



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: MTHATHA

CASE NO: 4637/2022

In the matter between:

Z[...] M[...] & ANOTHER

APPLICANTS

And

A[...] F[...] & 3 OTHERS

RESPONDENTS

JUDGMENT ON LEAVE TO APPEAL

MHAMBI AJ

[1] This is an application for leave to appeal against judgment and order of the court granted on 03rd June 2025.

[2] The issues for determination in the main judgment concern whether this court has powers to order an adult person to undergo paternity test. The main judgment described this as a thorny issue of law as circumstances of this kind are unusual in law. According to the parties it is common cause that determining paternity is necessary to establish whether the respondents are the children of the late M[...]

R[...] M[...]. What is in dispute is the manner in which the DNA should be conducted to prove such a paternity.

[3] The applicants suggested that a sibling's test, whereas the respondents suggested that the only conducive DNA test would be one conducted on the remains of the deceased. The main judgment described this as drastic.

[4] The test for leave to appeal is regulated by Section 17 of the Superior Court Act¹, '**the Act**'.

[5] Section 17(1)(a) of the Act provides that:-

'Leave to appeal may only be when the judge or judges concerned are of the opinion that-

- 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 judgment on the matter under consideration'.

[6] In the *Mount Chavelox Trust v Tina Goosen and Others*², unreported judgment of the Land Claim Court, Bertelsmann J held that:-

'It is clear that the threshold of granting leave to appeal against the judgment of a higher court has been raised in the new Act. The former Act whether leave to appeal should be granted was reasonable prospect of success that another court might come to a different conclusion see **Van Heerden v Groonwright and Others**³. The use of the word "**would**" in the new statute indicate a measure of certainty that another court will differ from court whose judgment to be appealed against'.

[7] In a nutshell an application for leave to appeal must convince the court that on proper grounds there is a real prospect or realistic chance on appeal. A mere

¹ Act 10 of 2013

² LCC 14R/2014, 3 November 2014.

³ 1986 (2) SA 342 (TPD) at 343C

possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

[8] On this test of appeal, the SCA stated the following in *S v Smith*⁴:-

‘What is a test of a reasonable prospect 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 that of the trial court. In order to succeed therefore the appellant must convince this court that 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 that that there is mere possibility of success that the case is arguable on appeal or that the case is not categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’⁵

[9] The basis of this appeal is whether or not the court has powers to compel any person to subject to DNA test for the purposes of proving paternity or proving the truth and the administration of justice.

[10] In my view, despite *Botha v Dreyer*⁶ and the authorities referred therein, finding find that this court does have the power to order or compel any person to submit to a DNA test for the purposes of establishing paternity or of proving the truth in the administration of justice ,whenever the need arises or when it is in the interest of justice to do so.

[11] I disagree with the applicant that the decision in *Botha v Dreyer* even though specifically dealt with paternity involving minor child and thus its findings cannot be extended to all persons and or any person.

⁴ *S v Smith*, 2012(1) SACR 567 (SCA), see also Ramakotso and Others V African National Congress, 2021 ZASCA 31, 31 March 2021

⁵ *Supra* para 7

⁶ 442/08 [2008] ZAGPHC 395 (19 November 2008)

[12] The applicant seem to have given little regard to the views of Didcott J, as he held in *Seetal v Previtha and Another NO*⁷. The judgment is correctly referred to in paragraph 9 of the main judgment.

[13] It is a matter of fact that the DNA test on the remains of the deceased could not be conducted without the remains being exhumed. This is a point the appellant misses, unless it has another suggestion, which it has not proposed in the main action.

[14] The conditional consent for the DNA to be conducted on the remains of the deceased, *ipso facto* means the respondents seek the remains of the deceased to be exhumed for that purpose. The main judgment is correct in this regard; no other interpretation could be placed on the intention of the applicant.

[15] The reference in the main judgment to the issue of public morals and the authorities cited therein, is relevant to stress the fact that the remains of the deceased must be respected. I-re-iterate that the intentions of the applicants are drastic on how DNA test should be conducted.

[16] I disagree with the applicant; the main judgment considered condonation of the late filing of the applicants' replying affidavit. The court expressed its displeasure; hence its party was ordered to pay its own costs, this is despite the success of the applicant in the main application.

[17] I agree with the view that a court may not grant leave to appeal where the threshold which warrants such a leave has not been cleared by the applicant. The threshold has been given legislative force and clarity⁸

⁷ 1983 (3) SA 827 (D) 862-M

⁸ H.B. (nee DJ) v R.J.B. (21480/2014) [2024] ZAGPPHC 401 (2 April 2024)

[11] Perhaps, before, I conclude and make a finding on this application, it is apposite for me to borrow from the words of Theron AJ in *Molaudzi v S*⁹ in that:-

‘The rule of law and legal certainty of finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be attended if parties are free to continuously approach court on multiple occasions in the same matter. However, legitimacy and confidence in the legal system demands that an effective remedy in situations where the interest of justice cry out for one. There can be no legitimacy where final orders would result in substantial hardships or injustice or are allowed to stand merely for the sake of rigidly adhering to the principle of res judicata. (paras 37-39)’.

[12] In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* maintains that finality of a matter is of essence and the parties may not come to court for a simple delay or it’s deferral¹⁰

[13] In my view, meritless and void of basis application for court to appeal should not burden an appeal court with scarce resources as it may have.

[14] I maintain, the main judgment is correct, the DNA proposition as suggested by the applicant, in this application for leave to appeal is drastic, in circumstances where less drastic measures can be used.

[15] I am not convinced that another court might find differently. Therefore, this application for leave to appeal should fail.

In the result I make the following order:-

⁹ 2015 (8) BCLR 904 (CC)

¹⁰ 2021 (11) BCLR 1263 (CC) para 1

1. This application for leave to appeal is dismissed with costs on Scale B.

M. MHAMBI

Judge of the High Court (Acting)

Date heard : 28 August 2025

Date Delivered : 16 September 2025

APPEARANCES:-

ADVOCATE ZILWA : Counsel for the Applicants

Instructed by : Zilwa Attorneys
Suite 542 – 4th Floor
Development House
York Road
Mthatha
Tel: 047 5311572

Mr Msindo : Attorneys for the Respondents

Instructed by : V.V. Msindo & Associates
No: 48 Wesley Street
Mthatha