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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: 1575/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

C [....] L [....]

Applicant

and

N [....] V [....] V [....] 1

Respondent

BEFORE: CHESIWE, J

DATE RECEIVED: 11 NOVEMBER 2022

DATE RESERVED: 27 JANUARY 2023, this upon receipt of the written heads of arguments on 20 & 27 January 2023 respectively.

DELIVERED ON: 16 FEBRUARY 2023

JUDGMENT IN RESPEST OF THE APPLICATION FOR LEAVE TO APPEAL

[1] The Applicant seeks leave to appeal to the Full Bench of this Division against the whole of the judgment and orders granted on 21 October 2022. The application is opposed by the Respondent.

[2] The grounds of this application for leave to appeal are listed in the application for leave to appeal and will therefore not be repeated herein.

[3] The Applicant contends that it has good prospects of success on appeal. The Respondent contends that the application is fatally flawed and that the Applicant did not make out a case in terms of section 17 of the **Superior Courts Act 10 of 2013**.

[4] In terms of the provisions of section 17(1) of the Superior Courts Act 10 of 2013 (as amended) leave to appeal may only be granted if the judge concerned is of the opinion that:

1. *The appeal would have a reasonable prospects of success or if there is some compelling reasons why leave should be granted;*
2. *The decision sought on appeal does not fall within the ambit of s16(2)(a) of the Act;*
3. *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.*

[5] In **Matoto v Free State Gambling and Liquor Authority and Others** ¹ the Court said the following:

“There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word ‘would’ indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

[6] In **S v Smith** ² the court dealt with the question of what constitutes reasonable prospects of success as follows:

¹ (4629/2015) [2017] ZAFSHC 80 (8 June 2017)

“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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[7] In **MEC for Health, Eastern Cape v Mkhitha and Another**³ the court held as follows:

“[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 Court 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 sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[8] The applicant relies on several grounds of appeal as mentioned in the leave to appeal application with the main assertion that the appeal would have a reasonable prospect of success. Most of the grounds sought to be relied upon are

² 2012(1) SACR 567 (SCA) par [7]

³ (1221/2015)[2015] ZASCA 176(25 November 2016)

essentially a rehash of the case as set out in the pleadings and fully argued and dealt with in my judgment.

[9] In the main application this court was called upon to adjudicate upon following issue:

“Whether it is in the minor child’s best interest that primary care, and residence should be awarded to the Respondent and that the Applicant is to be awarded contact.”

[10] The issues raised in these grounds, entail a revisit to the seriously contended issues in which the Applicant contends that there is prospects of success. In an application for leave to appeal, the Applicant is not precluded to revisit the issues provided that the court is satisfied that there is a reasonable prospect that the factual matrix would receive a different interpretation by another court.

[11] Based on the submissions of the Applicant and those of the Respondent, indeed, the bar has been raised for granting leave to appeal against the judgment of a high court. As the matter involves a minor child and in the interest of justice, I see no reason not to grant the application.

[12] I am therefore of the considered view that the application is with merit and that another court may come to a different conclusion.

[13] I accordingly make the following order:

1. The application for leave to appeal to the Full Bench of this Court is therefore granted.
2. Costs of the application to be costs in the appeal.

S. CHESIWE, J

On behalf of the Applicant:

Mr E Visser/Mrs C van Dyk

Instructed by:

Etienne Visser Attorneys

BLOEMFONTEIN

On behalf of the Respondent:

Adv. J van Rooyen

Instructed by:

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