Minister of Law and Order 1996

(4) SA 384 (E) at 385I - J

[2] (724/2019)

[2021] ZASCA 31 (31 March 2021) at para [10]

[3] McIntosh v McIntosh en Anders (3037/2007)

[2011] ZAFSHC 116 (14 July 2011) at [28]

[4] Holmdene Brickworks v Robertson Construction 1977

(3) SA 670 (A) at 692F - G

[5] D v D (A3079/15)

[2016] ZAGPJHC 31 (12 February 2016) at [30] "To set aside the divorce per se between the parties, and return them to a state of matrimony pursuant to an automatic consequence of the legal process, and, not as a result of a personal choice purposely made by each of them, would be to undermine, even deny, their respective rights of dignity, including their right to privacy."

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Prepared on 9 October 2026 · Esheria