

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2024-142336

DATE: 5 MARCH 2025

In the matter between:

A M D

Applicant

and

C D D

First Respondent

ACTING MAGISTRATE PIETERSE-KRIEL N O

Second Respondent

TANYA KRIEL

Third Respondent

ADVOCATE N STRATHERN N O

Fourth Respondent

ADVOCATE ELIZABETH NIEWOUDT N O

Fifth Respondent

ADVOCATE KAREN GREEN N O

Sixth Respondent

Neutral Citation: *D v D and Others* (2024/142336) [2025] ZAGPJHC --- (5 March 2025)

Coram: Adams J

Heard: 5 March 2025 – ‘virtually’ as a videoconference on *Microsoft Teams*

Delivered: 5 March 2025 – 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 11:30 on 5 March 2025.

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

Appeals against costs orders – trial judge exercises a ‘true’ discretion – to be exercised judicially – while a court of appeal has the power to alter a decision as to costs, it will exercise this power sparingly – before an appeal court will interfere with an order as to costs it must be satisfied that there has not been a judicial exercise of the lower court's discretion – appeal court will interfere where the exercise of the discretion has not been proper or where it was exercised based upon a wrong principle or upon a wrong view of the facts –

Leave to appeal refused.

ORDER

- (1) The applicant's application for leave to appeal is dismissed with costs.
 - (2) The applicant shall pay the first respondent's costs of this application for leave to appeal, including Counsel's charges on scale 'B' of the Tariff applicable in terms of the Uniform Rules of Court.
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JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original urgent application by the applicant for *inter alia* an order setting aside an interim order of the Children's Court in Randburg. The applicant is the applicant in this application for leave to appeal and the respondent herein was the first respondent in the urgent application.

[2]. On 10 December 2024 I handed down an *ex-tempore* judgment in that application and granted an order in the following terms:

- '(1) The applicant's non-compliance with the Uniform Rules of Court relating to time periods, service and filing is condoned, and the matter is to be heard as one of urgency in terms of Rule 6(12).
- (2) The interim order granted by the second respondent in the Randburg Children's Court on 2 December 2024, under Case No 14/1/4/2-355/2024, be and is hereby reviewed and set aside.
- (3) It be and is hereby declared that the Children's Court application pending in the Randburg Magistrate's Court under Case No 14/1/4/2-355/24 is void *ab initio* and terminated.
- (4) It be and is hereby declared that the second respondent acted *ultra vires* by suspending the applicant's contact with the children in terms of the existing Rule 43(6) Order of the above Honourable Court, and further in directing overnight restrictions to such contact contrary to the existing High Court Rule 43(6) order.

- (5) The applicant's care and contact rights in accordance with the High Court's Rule 43(6) order be and are hereby restored.
- (6) The applicant and the first respondent shall remain liable, in equal shares, for payment of the costs and charges to date of this order of the *curatrix ad litem* (Ms Strathern) and the social worker (Ms Kriel), including Ms Strathern's charges in relation to her appearance at the hearing of the urgent application on 10 December 2024.
- (7) Each party shall bear her/his own costs of this urgent application.'

[3]. The applicant applies for leave to appeal against my above costs orders as per paragraphs 6 and 7 of the above Order which I granted on 10 December 2024. The grounds on which the applicant's application for leave to appeal are based are the following: (a) The *curatrix ad litem* (Advocate Strathern) did not deliver a notice of intention to oppose the relief claimed by the applicant nor did she deliver any opposing affidavit; (2) Advocate Strathern uploaded her report dated 2 December 2024 to *CaseLines* (absent any request for her to do so) and delivered a practice note in which she did not indicate that she opposed the relief sought; and (c) Advocate Strathern attended the virtual hearing on 10 December 2024 and made submissions to the Court in support of a dismissal of the applicant's application.

[4]. Ms De Wet SC, Counsel for the applicant, accordingly, submits that I erred in granting the costs order in paragraph 6 above. I failed to exercise a judicial discretion, so it is contended on behalf of the applicant, in granting the said costs order and/or I was influenced by wrong principles and/or my decision could not have been reasonably reached by a Court properly directing itself to the relevant facts, circumstances and principles before the Court.

[5]. The applicant also argues that exceptional circumstances exist for the granting of leave to appeal in that the issue relating to the costs of Advocate Strathern were not an issue in the application before me. Moreover, so the argument continues, the appointment of Advocate Strathern was a nullity by virtue of the fact that the Magistrate's Court lacked jurisdiction to entertain the

application and/or lacked jurisdiction to appoint as *curatrix ad litem* Advocate Strathern, who, in any event, unsuccessfully made representations to the Court in opposition to the relief claimed by the applicant. The applicant also contend that I made the Order in circumstances prejudicial to her and she did not have an opportunity to set out under oath the facts and circumstances in relation to the appointment of Advocate Strathern. Such facts include a request made to Advocate Strathern by the applicant's attorney to resign prior to her report dated 2 December 2024, as well as the fact that the Magistrate's Court had no jurisdiction to appoint a *curator ad litem* and no jurisdiction to entertain the application before it. Furthermore, the costs charged by Advocate Strathern are not insignificant.

[6]. As for the social worker (Mrs Kriel), the applicant contends that she was appointed by the Learned Children's Court Magistrate and she did not deliver a notice of intention to oppose the relief claimed by the applicant nor did she deliver any opposing affidavit. The issue of the costs of Mrs Kriel was, so the applicant contends, also not an issue in the application before me and the costs order was likewise made in circumstances prejudicial to the applicant who had no opportunity to set out under oath the facts and circumstances in regard to the appointment of Mrs Kriel and her mandate. The appointment of Mrs Kriel, so the applicant contends, was also a nullity by virtue of the fact that the Magistrate's Court lacked jurisdiction to entertain the application and/or lacked jurisdiction to appoint Mrs Kriel.

[7]. The applicant therefore contends that I should accordingly not have made the Order in paragraph 6 of the Order.

[8]. As for the order made in paragraph 7 of the Court Order, the applicant contends that I erred in the exercise of my discretion in relation to costs and that I did not exercise my discretion judicially but that I was influenced by wrong principles. My costs order, so the contention goes, is not a decision that `could reasonably have been reached by a Court properly directing itself to the relevant circumstances, facts and principles. Those grounds, according to the applicant,

include the following exceptional circumstances: (a) the applicant did not seek an order for costs against any of the respondents (including the first respondent) save in the event of opposition; and (b) the first respondent opposed the application and his opposition was without any merit. The relief claimed by her, so the applicant submits, should have been conceded by the first respondent both in respect of urgency and on the merits. Instead, the first respondent sought an order striking the application from the roll for lack of urgency, alternatively, an order dismissing the application together with a punitive order for costs against the applicant.

[9]. The applicant also contends that the first respondent's opposition was frivolous and the relief claimed by the applicant should have been conceded by him. In any event, so the applicant's argument is concluded, she was successful in her urgent application and she ought to have been awarded the costs as the successful party.

[10]. On the other hand, Ms Bedeker, who appeared on behalf of the first respondent, submitted that the application for leave to appeal should be dismissed as the court *a quo*, in granting the impugned costs orders 6 and 7, exercised a 'true' or 'narrow' discretion, which it did judicially. I did not err, so the contention on behalf of the first respondent goes, as, in the exercise of my discretion, I ordered costs 'in a fair, just and reasonable manner taking into account the undisputed facts of the application'. According to the first respondent, I had correctly adopted the view that the *curatrix ad litem* (fourth respondent) and the social worker (Mrs Kriel), having been appointed by the Children's Court, are entitled to their fees and charges as a result of their appointment by the Children's Court.

[11]. I find myself in agreement with these contentions by Ms Bedeker. In the exercise of my discretion, I had regard to the fact that neither of the parties can be said to have been responsible for the sequence of events which followed after the applicant initiated the proceedings in the Children's Court in terms of section 150 of the Children's Act. What weighed heavily on my mind is the fact the

applicant herself initiated the proceedings, which ultimately culminated in the interim order granted by the Children's Court on 2 December 2024.

[12]. 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 judge concerned is of the opinion that 'the appeal would have a reasonable prospect of success'.

[13]. In *Ramakatsa and Others v African National Congress and Another*¹, the SCA held that 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. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[14]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the 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

¹ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[15]. In *Mont Chevaux Trust v Tina Goosen*², 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*³. 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*⁴.

[16]. I am not persuaded that the issues raised by the applicant in her application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. The simple point about this application for leave to appeal is that, while a court of appeal has the power to alter a decision as to costs, it will exercise this power sparingly. Before a court of appeal will interfere with an order as to costs, it must be satisfied that there has not been a judicial exercise of the *a quo* court's discretion.⁵ The court on appeal will interfere where the exercise of the discretion has not been proper⁶, or has been based upon a wrong principle or upon a wrong view of the facts.

² *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

³ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

⁴ *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).

⁵ *Merber v Merber* 1948 (1) SA 446 (A).

⁶ *Kruger v Le Roux* 1987 (1) SA 866 (A) at 871F-G.

[17]. In my view, and having regard to the foregoing principles, it cannot be said with any conviction that I had not exercised my discretion judiciously or that there has been an improper exercise of judicial discretion, that being a vitiating of the award of costs by irregularity or misdirection, or that the costs award was disquietingly inappropriate.

[18]. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*⁷, the Constitutional Court held as follows: -

'A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

[19]. Applying the foregoing principles to this application for leave to appeal, I conclude that there are no reasonable prospects of another court coming to legal conclusions in relation to the costs order at variance with the order I granted in relation to costs. The appeal, therefore, in my view, does not have a reasonable prospect of success.

[20]. Leave to appeal should therefore be refused.

Order

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

(1) The applicant's application for leave to appeal is dismissed with costs.

⁷ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

- (2) The applicant shall pay the first respondent's costs of this application for leave to appeal, including Counsel's charges on scale 'B' of the Tariff applicable in terms of the Uniform Rules of Court.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	5 March 2025
JUDGMENT DATE:	5 March 2025 – judgment handed down electronically
FOR THE APPLICANT:	A De Wet SC
INSTRUCTED BY:	Billy Gundelfinger Attorneys, Melrose Arch, Johannesburg
FOR THE FIRST RESPONDENT:	L Bedeker
INSTRUCTED BY:	Van Zyl Johnson Incorporated, Woodmead, Sandton
<i>CURATRIX AD LITEM:</i>	N Strathern