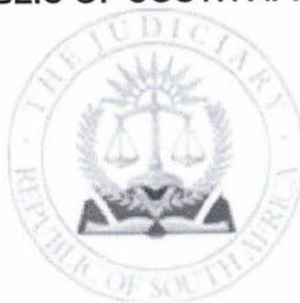


REPUBLIC OF SOUTH AFRICA



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

CASE NO. 2941/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
DATE	SIGNATURE

07/10/2025

[Signature]

In the matter between:

P [L...] [S...]

Plaintiff/Respondent

and

P [R...] [S...]

Defendant/Applicant

This judgment was handed down electronically by circulation to the parties' and or the parties' legal representatives by email and by being uploaded to CaseLines. The date for the hand down is deemed to be 07October 2025.

Judgment - Leave to Appeal

Thupaatlase, AJ

Introduction

- [1] This is an application for leave to appeal against the whole judgment and order of this Court delivered on 9 November 2023. I granted the respondent/plaintiff the relief as follows:
- (i) The defendant is directed to forthwith to pay R 711 337.00 towards costs of the pending divorce trial action instituted under case no. 2014/2941;
 - (ii) Prayer 2 is hereby dismissed;
 - (iii) The defendant's counterclaim is dismissed; and
 - (iv) Cost on attorney and client scale.
- [2] The order was granted pursuant to an application for relief in terms Rule 43¹ of the Uniform Rules of Court, for contribution towards the legal costs of divorce proceedings pending between the parties. As shown in the judgment against which leave to appeal is sought, the matter has had a long history. The proceedings were instituted in 2014 and as the record reflects, there appears to be no end in sight to this matrimonial saga.
- [3] As my judgment bears out, the divorce proceedings have been acrimonious and resulted in two Rule 43 applications. I shall proceed to deal with the grounds of appeal. It is not my intention to rehash what is already contained in the main judgment.

Grounds of Appeal

- [4] There were numerous grounds on which the judgment was criticised by the applicant. These grounds are both what the applicant characterises as wrong application of the law and further that, the court made incorrect factual findings and conclusions. This also included the costs order which the court

¹ Rule 43 (1): "This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

...

(b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;

granted in favour of the respondent. It is also contended that the court failed to exercise its discretion. The applicant characterised such discretion as a true discretion.

[5] It was also argued that given the fact that the order contemplated in terms of Rule 43 has a final effect, it was appealable. This was so because as argued by the applicant, there is no other remedy available to him if dissatisfied by the order granted. The applicant contended that the court should have concluded that there was no urgency in hearing the application. The applicant argued further that, the respondent failed to prove her case and the court erred in finding in her favour.

[6] The current application is opposed by the respondent on a narrow point of law. The respondent argues that on available authority the application for leave to appeal a Rule 43 judgment is incompetent. According to the respondent, the issue as to whether the Rule 43 application is appealable or not has been settled by the Constitutional Court. The respondent submits further that given that the application was launched against trite law, the court should consider costs *de bonis propriis*. The authority relied upon by the respondent will be discussed later in the judgment.

The Law

[7] The law governing leave to appeal is set out in section 17 (1) (a)² and (b) of the Superior Court Act³ ('the Act'), read together with rule 49(1)(a) of the Uniform Rules. The ground for appeal is that the appeal would have reasonable prospects of success. The section has been subject to judicial interpretation.

[8] The approach that guides a decision whether or not to grant leave to appeal was stated succinctly in *Mont Chevaux Trust v Tina Goosen & Others*⁴ that:

² '(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 reasonable prospects of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;'

³ Act 10 of 2013.

⁴ 2014 JDR 2325 (LCC) at para 6.

"It is clear that the threshold for granting leave to appeal against 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 Cronwright and 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."

- [9] There is a clear recognition of the heightened threshold in cases of application for leave to appeal in terms of the new statutory regime. In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*,⁵ the court held that:

"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."

- [10] In the judgment of *Ramakatsa and Others v African National Congress and Another*,⁶ the SCA gave an *imprimatur* to this legal position by stating that:

"Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice... I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly mean that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave should be granted... The test of reasonable prospects 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. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."

⁵ [2013] ZASCA 120; 2013 (6) SA 520 (SCA) at [24].

⁶ [2021] ZASCA 31 at [10].

[11] It is clear that the test whether the requirement of section 17(1) (a) of the Act is stringent. In the case of *MEC for Health, Eastern Cape v Mkhitha and Another*,⁷ (*Mkhitha*) the court held that:

“Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there is truly a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 make 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 the there is some other compelling reason why it should be heard.”

[12] The court in *Mkhitha*⁸ continued to set the test as follows:

“An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable 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 sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[13] As argued by the respondent’s counsel, the matter was authoritatively dealt with in the case of *S v S and Another*⁹ (*S v S*). The court dealt with the litigation history of the matter and having found the matter of appealability of rule 43 orders as it raised arguable point of law of general public importance as envisaged by section 167 (3) (b) of the Constitution, the court went on to hear the matter. The court had to decide whether section 16 (3)¹⁰ of the Act infringes any constitutional rights of parties to such litigation.

[14] In *S v S*¹¹ judgment, the court observed that:

⁷ [2016] ZASCA 176 at [16].

⁸ *Id* at [17].

⁹ [2019] ZACC 22; 2019 (8) BCLR 989 (CC); 2019 (6) SA 1 (CC).

¹⁰ Section 16(3) provides: ‘Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application-

- (a) by one spouse against the other for maintenance *pendente lite*;
- (b) for contribution towards the costs of a pending matrimonial action;
- (c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or

- (d) by one parent against the other for the interim access to a child when patrimonial action between the parents is pending or about to be instituted.

¹¹ See n10 at [30].

“It is undeniable that an appeal process would significantly delay the finalisation of rule 43 proceedings. Several applications could potentially be heard before the final order. These include application for leave to appeal; an application in terms section 18 of the Act for the suspension of the order; an urgent appeal in terms of section 18, an application for leave to appeal to the Supreme Court of Appeal; an application for reconsideration by its President; an application for leave to appeal to the Constitutional Court; and finally hearing in this court.”
(References omitted)

[15] The court continued to remark as follows:

“It goes without saying that the expense would be immense. An added financial impediment is that since 1 November 2017 there are no longer fee restrictions on rule 43 applications. This means that an appeal procedure would have enormous cost ramifications for an impecunious spouse. It is more financially vulnerable spouses, usually the wives, who disproportionately bear the brunt of this. Generally, they are the ones who launch rule 43 applications. This is so because it is women, who more often than not, are the primary care-givers. Recalcitrant spouses could use the appeal process to generate a plethora of unmeritorious applications.”

[16] The court dealt with the application under various headings including the following: best interests of the child; equality before the law as envisaged by section 9 of the Constitution and access to court as per section 34 of the Constitution. The court conclusion against all those factors, rule 43 is not appealable.

[17] In the judgment of *C.T v M.T and Others*,¹² the court confirmed the triteness and constitutionality of the law in this respect. The court stated that:

“I turn now to complaints articulated in para 115.1 of the stated case. In regard to non-appealability, the question has been settled by the Constitutional Court in *S v S supra*. Non-appealability is not unconstitutional. I should add that non-appealability is not imposed by rule 43 but by s 16 (3) of the Superior Courts Act 10 of 2013. At the hearing the applicant acknowledged that the appealability

¹² [2020] ZAWCHC 2; 2020 (3) SA 409 (WCC) at [26].

question had been settled in *S v S*, but said that in considering his other complaints one must bear in mind there is no appeal as antidote to unjust decisions.”

[18] The considerations that militate against appealability as enumerated in *S v S* are all present in this case. The court mentioned earlier in its judgment that the divorce proceedings were commenced in 2018. The order for contribution to costs was made in 2023 and it was only in June 2025 that an application for leave to appeal was brought. It is apparent why section 16(3) was enacted to alleviate and shield litigants from recalcitrance of this nature.

[19] What is clearer is that the order I made has no final effect. There is an inbuilt mechanism to mitigate any perceived unfairness that party may experience. This is clear from a plain reading of rule 43(6)¹³ itself and of course as already indicated section 16(3). As at the time of this application, I am not aware of such application by the court or no such application for variation or none was brought to my attention.

[20] The law regarding interim orders was settled in *Zweni v Minister of Law and Order*,¹⁴ after having comprehensively reviewed the authorities, the court said the following:

“In light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that generally speaking, a non-appealable decision (ruling) is a decision which is not final (because of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.”

[21] The Constitutional Court expanded the above exposition and introduced the aspect of interest of justice. This was in the case of *City of Tshwane Metropolitan Municipality v AfriForum and Another*.¹⁵ This point was not raised

¹³ Rule 43(6) provides that: ‘The court may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate’.

¹⁴ 1993 (1) SA 523 (A) at p536B.

¹⁵ [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC).

directly by the applicant. However, in case this was the point argued, I am still disinclined to accede to granting the application for leave to appeal as such order will not be in the interest of justice. The matter was aptly put by the Constitutional Court as follows:

“The reality of the order is again that Council is forced to live with that intrusive effect as long as the review proceedings are pending or remain inconclusive by reason of likely appellate processes. The issues at stake being hotly contested and emotive, it is very likely that the decision of the review court would indeed be taken on appeal by whomsoever loses. If the four years it took for this interim order to be heard by this Court be anything to go by, then Council would have to wait for many years while the review order is slowly meandering its way up the appellate ladder of our court system.”¹⁶

- [22] Given a long and protracted history of this matter, it is not farfetched to make the same conclusion regarding this matter. Additionally, the application is not based on existing authority. The applicant has made no attempt to point out any distinguishable factor which would make an appeal court to depart from *S v S*. During the argument, counsel for the applicant failed to even make an effort to address the authorities which were clearly against his case.

Costs

- [23] The respondent prevailed upon me to make a punitive costs order against the applicant. It is true that the manner in which the applicant has conducted this litigation is to be deprecated. The applicant brought an application against established authority by the Constitutional Court. The issue of costs has been crystalised in a number of cases. The general principle is that costs follow the results unless the court finds otherwise. The court was urged by the respondent that the court should have regard to the history of this matter and to conclude that the application was *mala fide*.
- [24] The respondent asked for costs *de bonis propriis*. The respondent pointed out that she addressed a letter through her legal representative to the applicant advising the applicant to withdraw this application. Despite such an advice the

¹⁶ *Id* at [37].

applicant persisted to bring the application. The applicant argued that the reason for the actions he took was because of the unjust order.

[25] It is trite law that awarding of costs is a matter that falls within the discretion of the court, and such discretion must be exercised judicially taking into account all the relevant factors.

[26] In *South Africa Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others*,¹⁷ the court held that:

“An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy....”

[27] In *Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited*,¹⁸ the court held that:

“It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, *per se* ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context.”

[28] I have carefully considered whether to mulct the legal representative of the applicant with costs *de bonis propriis*. I am aware that an order of such nature is reserved for conduct which substantially and materially deviates from standard expected of a legal practitioner in the conduct of litigation. It follows that such conduct must be found to be egregious that the court in granting

¹⁷ [2006] ZACC 7; 2006 (8) BCLR 901 (CC); 2009 (1) SA 565 (CC) at [54].

¹⁸ 2014 (3) SA 265 (GP) at [35].

such an order, the court will be expressing its opprobrium towards such conduct. I am not persuaded that this is such a conduct.

Order

1. Application for leave to appeal is hereby dismissed.
2. The applicant is ordered to pay costs on attorney and client.



THUPAATLASE AJ
ACTING JUDGE OF THE HIGH

COURT

JOHANNESBURG

Date of Hearing: 26 June 2025
Date of Judgment: 07 October 2025

Appearances:

For the Plaintiff /Respondent: Adv. M Nowitz
Instructed by: Hirschowitz Flionis Attorneys

For the Defendant/Applicant: Greg Willis
Instructed: Cummings Attorneys