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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE SIGNATURE

CASE NO: **2024-047309**

In the matter between:

K[...] D[...] Z[...] S[...]

APPLICANT

And

**THE CENTRAL AUTHORITY FOR THE
REPUBLIC OF SOUTH AFRICA**

FIRST RESPONDENT

J[...] R[...] S[...]

SECOND RESPONDENT

JUDGMENT- LEAVE TO APPEAL

MAHALELO J

Introduction

[1] On 10 September 2024 I handed down judgment in this matter. The case is centered on the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Convention). I made an order in the following terms:

“Order

1. The minor children, LS and MS are to be returned forthwith to the jurisdiction of Germany, Munich in accordance with the provisions of article 12 of the Hague Convention on the Civil Aspects of International Child Abduction.
2. The Respondent is to hand over all the travel documents of the minor children to the first applicant forthwith.
3. The Sheriff of this Court is to forthwith search for and seize all the travel documents of the minor children, wherever they may be found and hand same over to the first applicant, in the event the respondent fails to comply with prayer 2.
4. The respondent is to indicate to the applicants within 7 days of this order whether she intends to travel with the minor children to Germany.
5. In the event the respondent chooses to travel with the minor children and does not wish to stay with the second applicant and the children at their apartment, the second applicant is ordered to pay for the accommodation and all other costs for the respondent's stay in close proximity to the apartment.
6. In the event the respondent elects not to return to Germany with the minor children, the second applicant, or a representative of the Germany Central Authority, being a registered social worker, or an Advocate of the High Court, duly appointed by the Family Advocate, shall be entitled to remove the minor children from the borders of South Africa and travel to Germany with them.
7. The second applicant and the respondent shall agree on issues relating to the education of the children for which the second applicant will make payment of all costs inclusive of any registration fees.

8. The second applicant shall secure, in consultation with the respondent and with the involvement of Child Services or institutions of Germany and pay for, such objective and independent English-speaking therapeutic support services as may be required by the minor children after their return to Germany, including, but not limited to, psychotherapy or such other appropriate counselling services as the minor children may require.
9. Either party may approach the Family Courts in Germany inter alia:
 - a. for a variation of this order; and/or
 - b. making this order a mirror order of court in Munich.
10. No order as to costs is made.”

[2] This is an application for leave to appeal against that judgment and order. The application was filed timeously. The first and second respondents opposed the application. The applicant and the respondents filed written submissions and argued the matter in open court.

The grounds for leave

[3] Two grounds of appeal were raised in support of this application. The first is that the court erred in finding that Germany is the state of habitual residence of the two minor children immediately prior to their retention in South Africa, secondly that the Court erred in finding that in terms of the defence raised under Article 13(b) of the Hague Convention there is no evidence placed before court that there is grave risk that the return of the minor children to Germany would expose them to physical or psychological harm, or otherwise place them in an intolerable situation. Therefore, so it was submitted, the court erred in ordering the return of the two minor children to Germany.

Test for Leave to Appeal

[4] Section 17 (1) of the Superior Court Act¹ deals with the relief of leave to appeal. In terms thereof, leave to appeal may only be granted (a) where a judge/s are of an opinion that (a) the appeal “*would*” not “*may*”, have reasonable prospects of success (b) there are some compelling reasons why the appeal should be heard, including the existence of conflicting judgments on the matter under consideration.

[5] It has been confirmed that the use of the words “*only*” and “*would*” implies that the threshold is set too high to a point where this Court must only give leave in instances where a definitive prospect exist that the appeal would succeed.

[6] The court held in the case of *The Mont Chevaux Trust v Tina Goosen & 18 Others*² 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 Cornwright & 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.”

[7] I have dealt in depth with all the issues raised in the application for leave to appeal in my judgement. In the present application I have had regard to the test for leave to appeal and the submissions by both parties. I have concluded that there are no reasonable prospects of success on appeal.

[8] In the premises, the following order is granted:

1. The application for leave to appeal is dismissed.
2. Each party to pay own costs.

¹ 10 of 2013

² 2014 JDR 2335 (LCC) at para 6

MAHALELO MB
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, JOHANNESBURG

APPEARANCES

FOR THE APPLICANT: OS MATLAILA

INSTRUCTED BY: MATLAILA ATTORNEYS

FOR FIRST RESPONDENT: ADV MOKADIKOA

INSTRUCTED BY: STATE ATTORNEY, JHB

FOR SECOND RESPONDENT: ADV WHARTON

INSTRUCTED BY: TSP CAPE TOWN INC

HEARD: 4 OCTOBER 2024

DECIDED ON: 7 OCTOBER 2024