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

CASE NO: 19762/2007

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: Yes

13th October 2022

In the matter between:

C [....], R [....] P [....]

Applicant

and

Y [....], L [....] G [....]

Respondent

Heard: 13 October 2022 – The ‘virtual hearing’ of this opposed application for leave to appeal was conducted as a videoconference on *Microsoft Teams*.

Delivered: 13 October 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 13 October 2022.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal granted

ORDER

- (1) The applicant's application for leave to appeal succeeds.
- (2) The applicant is granted leave to appeal to the Full Court of this Division.
- (3) The cost of this application for leave to appeal shall be costs in the appeal.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original application for the setting aside of a warrant of execution against the property of the applicant. The applicant is the applicant in this application for leave to appeal and the respondent herein was also the respondent in the said application. The applicant applies for leave to appeal against the judgment and the order, as well as the reasons therefor, which I granted on 12 August 2022, in terms of which I had dismissed, with costs, the applicant's application to have set aside a writ issued against his property for alleged arrear maintenance in terms of a divorce order.

[2]. The application for leave to appeal is mainly against my factual findings and legal conclusion that the original agreement of settlement, which was incorporated into a divorce order granted by this court on 31 July 2009, had not been varied by agreement between the parties. The applicant also applies for leave to appeal my interpretation of the said agreement in relation to whether the applicant was liable for private school tuition fees as against public school fees. In interpreting the

agreement, so the applicant contends, I should have had regard *inter alia* to the fact that the word 'private' was deleted from the original draft agreement at the request of the applicant during the settlement discussions and prior to the conclusion of the settlement agreement.

[3]. The applicant submits that, in my interpretation of the agreement, I had erred by failing to take into consideration all the facts and the entire conduct of the respondent over the preceding approximate ten years prior to her causing a warrant of execution to be issued. This conduct, so the argument on behalf of the applicant goes, demonstrates that the parties had varied the settlement agreement and that the respondent, in relying on the *Shifren* principle, is *mala fide*. Moreover, so the further contention on behalf of the applicant goes, in interpreting the contract and deciding whether a written variation agreement was concluded, I erroneously failed to have regard to the provisions of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), which permits the conclusion of a contract by the exchange of electronic emails.

[4]. Nothing new has been raised by the applicant in this application for leave to appeal. In my original judgment, I have dealt with most of the issues raised and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that, in my view, the so called *Shifren* principle finds application *in casu*, which means that a variation of the settlement agreement required the parties to reduce such to writing and to have same signed. That was not done and therefore the original agreement stands and the matter should be adjudicated on that basis.

[5]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success'.

[6]. In *Mont Chevaux Trust v Tina Goosen*¹, the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*². In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*³.

[7]. I am persuaded that the issues raised by the applicant in his application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. Those issues include the way in which I have interpreted the settlement agreement and whether the said agreement had been varied by agreement between the parties. I am therefore of the view that there are reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeal therefore, in my view, has a reasonable prospect of success.

[8]. Leave to appeal should therefore be granted to the Full Court of this Division.

Order

[9]. In the circumstances, the following order is made:

- (1) The applicant's application for leave to appeal succeeds.

¹ *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

² *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

³ *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).

(2) The applicant is granted leave to appeal to the Full Court of this Division.

(3) The costs of this application for leave to appeal shall be costs in the appeal.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON: 13th October 2022 as a videoconference on
Microsoft Teams

JUDGMENT DATE: 13th October 2022 – handed down electronically

FOR THE APPLICANT: Advocate M Nowitz

INSTRUCTED BY: Nowitz Attorneys, Hyde Park, Johannesburg

FOR THE RESPONDENT: Advocate Sarita Liebenberg

INSTRUCTED BY: Yammin & Hammond Attorneys, Bedfordview