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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO. 2024/077659

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 9/12/2025

SIGNATURE

In the matter between:

A[...] K[...] S[...]

Applicant

and

T[...] M[...]

First Respondent

S[...] M[...]

Second Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

H G A SNYMAN AJ

INTRODUCTION

[1] I granted the application the applicant ("*Mr S[...]*") brought against the first respondent ("*Ms M[...]*") and the second respondent ("*Ms M[...]’s farther*") for the return of his male Labrador dog called Benji. Ms M[...] and Ms M[...]’s

father will where applicable, collectively be referred to herein as “*the respondents*”. The reasons for my judgment and order appear from my judgment dated 6 November 2025.

- [2] The respondents applied for leave to appeal on 12 November 2025. According to the notice of application for leave to appear, the respondents apply for leave to appeal to the Supreme Court of Appeal, alternatively the Full Court of this Court. However, in the heads of argument and in argument before me, the respondents only sought leave to appeal to the Full Court.

GROUND FOR LEAVE TO APPEAL

- [3] As part of the notice of application for leave to appeal the respondents rely on the following four grounds of appeal:

[3.1] That I made errors in findings of fact;

[3.2] That I made an error in not accepting that in terms of the divorce order dated 27 January 2025, Benji was awarded to Ms M[...];

[3.3] That the divorce order rendered the application under this case number moot;

[3.4] That leave ought to be granted since there are now conflicting judgments, namely, so the argument goes, the 27 January 2025 divorce order which awarded Benji to Ms M[...] and my judgment awarding Benji to Mr S[...].

- [4] As I see it, although described as four separate grounds of appeal, the grounds of appeal are in fact intertwined and I will deal with them as such. The central theme of all these grounds is the respondents' contention that the divorce order dated 27 January 2025 finally decided who owns Benji.

TEST FOR LEAVE TO APPEAL

- [5] Sections 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 (*"the Superior Courts Act"*), provide that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard.
- [6] According to Bertelsmann J in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*¹ the test under section 17(1)(a)(i) of the Superior Courts Act is more stringent than what was previously the case:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in [the Superior Courts Act]. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion 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".² (emphasis added)

¹ *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* LCC14R/2014 (unreported judgment of the Land Claims Court delivered on 3 November 2014).

² See paragraph 6.

- [7] In *MEC for Health, Eastern Cape v Mkhitha*,³ the Supreme Court of Appeal held that:

“[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] 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.”

- [8] In *KwaZulu-Natal Law Society v Sharma*,⁴ van Zyl J held at paragraph 30 that the test enunciated in *S v Smith*⁵ still holds good. In *S v Smith* at paragraph 7 the Supreme Court of Appeal held that:

“In order to succeed, therefore, the appellant 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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

³ *MEC for Health, Eastern Cape v Mkhitha*, unreported, SCA case no 1221/2015 dated 25 November 2016, 2016 JDR 2214 (SCA).

⁴ *KwaZulu-Natal Law Society v Sharma* 2017 JDR 0753 (KZP).

⁵ *S v Smith* 2012 (1) SACR 567 (SCA).

- [9] In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*,⁶ the Supreme Court of Appeal held at paragraph [2] that:

“In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) 2 of [the Superior Courts Act] an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive.” (emphasis added)

- [10] Therefore, even if there is an important point of law, or an issue of public importance in point, no purpose is served by granting leave to appeal, if the prospects of interference with the judgment at first instance is remote.

DISCUSSION

- [11] The respondents contend that I erred in relying on the *Plascon Evans* rule in rejecting their version and describing it as being “*far-fetched and unattainable*”. According to them I should have accepted their version that there was and remains a factual dispute between the parties in so far as ownership of Benji is concerned. I neither referred to the Plascon-Evans rule in my judgment, nor did I describe the respondents’ version as “*far-fetched and unattainable*”. After a careful analysis of what Mr S[...] said as part of his affidavits, as compared to what the respondents said, I held at paragraph [83]

⁶ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA).

of my judgment that:

“As I see it, [Ms M[...]]’s] version is therefore vague in the extreme, unsupported and changes as she sees fit. It ought therefore be rejected.”

[12] As I see it, there is not a reasonable prospect that a court on appeal would find differently.

[13] According to the respondents, I erred in not making the following findings:

[13.1] That Mr S[...] conceded that there is a factual dispute regarding ownership of Benji by making numerous settlement offers during the divorce proceedings;

[13.2] Mr S[...] did not meaningfully dispute Ms M[...]’s contention that Benji was bestowed upon her as a gift by Mr S[...]’s parents;

[13.3] Mr S[...] did not dispute the fact that Ms M[...], as the lawful owner of Benji, had taken out pet insurance dating back to 2021.

[14] According to the respondents, I ought to have found that even on Mr S[...]’s version, Benji was to be dealt with in the divorce action.

[15] As I see it, all of the above is misplaced. The inquiry is not whether there was or there still is a factual dispute regarding Benji. The inquiry is as I held at paragraph [73] of my judgment with reference to the Supreme Court of Appeal’s judgment in **Wightman t/a JW Construction v Headfour (Pty) Ltd**

and Another⁷ at para [13], namely whether on the papers before me there is a real, genuine and *bona fide* dispute of fact. As I see it, it is critical that Mr S[...]’s father and brother confirmed his version under oath. The respondents did not even as part of their affidavits deal with what is stated in Mr S[...]’s father and his brother’s affidavits.

[16] As I see it, the respondents therefore failed to show a real, genuine and *bona fide* dispute of fact. As I see it, there is no reasonable prospect that a Full Bench would come to a different conclusion regarding this.

[17] There is also no merit in the contention that Mr S[...] conceded that there is a factual dispute regarding ownership of Benji by making numerous settlement offers during the divorce proceedings. It does not appear from the papers that Mr S[...] made numerous settlement offers. It seems that there was one settlement offer in which Mr S[...] reflected that he retains ownership of Benji. It would obviously have been in everybody’s interest if they could have settled this.

[18] When Ms M[...] did not accept that, Mr S[...]’s attorneys, days before first Ms M[...] and then Mr S[...] signed the settlement agreement, expressly in their letter dated 9 January 2025, confirmed the following:

“REI VINDICATIO APPLICATION

At the outset, we wish to address paragraphs 2.6 and 2.7 of your aforementioned correspondence regarding the rei vindicatio application. We in this regard record as follows:

⁷ 2008 (3) SA 371 (SCA).

1.1 *As was indicated in our previous correspondence, the rei vindicatio application in respect of Benji and outcome thereof has no bearing on the divorce itself whatsoever. Benji is not a subject of the divorce proceedings.*

1.2 *The application is pending before court under a completely different case number for this reason.*

1.3 *In addition, the parties differ from the parties to the divorce action. The application is against your client and her father and not only your client. Our client has also at no stage withdrawn the application against your client's father.*

To include a settlement of the application in the divorce action would require your client's father to also be party to the divorce settlement agreement, which is not appropriate.

1.4 *On consideration of your correspondence, and subject to what follows below, it would appear that the parties are in agreement with regard to the settlement of the divorce action. The application is, however, not settled and we do not believe that the parties are in a position to settle same due to their conflicting versions.*

We are of the view that it would therefore be in both our clients' best interests to finalise the divorce and put it behind them. There is no reason to force two parties to remain in a broken marriage and carry the associated emotional burden, when there is in essence no dispute regarding the termination of the marriage.

1.5 *In the absence of a settlement regarding the issues that form the subject of the application, a decision cannot be made with regard to the costs thereof. The issue of costs will therefore be determined by the judge who eventually presides over the matter.*

We therefore urge your client to reconsider her position in anticipation of bringing the divorce action to an end sooner rather than later."

[19] I dealt with the above letter in paragraph [60] of my judgment. For the respondents to notwithstanding the above contend that there was a meeting of the minds and that the parties settled the dispute regarding Benji as part of the settlement agreement in the divorce action, must therefore be rejected.

[20] In any event, as I see it, simply put, the ownership issue of Benji was not before the divorce court. This at the very least follows from the fact that Ms M[...] alleged as part of her papers, confirmed by Ms M[...]’s father under oath, that she on gifted Benji to her farther on an uncertain date, but obviously before the divorce order was granted. Ms M[...]’s father was not a party to the divorce action, neither could he be. That decree of divorce therefore neither rendered the *rei vindicatio* application moot, nor constituted a conflicting judgment. As I see it, there is not a reasonable prospect that a court of appeal would come to a different finding.

[21] In so far as the ground of appeal is concerned that I erred in not finding that Mr S[...] did not meaningfully dispute Ms M[...]’s contention that Benji was bestowed upon her as a gift by Mr S[...]’s parents the following: First, Ms M[...] never as part of her papers contended that Benji was bestowed upon her as a gift by Mr S[...]’s parents. She first as part of the pre-litigation correspondence stated that Benji was a gift to her by Mr S[...]’s father. This was not repeated in the answering affidavit. Ms M[...] only later contended that Benji was gifted to her by her in-laws, which concept includes all the relatives by marriage. This on one interpretation could have included Mr S[...]’s brother. She even as part of the replying affidavit in the interlocutory application stated that Benji was gifted to her by Mr S[...]. All in all, on a conspectus of the pleadings this ground of appeal lacks merit.

[22] In so far as the contention is concerned that Mr S[...] did not dispute that Ms M[...] had taken out pet insurance for Benji dating back to 2021, this equally

lacks merit. I referred to the pet insurance issue at paragraph [45] of my judgment. I pointed out that the policy document is illegible. I held at paragraph [80] of my judgment that the fact that Ms M[...] took out pet insurance for Benji is not decisive. I referred in this regard to the fact that Mr S[...] attached numerous documentation to the founding affidavit, which show that he covered some of the expenses in relation to Benji. I held that the highwater mark of this issue was that the spouses in happier days obviously agreed to share the expenses in respect of Benji in the way that they did. This is what Mr S[...] said in the replying affidavit at paragraph 11.2. I found that nothing further can be inferred from this. As I see it, there is not a reasonable prospect that a court of appeal would come to a different finding.

[23] In the result, I make the following order.

ORDER

[1] The application for leave to appeal is dismissed with costs.

H G A SNYMAN

Acting Judge of the High Court of
South Africa, Gauteng Division,
Pretoria

Heard on MS Teams: 5 December 2025

Delivered and uploaded to CaseLines: 9 December 2025

Appearances:

For the applicant:

Adv Mari Fabricius

Instructed by Adams & Adams Attorneys

For the first and second respondent:

Adv Willie du Preez

Instructed by Goodes & Co Attorneys