



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case number: **8947/2022P**

In the matter between:

D[...] R[...] R[...]

APPLICANT

and

S[...] D[...] R[...]

FIRST RESPONDENT

THE OFFICE OF THE FAMILY ADVOCATE

SECOND RESPONDENT

Coram: Mossop J

Heard: 28 May 2025

Delivered: 28 May 2025

ORDER

The following order is granted:

The application for leave to appeal is dismissed with costs, such to be taxed on scale B.

JUDGMENT

MOSSOP J:

Introduction

[1] This is an ex tempore judgment.

[2] Over the course of three days in February 2025 I heard oral evidence in the dispute between the applicant and the first respondent. That dispute, as initially framed, involved who of the applicant and the first respondent should have care of their two minor children and where the minor childrens' principal place of residence should be. In the judgment that I delivered, I identified the two children by their respective initials, namely 'S' and 'M' respectively, and I shall continue to refer to them by those initials.

[3] The appearances this morning are as they were at the hearing of oral evidence: Mr Ender appears for the applicant and Mr Dwayi appears for the first respondent. As before, there is no appearance for the second respondent.

[4] The referral to oral evidence was as a consequence of an order of this court delivered on 27 September 2022. That order, acknowledging the disputes of fact that existed on the papers, stated that the issues to be determined by the hearing of oral evidence were the following:

'1.1 Which of the parties (the Applicant or the First Respondent) should the minor child S, a boy born of the union between the Applicant and First Respondent on 5 May 2017 (S) have his primary place of residence with ("S's custodial parent");

1.2 What terms of contact should the party with whom S does not primarily reside (S's non-custodial parent) enjoy with regard to S?

1.3 Which of the parties (the Applicant or the First Respondent) should the minor child, M, a girl born of the union between the parties on 21 September 2021 ("M") have her primary place of residence with (M's custodial parent);

- 1.4 What terms of contact should the party with whom M does not primarily reside (M's non-custodial parent) enjoy with regard to M;
- 1.5 Should S and M be separated and have different custodial parents.'

[5] Evidence was duly led before me. Midway through the third and last day of the three-day hearing, the parties handed up an order that was ostensibly to be taken by consent, in terms of which the then prevailing status quo would remain (the consent order). In terms of the consent order, care of S would be formally awarded to the applicant and care of M would be formally awarded to the first respondent.

[6] On first reading, I was dubious that the consent order was in the best interests of S and M. I accordingly called for written argument on whether I should grant that order. I received the requested written argument and after considering it and the facts of the matter, I delivered judgment on 13 March 2025.¹ In my judgment, I declined to grant the consent order and found that the answer to the question framed in paragraph 1.5 of the court order of 27 September 2022 was in the negative: the minor children should not continue to be separated. In my view, the consent order was not in the best interests of S and M. I consequently directed that their primary care be awarded to the first respondent and that both children would have their primary place of residence with her. I also set out the applicant's rights of contact with S and M.

[7] The applicant, dissatisfied with my order, seeks leave to appeal against it.

The Superior Courts Act and the applicable test

[8] Section 17(1) of the Superior Courts Act² (the Act) provides as follows:

'17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a)(i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

¹ *D.R.R v S.D.R and another* [2025] ZAKZPHC 26.

² Superior Courts Act 10 of 2013.

- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) 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.’

[9] How that section of the Act should be applied was considered by the Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhita*,³ with the court commenting 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 Courts 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 a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.’

[10] In bringing an application for leave to appeal, an applicant must identify a material misdirection, or misdirections, on the part of the judicial officer whose decision is sought to be appealed against that would warrant an appeal being allowed. These misdirections, ordinarily, will be identified in the applicant’s notice of application for leave to appeal.

The applicant’s notice of application for leave to appeal

[11] The relief that the applicant claims in his notice of application for leave to appeal (the notice) is that he be granted leave to appeal against:

- ‘(a) That portion of paragraph 1 of the Order which grants primary care of S to the first respondent;
- (b) That portion of paragraph 1 of the Order which directs that S shall have his primary place of residence with the first respondent;
- (c) The orders set out in paragraphs 2, 3, 4, 5, 6 and 7 of the Order.’

³ *MEC for Health, Eastern Cape v Mkhita* 2016 JDR 2214 (SCA) paras 16, 17.

[12] From this it is possible to deduce that the applicant contends that the correct order that ought to have been granted was an order formally and permanently separating the two minor children from each other. In other words, the consent order should have been granted. It is that consent order that I found not to be in the best interests of S and M. The applicant consequently no longer claims the relief that led to the matter being referred to oral evidence in the first place.

[13] From a close reading of the applicant's notice, it seems that he alleges that I misdirected myself in the following respects:

- (a) I ought to have approved of, and granted, the consent order;
- (b) I ought not to have granted so-called restricted 'dialed-back' contact between the applicant and M;
- (c) I ought to have drawn a negative inference against the first respondent arising out of the way that she allegedly conducted herself over the course of the litigation;
- (d) I overemphasized the desirability of siblings being raised together;
- (e) I erred in accepting the evidence of the applicant's principal expert witness, Ms Main-Baillie (Ms Main-Baillie), that the applicant had no real relationship with M; and
- (f) I overemphasized the applicant's history of drug use, unemployment, and reliance upon his family.

[14] Thus, when considered individually or collectively, the applicant submits that another court may come to a different conclusion than the one to which I came, alternatively, that there are compelling reasons for leave to appeal to be granted.

[15] I briefly consider each of the grounds of appeal identified in the notice.

The grounds of appeal

The consent order

[16] As mentioned, the consent order was not presented on the first day of the hearing but midway through the last day of hearing. Its production was preceded by three days of evidence. The evidence that had been led up until that point had a

common thread to it: young children, such as M, should not easily be separated from their primary caregiver, and siblings should ideally be raised together where this is at all possible.

[17] There is nothing magical in these propositions - they simply accord with common sense. Those propositions were supported both by Ms Main-Baillie and the Family Advocate, the latter of which stated that:

‘Siblings at this tender age should not be growing apart from one another.’

[18] No reason was advanced by the applicant as to why S should not be permitted to grow up with his sister. The continued separation of S and M appeared not to be a concern to him and was never addressed by him. There appeared to be no impediment as to why S and M should not be raised together, other than the fact that the applicant wanted S with him.

[19] The applicant repeatedly submitted that S was happy in his present surroundings and should not be uprooted from them. That appeared to be the only justification for the position adopted by the applicant. S may well be happy with things as they now are. But happiness is not static: it changes and evolves. Growing up with his sister may bring S a different form of happiness, and a happiness that is no less satisfying. S is now but eight years old and will easily adapt to life with his sister, who, according to Ms Main-Baillie, obviously adores her brother. In my view, this already fractured family should not be further fractured unnecessarily.

[20] The consent order, in my view, had all the hallmarks of the applicant trying to avoid a looming order depriving him of the care of S based upon the evidence heard. It did not consider what was in the best interests of S or of M but seemed to be constructed to best serve the interests of the applicant. In being confronted with the consent order I had a duty to consider and evaluate whether it was in the best interests of the minor children, and I dispassionately did so.⁴ I am satisfied that no other court

⁴ *ZDE v CE* (1011/2022) [2024] ZASCA 159 para 18.

would find differently in not accepting the consent order, for no reason of any materiality was advanced for the continued separation of S and M.

Dialed-back contact

[21] M was three and a half years old at the time of the hearing of oral evidence. She had been separated from the first respondent, and S, for three of those years. She accordingly had minimal, intermittent contact with the applicant over the short span of her life. Ms Main-Baillie found in her report that:

‘[t]here is therefore a clear difference in his attachment with S compared with M.’

[22] The Family Advocate in her report advocated for ‘gradual phased-in contact.’ Ms Main-Baillie, in her report, also made the following observations:

‘M is of a tender age, and any change in primary residence will need to be phased in.’

Ms Main-Baillie went on to state the following under a heading in her report that read ‘Phased in Contact’:

‘Given M’s tender age and stage of development, and bearing in mind that Mrs R has had primary residency of her since birth, a phased-in contact approach is recommended over a period of eight weeks...’.

These comments were made in the context of an assumption that the care of M would be awarded to the applicant. Why that gradual introduction should not occur given the order that I made is not clear to me.

[23] The second respondent and Ms Main-Baillie thus both recommended a gradual reintroduction of the applicant to M. That is what I have ordered to minimize any potential distress to M. It appears unlikely to me that another court would come to a different view.

The negative inference

[24] I was required to decide this matter based on the evidence led before me. It is correct that I was involved to an extent in an earlier skirmish in the matter when I granted an order against the first respondent. She complied with that order. I pointed

out in my judgment that the first respondent was never cross-examined after she had given her evidence in chief. I am therefore uncertain on what basis I was expected to draw the negative inference urged by the applicant.

Siblings being raised together

[25] I have already mentioned that one of the common themes of the evidence of all the witnesses that testified, especially that of the expert witnesses, was that siblings should be raised together unless there is an exceptionally good reason why that should not happen. The applicant advanced no such reason, other than the fact that S is presently happy. I considered this issue in some detail in my judgment, and to repeat myself will not serve any useful purpose.

[26] However, in this regard, the applicant's expert witness, Ms Main-Baillie, stated in her report:

'It is generally in children's best interests to have shared residency and contact with their parents in separated families.'

[27] Parents may choose no longer to have a relationship with each other, for that is their right. But by exercising that right they may not infringe the right of siblings to grow up with each other. I do not believe that I overemphasized this fundamental, yet basic principle.

Acceptance of the evidence of the applicant's expert witness

[28] I need to spend little time on this ground. The applicant presented the evidence of his expert witness, Ms Main-Baillie, in support of his relief as originally claimed in his notice of motion. As my judgment reveals, I was not overly impressed by her as a witness but accepted that she was correct when she stated that the applicant did not have much of a relationship with M. Their continued separation over virtually the entire length of her life and the common cause facts pointed to this being the case.

[29] In those circumstances, the applicant cannot now complain that I ought not to have accepted the evidence of his witness. Ms Main-Baillie's evidence was led at the commencement of the hearing and before the consent order was produced. If the applicant now contends, as he appears to do, that much has changed since Ms Main-Baillie prepared her report, then he ought to have introduced expert evidence to that effect. He did not do so but was content to rely on the evidence of Ms Main-Baillie notwithstanding that the relief that he ultimately claimed had changed substantially.

The applicant's drug usage and unemployment

[30] It is submitted that I overemphasized the applicant's history of drug use, his unemployment, and his reliance upon his family. The fact of the matter is that these are not issues that can be disputed by the applicant. He has a history of hard drug use and of relapsing after receiving treatment, he was unemployed for a considerable period, and he is only able to cope with the demands of raising S with the considerable assistance of his loving and supportive family. These were facts presented before me, and I was required to consider them and weigh them up in formulating my decision. I placed some, but not undue, weight upon them.

Conclusion

[31] I am satisfied that there is no reasonable prospect of another court coming to a different decision nor do I perceive there to be any compelling reason for an appeal to be allowed. I also do not see an important question of law arising from the facts of this case and I cannot therefore share Mr Ender's submissions in this regard. The application must accordingly fail.

Costs

[32] Having heard the oral evidence, and after some deliberation, I did not order costs. I am, however, prepared to grant costs in this instance as the application has, in

my view, been entirely without merit. As Wallis JA stated in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and others*:⁵

‘The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.’

[33] In my view, this application falls within the type of application contemplated by Wallis JA. Accordingly, it would be appropriate to direct that the costs to be awarded against the applicant be taxed on scale B.

Order

[34] I accordingly grant the following order:

The application for leave to appeal is dismissed with costs, such to be taxed on scale B.

MOSSOP J

⁵ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and others* [2013] ZASCA 120; 2013 (6) SA 520 (SCA); [2014] 1 All SA 375 (SCA) para 24.

APPEARANCES

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No appearance