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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2017/30005

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between –

M, S L

APPLICANT

AND

M, B

RESPONDENT

In re the matter between

M, S L

PLAINTIFF

AND

M, B

DEFENDANT

JUDGMENT

MOORCROFT AJ:

Summary

*Application for leave to appeal - section 17(1)(a) of Superior Court Courts Act, 10 of 2013 –
No reasonable prospects of success on appeal – no compelling reasons for appeal to be
heard - application dismissed*

Order

[1] I make the following order:

- 1. The application is dismissed;*
- 2. The applicant (plaintiff) is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for leave to appeal in terms of section 17(1)(a)(i) of the Superior Courts Act, 10 of 2023 against a decision¹ handed down by me on 23 May 2023.

[4] I refer to the parties as they were referred to in the judgment.

¹ *M v M* 2023 JDR 1705 (GJ), also reported at JOL 59179 (GJ).

[5] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused. Importantly, a Judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong.

[6] In *Ramakatsa and others v African National Congress and another*² Dlodlo JA placed the earlier authorities in perspective. He said:

“[10] ... 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

² *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) See also *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae)*; *S v O'Connell and others* 2007 (2) SACR 28 (CC); *S v Smith* 2012 (1) SACR 567 (SCA) para [7], *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC) para [6], *The Acting National Director of Public Prosecution v Democratic Alliance* JOL 36123 (GP) para [25], *S v Notshokovu* 2016 JDR 1647 (SCA) para [2], *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) para [29], *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para [5], *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para [5], *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA) paras [25] and [26]; *Lephoi v Ramakarane* [2023] JOL 59548 (FB) para [4], as well as Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55.

that there are prospects of success must be shown to exist.”³

[7] The plaintiff filed a 19 page application for leave to appeal that is part application and part heads of argument. A number of grounds of appeal can be distilled from the application and I deal with those below.

The Court erred in finding that there was no scope for an implied term or a tacit term as contended for by the plaintiff

[8] I dealt with the alleged tacit term or implied term in paragraphs 14 to 21 of the judgement. The settlement agreement provides in express terms for the payment of maintenance until the death of the defendant and for the provision of a motor vehicle until death or remarriage. There is no room for a term implied by law or a term tacitly agreed to by the parties that the maintenance obligation would terminate upon remarriage or cohabitation (or of course the establishment of a lifetime partnership).

[9] It is so, as argued on behalf of the plaintiff, that the law will continue to develop and that new implied terms may be recognised. There is simply no basis on the facts of the case now before court for the recognition of an implied term as suggested by the plaintiff, and what the plaintiff is seeking to do is for the court to make a new agreement for the parties by importing tacit or implied terms, and changing the contract to create what the plaintiff regards as a ‘better’ contract. This is not permissible.

[10] The plaintiff’s reliance on section 7(2) of the Divorce Act, 70 of 1979 is misplaced. As pointed out in paragraph 22 of the judgement the sub-section finds application when there is no settlement agreement between the parties to a divorce action. In the present matter there was a settlement agreement and the settlement agreement was central to the action between the parties. The applicable sub-section is section 7(2). In the same paragraph of the judgement I dealt with the distinction made by the legislature in section 7(1) and 7(2) of the Divorce Act.

³ Footnote 9 in the judgment reads as follows: “See *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); *MEC Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 para 17”.

[11] There is therefore no basis in the evidence for a finding that it was the unexpressed intention of the parties that maintenance would terminate upon remarriage or upon cohabitation. Such a term would be in conflict with their express intention as unambiguously reflected in the words used, such as 'death,' and 'remarriage' in the context of the vehicle to be provided.

[12] There is also no basis in law for an implied term as suggested.

The court erred in finding that clause 6 of the settlement agreement provides that the agreement constitutes the whole agreement and there is no merit in the submission that the parties agreed to a contrary tacit term

[13] I dealt with clause 6 of the agreement in paragraph 19 of the judgement and it is not necessary to elaborate save to refer again to what is set out above.

The Court erred in finding that the recognition of other relationships as deserving of the protection of the law does not mean that the word 'remarriage' should not be given an extended definition in this agreement

[14] There is no reason to find that because our courts have recognised the need to protect parties in relationships other than marriage means that the word must be interpreted differently in this agreement. There is no evidence that it was ever something that the parties applied their minds to.

[15] I may add that neither the plaintiff nor the defendant testified that when they used the word 'remarriage' in the agreement they actually meant to include other relationships within the meaning of the word. No evidence was led to establish that when the parties used the word 'remarriage' they intended the meaning to include 'cohabitation' or 'life partnership' or a similar term. It is of course possible to lead evidence to the effect that words carry a special meaning for the parties (such as the example used in law school lecture rooms that a 'dozen'

may mean a 'baker's dozen' or 'thirteen' in a particular industry) but that is not the case here.

The court erred in finding that the plaintiff had failed to establish the existence of a lifetime partnership between the defendant and a third party

[16] It was common cause that the defendant had not remarried.

[17] The onus to prove his case was on the plaintiff. He did not acquit himself of the onus.

[18] I dealt with the actual evidence in paragraphs 6 to 13 of the judgement. The plaintiff's evidence fell far short of establishing the existence of a 'lifetime partnership.' The plaintiff himself testified that the defendant lived with a man called Bill but he had to concede that his knowledge of the domestic arrangement was based on what he had been told by others. He had no personal knowledge of these arrangements, and when he testified he was not even aware of the fact that the defendant had relocated to a different house two years earlier.

[19] The witness called on behalf of the plaintiff was a former employee of the defendant. She testified that the defendant was in a relationship with a man. She testified to a relationship of some permanence as this man's clothes were kept at the defendant's house when she was still employed there, but she did not testify that they lived together as husband and wife in a permanent life partnership or cohabitation arrangement. This man came and went; he would stay for a while and then leave.

[20] This evidence was largely supported by the evidence of the defendant. She testified to an intermittent romantic relationship with the father of her child born during her marriage to the plaintiff. She testified that this man would stay over for a while and then return to his own house. There were no plans to get married.

The Court erred when the divorce order incorporating the settlement agreement was made an order of court

[21] I dealt with this question in paragraphs 25 to 29 of the judgment.

[22] The divorce order was granted by consent. It was a competent order. The principles set out below are derived from the judgment of Madlanga J in *Eke v Parsons*,⁴ a judgment of the Constitutional Court:

22.1 The power of the Court to regulate its process is expressed in section 173 of the Constitution, 1996;

22.2 The agreement must relate directly or indirectly to the lis between the parties;

22.3 The agreement must be capable, both from a legal and a practical point of view, of being included in a court order;

22.4 This means that its terms must accord with both the Constitution and the law, and conform to public policy;

22.5 The agreement must hold some practical and legitimate advantage.

[23] The order making the agreement an order of court was properly sought and granted.

There are other compelling reasons to grant leave to appeal.

[24] It was argued on behalf of the plaintiff that the judgement created a dangerous precedent for attorneys representing both parties in a divorce matter because they may and unscrupulously provide for spousal maintenance in perpetuity.

⁴ *Eke v Parsons* 2016 (3) SA 37 (CC).

[25] It was never the case for the plaintiff during the trial that he had been cheated by his wife's attorney. He simply chose not to involve his own attorney in settlement discussions and he did so of his own volition. He exercised his freedom of choice as an experienced businessman.

[26] The judgement did not seek to interpret section 7(1) of the Divorce Act other than to state the obvious, namely that the section does not contain a statutory limitation on the freedom of contract as contended for by the plaintiff. The section is discussed in paragraph 21 of the judgement.

[27] There are no compelling reasons why the matter ought to be heard by a Court of Appeal.

Conclusion

[28] There are no reasonable prospects of success and no compelling reason why leave to appeal should be granted. For all the reasons set out above, I make the order in paragraph 1.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **8 AUGUST 2023**.

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INSTRUCTED BY: LETHAGE ATTORNEYS

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DATE OF THE HEARING: 25 JULY 2023

DATE OF JUDGMENT: 8 AUGUST 2023