



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 206373/2025

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE 31/8/2026

SIGNATURE

In the matter between:

R[...] **J[...]** **P[...]**

Applicant

and

V[...] **P[...]**

Respondent

JUDGMENT – LEAVE TO APPEAL

NEUKIRCHER J:

1] This is an application for leave to appeal against the judgment and order handed down by me on the 10th of June 2026. In that judgment, I dismissed the applicant's application for leave to appoint a private clinical psychologist to evaluate the parties and their minor daughter (L) at the applicant's own cost.

2] The applicant seeks leave to appeal to the Full Court of this Division, alternatively to the Supreme Court of Appeal, against the whole judgment and order. The essence of his complaint is that this court wrongly held that a further forensic psychological assessment of the parties and the child was unnecessary; that the court placed undue weight on his failure to seek substantive relief in respect of primary care in residence, other than in the main pleadings; and that the court failed to give proper effect to the child's best interest principle, as enshrined in the Constitution and in the Children's Act 38 of 2005. The last argument is that the court did not apply its role as Upper Guardian of minor children.

3] For the reasons as I set out below, I am not persuaded that the applicant has shown that the appeal has reasonable prospects of success, nor is there another compelling reason why the appeal should be heard.

The applicable test

4] Section 17(1)(a) of the Superior Courts Act 10 of 2013 (the Act) provides that leave to appeal may be granted only 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, including conflicting judgments, on the matter under consideration. As the latter is not a consideration in this matter, it will not be discussed.

5] It is, by now, trite, that the test is not whether another court may or could reach a different conclusion. The question is whether there is a sound, rational basis for concluding that another court would do so. In my view the application must accordingly be considered against the facts that were placed before this court at the time that the application was adjudicated and on the narrow issue that was argued and decided.

6] I wish to emphasize again that it was not the function of this court during the proceedings to determine primary care, residence or contact issues: this was not an application brought in terms of the provisions of rule 43; it was an application brought in terms of the provisions of Rule 6. It was thus dealt with as such. This being so, and the issues of primary care, residence and contact not being issues that the court was required to adjudicate, these issues were not decided. It was only the issue of whether a forensic assessment could or should be ordered that occupied the attention of the court.

7] It is clear from the judgment that there was no finding that an appropriately motivated forensic assessment could never be ordered in a dispute concerning the minor child. The only issue what was the whether the applicant had established, on the papers before me, a basis for an order immediately appointing a private

psychologist in circumstances in which the Family Advocate's investigation had yet to be finalized at the date that the application was instituted, and at the time of the hearing, had been finalized and was made available to the parties and the court.

The grounds of appeal

8] I have considered the judgment, the grounds of appeal, the heads of argument of the respondent and the oral argument presented. In my view, the applicant's grounds of appeal, in substance, revisit the case advanced at the initial hearing: that the Family Advocate's investigation and a forensic assessment serve different functions and a court would be better served in exercising its discretion as Upper Guardian were it to be assisted by the in-depth investigation that the forensic investigation would provide rather than the perfunctory interview process conducted by the Family Advocate. It was argued that the forensic assessment would assist a court in evaluating allegations concerning the respondent's parenting capacity, emotional functioning and alleged alienating conduct and L's alleged expressed wishes.

9] It was also argued that the court had erred in placing any value or emphasis on the undisputed fact that the applicant had allowed L to reside with the respondent since their separation, that the applicant had failed to bring any substantive application for primary care, residence or expanded contact, and had failed to file any counter-application for this relief in the Rule 43 proceedings brought by the respondent.

10] In my view, none of these arguments disclose a reasonable prospect that another court would interfere with the order granted. A Family Advocate's

investigation and a forensic assessment may, in appropriate circumstances, serve different functions – that argument was not rejected in the judgment. But it does not follow that the existence of the allegations automatically entitles a litigant to a further expert evaluation.

11] The enquiry remained whether the applicant established that the proposed assessment was necessary and justified at that point. For the reasons set out in the judgment, it was found that he had not, and that it was not.

12] It is important to note as well that the applicant's failure to institute proceedings for primary care, residence and expanded conduct was not the sole reason for dismissing the application. This was simply an evidentiary consideration.

13] The applicant's conversation with the respondent in February 2026 was similarly not afforded more weight than the other considerations weighed up in the judgment. What bears mentioning, however, is that the court's interpretation of this conversation is not mentioned as a ground of appeal, nor was any argument presented at the oral hearing that its content or import was incorrectly interpreted by the court.

14] In my view, the judgment places no one factor over another when weighing whether the application should succeed. In this respect, paragraph 40 of the judgment states:

“Whilst the applicant complains that the Family Advocate spent very little time with each party during the investigation, given the complete conspectus of information placed before me that this stage (and the applicant's own inaction) I no reason to appoint an expert.”

15] In my view the applicant's argument that, as Upper Guardian, the court should have appointed a forensic expert, elevates his application to one where it could be interpreted to mean that in all applications involving minor children, should one parent insist on a private assessment, the court would not be able to exercise any discretion whether to grant the application – it would be compelled to do so by virtue of the provisions of Section 28 of the Constitution. In my view, this overstates the position. The court, as Upper Guardian, exercises a discretion in the best interests of minor children based on the facts and evidence placed before it at the time. This position holds, as its heart, the paramountcy of a child's best interests and leaves the court's discretionary powers intact. To hold otherwise would make a mockery of the entire process.

SVDB v HEVDB (Gauteng Division, Johannesburg – case no 2024-067811)(3 June 2025) (SVDB)

16] The applicant then argued that this court effectively closed the door to the applicant and that he could never bring another application for the appointment of an expert unless he proved a “material” change in circumstances. This argument was later tempered to argue that there would have to be a change in circumstances.

17] The argument is based on paragraph 27 of the above judgment of the Full Court in *SVBD*, in which the following was stated:

“Orders in relation to children are generally not cast in stone as they may be altered to meet ever evolving circumstances. Unlike matters not involving the best interests of children, an order may be replaced if new circumstances justify a new assessment of the best interests of children. That however does not make it interim or

interlocutory in the sense described above. Except for orders in terms of Rule 43, an order involving children is final, unless the circumstances change profoundly such that the change justified a variation of the order. Interim or interlocutory orders are susceptible to alteration by the same court without the need for a change in circumstances). For instance, an interim interdict pending the outcome of trial proceedings is susceptible to alteration by the trial court, or an order in terms of Rule 43 may be altered by the court that adjudicates the divorce trial.)

18] In my view, the facts set out in *SVDB* differ vastly from those of this matter. In *SVDB*, an order was granted in terms of Rule 43 in which *inter alia* primary care and residence of the parties' children was awarded to the wife and a forensic assessment was ordered to investigate and report on the children's best interests. Approximately six months later, the wife informed the husband that she intended to relocate to Cape Town with the children. The husband then brought a Rule 6 application to prevent the wife from relocating with the children, and also, adopting the procedure in Rule 43(6), he sought a variation of the Rule 43 order to extend the expert's mandate to include an investigation into whether the relocation was in the children's best interests.

19] The wife then launched a conditional counterclaim for an order granting her leave to relocate with the children, which was granted. The court also effectively ordered that the pending assessment was to be finalized.

20] The husband then launched an application for leave to appeal this order and a dispute arose between the parties as to whether the order was interim or not and whether it was suspended pending the finalization of the application for leave to

appeal. Before that could be set down, however, the husband sought – and was granted – an *ex parte* interdict preventing the relocation of the children pending the institution and finalization of urgent proceedings in terms of Section 18 of the Act. The wife instituted counter-proceedings in which she sought an order that the relocation order had not been suspended. The court hearing the Section 18 application ordered that the relocation order was not suspended and the husband invoked his automatic right of appeal in terms of Section 18(4) of the Act.

21] Thus, the Full Court was faced with argument that related to whether or not the order granted vis-à-vis the relocation of the children was interim in nature. It is that which directed the true attention of the court. In my view, the comments set out in paragraph 27 of the judgment are simply *obiter* and are not binding on me.

22] Whilst I agree in principle that the applicant cannot bring a new application for the appointment of an expert and re-hash the arguments set out before me¹, I do not agree with the argument that he needs to demonstrate some “material” or “exceptional” change in circumstances before he can launch fresh proceedings.

23] The present applicant is brought in terms of the provisions of Rule 6. The onus remains that of the applicant, and although the investigation into the best interests of L remains inquisitorial in nature rather than adversarial, the Rule 6 procedure does not elevate the new application to one in terms of Rule 43(6) – which requires a “material change in circumstance”. In any event, because the relief sought is not of a nature

¹ As this would be no more than a circumvented appeal

that seeks primary care, residence or a variation of contact rights it therefore, in my view, does not fall within the narrow grounds of Rule 43.

24] Thus, should the facts in any new application, subsequent to those set out in the application before me, demonstrate that an expert should be appointed, the court seized with that application would be entitled to consider it on its merits and either grant or refuse it. As was stated in paragraph 41 of my judgment:

“In my view, the facts demonstrate that it² is, at present, unnecessary.”

25] Given the above, in my view, the applicant’s argument that the order bars him from bringing another application of this nature must therefore be rejected.

26] In the circumstances, the application for leave to appeal has no prospects of success on any of the grounds set out in Section 17 of the Act and must be dismissed. Counsel are in agreement that, if the application fails, costs should follow the result and be awarded on Scale B.

ORDER

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the respondent’s costs, which costs are to be taxed in accordance with Scale B.

B NEUKIRCHER

² I.e. the appointment of the expert

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 August 2026.

Appearances

For the applicant	:	Adv Haskins SC
Instructed by	:	Wolmarans and Susan Attorneys
For the first respondent	:	Adv I Vermaak-Hay SC
Instructed by	:	Arthur Channon Attorneys
Matter heard on	:	19 August 2026
Judgment date	:	31 August 2026