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

Not reportable / Reportable

Case no: A157/2017

In the matter between

K[...] I[...] V[...]

APPLICANT

And

C[...] J[...] V[...]

RESPONDENT

In re:

K[...] I[...] V[...]

PLAINTIFF

and

C[...] J[...] V[...]

DEFENDANT

Neutral citation: *V[...] v V[...]* (A157/2017) [2025] ZAFSHC 231 (7 August 2025)

Coram: BOONZAAIER AJ

Heard: 4th August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7th August 2025.

ORDER

- 1 Leave to appeal to the full bench of this division is granted.
- 2 Costs to be cost in the appeal.

JUDGMENT

Boonzaaier AJ

[1] The applicant seeks leave to appeal the judgment and order of this Court handed down on 17 April 2025. Leave is sought to the full bench of this Court or the Supreme Court of Appeal on the grounds embodied in its notice of application for leave to appeal dated 26 May 2025. The respondent opposed the application.

[2] Leave to appeal is sought in terms of s17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act 10 of 2013. The applicant relies on a number of grounds and reasons which are discussed in his notice of appeal.

[3] Section 17(1) of the Superior Courts Act provides that leave to appeal may only be granted 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;’

[4] The primary case made out in support of the application is that the court misdirected itself by:

(a) holding that the core issue in this matter is whether a certain clause in the settlement agreement was concluded as a result of a common mistake between the parties, in spite of a clear demonstration otherwise;

(b) not considering and determining each of the grounds of the relief sought, upon the correct principles and requirements of each cause of action;

- (c) drawing the incorrect attribution of drafting and responsibility and fault for the impugned clause 5;
- (d) finding that the settlement agreement provided *inter alia* that the respondent is entitled to spousal maintenance in the amount of R25 000 per month, whereas the settlement agreement clearly provided (in the clause 5), that he 'applicant shall pay maintenance to the respondent in respect of personal maintenance...in accordance with the existing Rule 43 order,'
- (e) finding that the Plascon-Evans¹ test applies to the determination of any dispute of fact, and not expressly for the determination of real and genuine disputes of fact, the mischaracterization of the dispute and failure to distinguish the legal basis of the relief sought;
- (f) holding that an applicant should realize prior to the launch of the application that a serious dispute of fact was bound to develop and erred in proceeding to determine the applicant's conduct based on a simple apprehension of a dispute of fact.
- (g) not rejecting the respondent's opposition, based on the written communications previously transmitted to the applicant, in which the respondent patently and clearly evinced a willingness to accept temporary maintenance from the applicant.
- (h) not rejecting the respondent's opposition and determining the relief on the papers;
- (i) finding a material dispute of fact existed which could not be resolved on the papers and that the applicant, who bore the onus, had failed to prove his case.
- (j) finding that the cost order against the applicant is justified despite the respondent's unreasonable and disingenuous conduct.

[5] The respondent contends that the test is simply whether there is any reasonable

¹ *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A).

prospect of success in an appeal. As such, leave to appeal in terms of s 17(1)(a)(ii) to the full bench should therefore not be granted. Furthermore, the respondent argued that if the court is unpersuaded that there are prospects of success, it must still enquire whether there is a compelling reason to entertain the appeal which is also absent.

[6] It was further submitted that the applicant ought to have applied for referral to oral evidence as soon as the dispute was evident on the papers and before full argument was heard by the court.²

[7] The applicant argued that the Supreme Court of Appeal (SCA) in *Pahad Shipping CC v Commissioner for the South African Revenue Services*³ noted that the court has a wide discretion with regard to a referral for oral evidence where an application cannot properly be decided on affidavit. Corbett JA opined that rule 6(5)(g) is not inflexible and the late request for oral evidence (even at the argument stage) can be considered.⁴

[8] The SCA in *Smith v S*,⁵ per Plasket AJA, had occasion to consider what constituted reasonable prospects of success in s 17(1)(a)(i) and held:

‘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 Respondent 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 categorized as hopeless. There must, in other words, be a sound, rational basis for

² *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 981D.

³ *Pahad Shipping CC v Commissioner for the South African Revenue Services* [2009] ZASCA 172; [2010] 2 All SA 246 (SCA).

⁴ *Ibid* para 20.

⁵ *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA).

the conclusion that there are prospects of success on appeal.’⁶

[9] This was an application for a declaratory order to address the maintenance obligation towards the Respondent or a variation, order in terms of rule 42(1)(a) and/or (c) for the rescission of an order granted by Justice Jordaan on 4 December 2025 (the order).

[10] The applicant argued that the respondent seeks to exploit a *patent lacuna* in the settlement agreement, that she is no longer entitled to spousal maintenance after the conclusion of the accrual.

[11] It is further submitted by the applicant that the intention of the parties - both prior to and following the settlement agreement - was that the maintenance payments were to be of an interim nature. The respondent confirmed this intention on two occasions through correspondence via her attorneys (annexures ‘R1’ and ‘R2’), wherein she expressed her willingness to accept the payments as interim. These communications clearly indicate that she regarded the maintenance as interim.

[12] The respondent, however, argued that she could not have considered the payments as interim, as no accrual amount had been determined at the time of the settlement agreement. Accordingly, she contends that she would not have accepted the maintenance on an interim basis.

[13] The applicant submitted that this opposition was raised for the first time in her replying affidavit and had not been introduced at any earlier stage.

[14] The respondent opposes the application on various grounds including *inter alia*:-

⁶ Ibid para 7.

- a) The applicant knew beforehand that there is a factual dispute between the parties which could not be addressed on papers only. This was foreseeable prior to the institution of the proceedings;
- b) The applicant ought to have applied for referral to oral evidence as soon as the dispute was evident on the papers and before full argument was heard by court;
- c) The applicant's contention that the Court misdirected itself in the application of the Plascon Evans test relating to the resolution of factual disputes in opposed motion proceedings is without merit;
- d) The respondent denied that the parties were *ad idem* that, once the divorce proceedings come to an end, the applicant's maintenance obligation would cease;
- e) The respondent disputed the decree of divorce and deed of settlement contained an ambiguity or patent error or omission as envisaged in rule 42(1)(b) of the Rules.

[15] I agree that the judgment was incorrect in stating that the application having been dismissed under rule 49(1)(c). It is clear that the application was dismissed in terms of rule 6(5)(g) and disposed of in accordance with Rule 49(1)(c), further that the applicant has failed to establish a case for the rescission or variation of the divorce order.

[16] Having considered the submissions made, I am of the view that another court might interpret the parties' intentions at the time of signing the settlement agreement differently. This could affect the determination of whether a real and foreseeable dispute existed. Additionally, a point of contention remains regarding the appropriate stage at which an applicant is expected to request a referral for the hearing of oral evidence, and whether the court *in casu* ought to have accepted the late request.

[17] Consequently, the following order is made:

- 1 Leave to appeal to the full bench of this division is granted.
- 2 Costs to be cost in the appeal.

Boonzaaier AJ

Appearances

For the Applicant: A Jansen van Vuuren

Instructed by: Van Zyl Johnson Inc,
/ CO Kramer Weiman,
Bloemfontein

For the Respondent: W Groenewald,
/ CO Strauss Daly Attorneys,
Bloemfontein