IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case NO: 10481/2018
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO

In the MATTER between:

D[...] N[...] **APPLICANT**

and

P[...] N[...] **RESPONDENT**

Coram: Kholong, AJ
Date of hearing: 22 September 2025
Date of judgment: 24 October 2025

Summary: Leave to appeal – requirements in terms of section 17 of the Superior Courts Act.

ORDER

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1 The application for leave to appeal is dismissed.

2 The applicant is to pay costs of this application.

JUDGMENT

KHOLONG AJ

Introduction

[1] Applicant has filed an application for leave to appeal against the judgement and orders of this Court delivered on 6 August 2025 and rulings related thereto.

Background

[2] This application follows this Court's judgement granting a decree of divorce and equitable distribution of the joint estate of applicant and respondent following the marriage they had entered into on 10 January 2003. Respondent, who is the plaintiff in the divorce action had prayed that she is entitled to the relief she sought in the particulars of claim on account of irretrievable breakdown of marriage. Applicant did not contest that the marriage had broken down irretrievably but had counterclaimed and sought forfeiture of benefits in his favor on account of alleged substantial misconduct by respondent during the marriage.

[3] This court following a trial that took some eight days found in respondent's favor and ordered a decree of divorce. This court declined applicant's counterclaim of forfeiture and ordered equitable distribution of the joint estate.

[4] Applicant now seeks leave to appeal this judgement.

[5] The respondent opposes this application.

Grounds of Appeal

[6] The grounds of appeal are divided by applicant in his application into 6 broad components.

[7] Applicant seeks leave to appeal the order granting equal division of the parties' joint estate. He seeks to appeal the order relating to maintenance arrangements for the minor child and the order directing the applicant to pay costs. Applicant does not seek to appeal the order granting the decree of divorce and the order relating to the care and contact arrangements for the minor child.

[8] He submits in support of his application that the Court erred in law and fact by fundamentally misdirecting itself on the legal test for forfeiture. He argues that the court misapplied Wijker v Wijker 1993 (4) SA 720 (A) by failing to properly conduct the first stage factual inquiry into whether the plaintiff would in fact be benefitted and the extent of such benefit. That the court incorrectly elevated the evidentiary threshold for substantial misconduct by requiring gambling records and expert reports when the plaintiff's own admissions were sufficient. The applicant submits that the court misinterpreted the requirement that misconduct be so gross that it would offend the whole notion of justice to allow the guilty party to get away with the spoils of marriage.

[9] He submits that the Court erred in paragraph 53 of its judgment by requiring proof of addiction rather than applying the test of substantial misconduct. That the court disregarded the principle that substantial misconduct includes squandering of money and other assets of one's estate which is prejudicial to the other spouse. He submits that the court failed to recognize that systematic dissipation of R3.9 Million to R5.2 Million through gambling, constitutes misconduct that is both serious and substantial within the meaning of Section 9(1). In this regard he contends that the court incorrectly applied the burden of proof as plaintiff had admitted to spending between R3000 and R10 000 per session for about more or less 3 times a week for approximately 5 years.

[10] Applicant further submits that the court erred in not conducting a meaningful mathematical analysis of undue benefit despite clear evidence that plaintiff had

dissipated at least R3.9 million through gambling. That the I[...] C[...] restaurant supposedly valued at R2.7 Million to R4.5 Million failed due to her alleged mismanagement. That therefore a 50/50 division awards her approximately R11 Million from the joint estate. That this division would effectively give her R14.16 million in total benefit from the joint estate while she has destroyed R6.6 Million to R8.3 Million in value.

[11] Applicant submits that the Court erred in paragraphs 49 to 50 by finding that the failure of plaintiff's restaurant was not due solely to gambling habits when plaintiff admitted to gambling. That the court incorrectly accepted plaintiff's explanation without corroborating evidence and ignored that the restaurant succeeded before her gambling escalated and succeeded again under her brother's management.

[12] Applicant submits that the Court erred in not adequately ascribing weight to the fact that defendant had solely maintained all joint estate properties and solely supported the minor child. That respondent contributed nothing to property maintenance despite properties being under her notional control as a person who rented out properties and collected.

[13] He argues that the court made errors in factual findings in paragraphs 13 to 16 by failing to recognize that defendant paid all bonds throughout the marriage. That plaintiff collected rental income and was entitled to retain and use surplus funds after paying levies and municipal accounts. That this arrangement was financially advantageous to plaintiff who effectively received income from properties for which defendant bore financial burden.

[14] He further submits that this court erred in paragraph 16 by accepting plaintiff's version when there was no evidence that any substantial amount of money was received by defendant from this sale. That debt accrued on properties because plaintiff stopped collecting rent and paying sundry expenses. Plaintiff argues that the court erred in accepting plaintiff's evidence in paragraph 15 regarding blank cheques when amounts referenced were deposits to secure properties, not blank cheques. That these amounts were either returned to plaintiff or recovered from rental income. That this mischaracterization contributed to an incorrect assessment of financial

arrangements. That the court erred in noting that defendant paid the one bond since 2018 when defendant actually started paying the particular bond since 2008. That the court erred in comparing the gambling habits of the plaintiff to the habits of the defendant in playing the lottery and his visits to the tote.

[15] He proceeds to submit that this Court erred in failing to accord due weight to the fact that plaintiff concealed her gambling addiction from defendant for approximately 6 years and did not put any money back into the joint estate despite winnings. That the court made factual errors and did not adequately consider the credibility issues regarding plaintiff's evidence. Further that the court did not deal with the evidence of Niranj Pather; K[...] N[...] and Kriegen Naicker properly, which evidence bears on the credibility of plaintiff.

[16] He submits further that the court failed to adequately interrogate the suspicious circumstances where the I[...] C[...] restaurant was liquidated with debts of approximately R400 000 and now a substantially similar business operates under plaintiff's brother. Further that the court did not accord due weight to plaintiff's admission that she kept R1.2 Million for herself and only giving R250 000 to defendant. He states that the court failed to place sufficient weight on the minor child's evidence that defendant had become primary caretaker which is relevant to assessment of contributions.

[17] Applicant proceeds to contend that the court erred in ordering equal sharing of the minor child's costs without considering that plaintiff will receive approximately R11 Million from the joint estate and the fact that that alters her financial capacity. This notwithstanding the fact that defendant had been the sole financial supporter since 2018. That equal cost-sharing is inappropriate where one parent receives a windfall and another bears primary care responsibilities.

[18] In respect of costs order, applicant submits that the court erred in awarding costs against defendant despite plaintiff's substantial misconduct being established through her own admissions and finding that costs follow the result. That no reasons were given by this court for departing from normal costs principles. That having

regard to the foregoing it would be in the interest of justice for leave to appeal to be granted as another court would come to a different conclusion.

[19] Respondents in opposition to this application submit that defendant fails to specify in clear unambiguous terms what the findings of fact and or law are which he wishes to take on appeal. Respondent argues that applicant refers to various errors and failures which this court has made but fail to specify the particular findings of facts or law which was made by this court as a result of such errors or failures. She states that the complains, propositions and contentions contained in paragraphs 2 to 19 are so widely specified and intertwined that it is impossible to discern to which specific findings of fact or law they relate to.

[20] Respondent point to this court that applicant fails to properly specify the actual grounds upon which he intends to found his appeal, or to properly indicate to which findings of fact or law these grounds relate to. That the application thus does not comply with the requirements of section 17 of the Superior Court Act of 2013 or rule 49(1) in that it is so vague, ambiguous and confusing that respondent is not properly informed of the case which she needs to meet in order to oppose this application for leave to appeal. Accordingly, that for this reason alone the application falls to be dismissed.

[21] Respondent proceeds to point out in respect of prayer 3 relating to appointment of receiver/liquidator, that applicant fails to specify any findings of fact or law upon which he relies in order to take this court's decision to grant an order for the appointment of a receiver/liquidator on appeal. He also fails to set out any grounds why he should be allowed to do so.

[22] In regard to the minor child's maintenance, respondent points out that the terms of this order was made by agreement between the parties. The minor child's maintenance was not in dispute during the trial and the relevant terms were in any event in accordance with defendant's prayer 8 as contained in his counterclaim. She reminds this court that when the legal representatives addressed the court at the commencement of the trial, applicant's legal representative confirmed that defendant was in agreement to the terms of paragraph 7 and 8 set out in plaintiff's proposed

draft order. As a result, neither party presented any evidence to the court in this regard. That it was thus unconscionable for the defendant to now want to take an order on appeal which he himself requested and consented to at the trial.

[23] In respect of costs respondent points out that the court granted all the orders which plaintiff had requested and dismissed defendant's claim for forfeiture, which was the central issue which the court had to determine in the trial. That by granting the cost order in favor of plaintiff, the successful party in both the action and the rule 43 application, the court merely followed the principle that costs follow the result. Respondent argues that it is thus ridiculous for defendant to state that the court provided no reason for departing from the normal costs principle, when the court did in fact not depart from the normal cost principle.

[24] Respondent points out that the application for leave to appeal does not contain the standard allegation that the intended appeal has a reasonable prospect of success. They point out that defendant has in any event failed to make out a case upon which this court can find out that this appeal has a reasonable prospect of success as envisaged in Section 17(2) of the Superior Court Act. That the application is thus an abuse of the court processes and yet another attempt by applicant to frustrate and further delay the division of the joint estate.

The Law

[25] Section 17(1) of the ***Superior Courts Act***[1] reads:

"(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 judgements on the matter under consideration".

[26] The Supreme Court of Appeal in **Notshokovu**[2] noted that an appellant faces a higher and stringent threshold in terms of the Act compared to the provisions of the

[1] Superior Courts Act 10 of 2013.

repealed **Supreme Court Act 59 of 1959**. Whilst ***Erasmus*** in its commentary observed that this remark by the SCA was obitur dictum as far as it possibly relates to section 17(1)(a)(i), it is significant that the **Notshokovu** remark was applied in applications for leave to appeal under section 17(1)(a)(i) of the Act in ***Mtungwa v Premier of Kwazulu-Natal*[3]*, Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank*[4] *and Mombeeg (Pty) Ltd v Eskom Rotek Industries SOC Ltd*[5]*.***

[27] In ***MEC for Health, Eastern Cape v Mkhitha***[6] the Supreme Court of Appeal held that leave to appeal, especially to that court must not be granted unless there truly is a reasonable prospect of success. The Court noted in this judgement that the ***Superior Courts Act*** makes it clear that leave to appeal may only be granted 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. 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. The Court noted that 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. A mere possibility of success is insufficient[7].

[28] ***Erasmus***[8] in its commentary observes that from this foreshadowed list of authorities following enactment of the new Act, it follows that leave to appeal must only be granted when there is a rational basis for doing so. This court concurs.

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[2] Notshokovu v S (unreported, SCA case no 157/15 dated 7 September 2016.)
[3] Mtungwa v Premier of Kwazulu Natal, unreported, KZP case no 3618/22P dated 28 February 2023 at para 5.
[4] Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank, unreported ECGq case no 1104/2022 dated 14 March 2023 at para 3.
[5] Mombeeg (Pty) Ltd v Eskom Rotek Industries SOC Ltd, unreported, Gj case no 2021/15418 dated 27 March 2023 at para 9.
[6] MEC for Health, Eastern Cape v Mkhitha, unreported, SCA case no 1221/2015 dated 25 November 2016
[7] Kingfisher Fuels cc t/a BP Braamfontein v BP Southern Africa (Pty) Ltd and Another 2025 JOL 68828 (GJ) para 12-19.
[8] Erasmus, Superior Court Practise, vol 1 3 rd edition, service 4, 2024 at D-106.

[29] The reasons for this court's judgement are set out in its main judgement handed down on 6 August 2025. This court will thus not relitigate the same points or factual matrix dealt with during the trial and judgment as applicant sought to do in his submissions before this court in support of his application as the reasons are set out in the judgement on record. It is also trite that the mere fact that a point is not stated in the judgment does not mean it was not considered. The court will thus simply examine remaining unattended salient features of this application which are relevant, in this court's opinion, to its assessment of the application for leave to appeal.

[30] On the facts before this court the main issue which the court had to determine was the counterclaim by applicant, namely his prayer in his counterclaim that the wife and respondent herein forfeit her benefits arising from the marriage they had entered in community of property in 2003 because of gambling addiction which he submitted constituted substantial misconduct warranting forfeiture. This court concurs with submission by respondent that there was no dispute between the parties during the trial that lasted some 8 days about the maintenance of the minor child. To now seek to appeal that order which was not in dispute is misplaced.

[31] At the beginning of the trial both parties indicated consensus amongst them in respect of maintenance arrangements for the minor child. The minor child's maintenance was thus not in dispute and the relevant terms were in any event in accordance with defendant's own prayers 11 and 12 contained in his own counterclaim which had built on paragraph 8 thereof. To now turn around and seek to appeal this court granting an order which applicant had prayed for is respectfully an abuse of court process.

[32] This court following argument by the parties and weighing the record concurs with respondent that when the legal representatives addressed the court at the commencement of the trial, defendant's legal representative confirmed that defendant was in agreement to the terms of paragraph 7 and 8 set out in plaintiff's proposed draft order. As a result neither party presented any evidence to the court in this regard. It is indeed unconscionable for the defendant to now want to take an order on appeal which he himself requested and consented to at the trial.

[33] Applicant seeks to appeal to the supreme court of appeal. The orders which applicant seeks to appeal do not involve in this court's opinion a question of law of importance as contemplated in section 17(6)(a) whether because of its general application or otherwise or in respect of which a decision of the supreme court of appeal is required to resolve differences or the administration of justice either generally or in this particular case requiring consideration of the supreme court of appeal.

[34] Paragraphs 2 to 19 of the notice of appeal refers to various errors and failures of this court but fail to specify the particular findings of facts or law made as a result of such failures. It does not set out clearly the grounds of appeal applicant actually intends to rely on for the appeal. The various submissions made in support of the application are so widely stated that it is difficult to establish which specific incorrect findings of fact or law they relate to. Plaintiff correctly complains that she is not properly informed of the case she needs to meet. This court thus concurs with argument by respondent that the application does not comply with the requirements of section 17 of the Superior Court Act.

[35] Applicant can also not seek to lift irrelevant material or evidence to the central question he brought before this court as set out in paragraph 9 of his counterclaim as a basis for leave to appeal. Plaintiff's case as set out in the counterclaim is that plaintiff had a gambling addiction which not only according to him led to irretrievable breakdown of marriage but also constituted substantial misconduct within the meaning of section 9(1) of the Divorce Act, 70 of 1979.

[36] Respondent's conduct including financial difficulties after separation with applicant is in this court's view not relevant to the central question of determination of forfeiture because of gambling addiction. Respondent never contested that she gambled before this court as a social activity. She did not, however, admit to having a gambling addiction as contended by applicant in its counterclaim. It follows therefore that applicant had a duty to prove such addiction, which in this court's view applicant failed to do. The evidence of Mr. Kammal N[...], Kriegen Naicker and Niranj Pather is assessed in that context. Work or business arrangements between respondent and his brother are also not relevant to forfeiture determination but have

in any event been addressed by the order to appoint a liquidator to assess the movement of assets by both parties. This complaint is thus misplaced.

[37] Nothing also turns in this court's view on whether applicant started paying one bond in 2008 or 2018 as it was common cause that applicant paid the bond. Nor the property management arrangements despite the fact that the evidence put before this court which this court accepted was that when the parties married applicant moved into a property in 2003 then owned by respondent. This court finds that points taken in paragraphs 8 and 9 like many other points from paragraphs 2 to 19 of the notice of application for leave to appeal are no more than attempts to relitigate the same points considered by this court in evidence and determined. They do not set out how the alleged errors as alleged by applicant bear relevance to forfeiture or substantial misconduct which was the central issue put before this court.

[38] In paragraph 1 of its application, applicant contends that this court erred in its application of the two-stage test established in Wijker v Wijker by failing to properly conduct the first stage factual inquiry into whether plaintiff would be benefitted and the extent of such benefit. Paragraph 32 to 35 of the judgment clearly apply the initial test being determination of whether plaintiff would be benefitted if an order of forfeiture was not granted. Paragraph 44 of the judgment accepted that the burden to prove this benefit rested on defendant. Applicant has not suggesting that the court erred in finding that such burden of proof rested on them.

[39] This court also concurs with submission by respondent that applicant did not contend in its application that the court erred in finding that both parties brought assets into the marriage and that respondent's property was used as the parties' marital home for about 3 years into the marriage; accepting respondent's evidence about various contributions she had made to the joint estate; that the court took into consideration that the parties' marriage had lasted nearly 20 years and respondent had contributed reasonably therein not only financially and in kind but also raising the minor child as the child only moved in with applicant in June 2019. Applicant failed to prove the nature and extent of the benefit which respondent would receive if no forfeiture order was granted. In the light of applicant's failure to prove its case the court could not have erred by not granting the forfeiture order.

[40] The legal position is clear that unless the party asking for forfeiture was able to prove the nature and extent of such benefit, the court could not determine whether such benefit was undue. The court in any event gave consideration to the allegations of misconduct. It considered the requirement that the misconduct must be so gross that it would offend the whole notion of justice to allow the guilty party to get away with the spoils of marriage, a requirement as set out in the judgment that has been cited with approval by our courts in many cases dealing with the matter. Applicant fails to indicate how this requirement was misinterpreted.

[41] Equally, the complaint to seek to appeal the costs order is without merit as costs were awarded to the successful party in both the rule 43 and in the main divorce action which is the respondent. This court had found that applicant had not proven its case for forfeiture on account of substantial misconduct. Accordingly, costs as a matter of established principle had to follow the result.

[42] This court finds that applicant has not only failed to aver in its application that there are reasonable prospects of success but has in the light of the foregoing also failed in setting out the grounds to satisfy this court that there are indeed reasonable prospects that another court may come to a different conclusion.

Conclusion

[43] This Court thus concludes that leave to appeal has no merits and falls to be dismissed.

Costs

[44] Applicant and respondents have asked for costs. This Court is satisfied that respondents are entitled to costs including costs of Counsel.

Order

Accordingly, I would make the following order:

[45] The application for leave to appeal is dismissed.

[46] The applicant is to pay costs of this application.

KHOLONG, AJ

Appearances:

For the Applicant: TJC Dunn Attorneys.

For the Respondent: Adv T-A. Pratt.
Instructed by: L Truter & Associates Inc.