REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022-015642

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

7/10/2024 [redacted]

DATE SIGNATURE

In the matter between:

GRIMAUDO, BENITO Applicant

and

DINWOODIE, TARYN First Respondent

ROBERTSON, DOROTHY Second Respondent

In re:

DINWOODIE, TARYN Plaintiff

and

GRIMAUDO, BENITO Defendant

JUDGMENT

ABRO AJ

[1] The applicant seeks leave to appeal to the Full Bench of this Court, alternatively the Supreme Court of Appeal, an order handed down on 7 June 2024 dismissing the applicant's application with costs, with written reasons being provided on 12 July 2024 ("the main application").

[2] Whilst the issue of appealability of the order was not raised by the parties, on reflection and whilst writing this judgment I considered that the order 'dismissing the main application with costs' may not have final effect in light of *inter alia* the pending action and was therefore not competent to appeal. The order dismissing the main application preserved the *status quo* which has been in place since the Adams order handed down on 13 July 2023. Accordingly, the order is interim in nature and the issues between the parties, including the best interests of the minor child concerned will be dealt with at the pending trial where the trial court will hear *viva voce* evidence of the various experts which the parties intend calling.

[3] The application for leave to appeal was however argued without any consideration of the appealability of the order, and as such I do not address this aspect further herein.

[4] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that:

> *'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 judgments on the matter under consideration;'*

[5] Sections 17(1)(b) and (c) find no application in this leave to appeal.

[6] Dealing with the test required to be made by the courts considering an application for leave to appeal, in *Zweni v Minister of Law and Order of the Republic of South Africa*[1] the court stated that:

> *'Leave is granted if there are reasonable prospects of success so much is trite'.*

[7] The test under section 17(1)(a) is however more stringent. The applicant must now show that leave to appeal may 'only' be given where the appeal 'would' have a prospect of success.

[8] Mr Garvey for the applicant referred me to paragraph [17] in *MEC for Health, Eastern Cape v Mkhitha*[2] in making the submission that an applicant seeking leave to appeal need only convince the court on proper grounds that there is a reasonable prospect of success on appeal. He submitted in this regard that courts adjudicating upon applications for leave to appeal have somewhat relaxed the requirements of the Act.

[9] However, the paragraph referred to by Mr Garvey in *Mkitha* must be read in the context of the whole of the judgment. The court at paragraph [16] of the judgment stated the following –

> *'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 10 of 2013 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.'* (my underlining)

[10] In this regard Miss Bezuidenhout for the first respondent referred to *Mont Chevaux Trust v Goosen*[3] wherein Bertelsmann J confirmed that the use of the

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[1] 1993 (1) SA 523 (A)
[2] 2016 JDR 2214 (SCA) para [17]
[3] 2014 JDR 2325 (LCC) at para [6]

word 'would' in the statute indicated a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against; and *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*[4] wherein Wallis JA stated that *'the need to obtain leave to appeal is a valuable tool in ensuring that scare judicial resources are not spent on appeals that lack merit.'*

[11] In the premises, I am not persuaded that our courts have relaxed the test. The words utilised in the statute, *'may only',* are clear and unambiguous as are the words *'must not'* used in *Mkitha.*

[12] Mr Garvey summarised that the applicant's grounds were as follows –

- that in dismissing the application on a legal point and not dealing with the merits the court misdirected itself, and further misdirected itself in that it misinterpreted and/or misapplied the principles enunciated in *Childerley Estate Stores v Standard Bank of SA Ltd*[5], on which judgment the applicant had relied on in the main application, and as such another court would find differently; and

- that there were compelling reasons why the appeal should be heard as the main application concerned the best interests of a minor child which I had failed to take into account sitting as the minor child's upper guardian.

[13] Van Der Schyff AJ, as she then was, in *M v M*[6] stated the following in regard to applications for leave to appeal, more particularly where the best interests of minor children were concerned, and which finds application in this matter:

> *'[11] It is trite that s 17 empowers the trial judge to give leave to appeal, and that that power must be exercised judicially. In view of the particular manner in which s 17 (1)(a)(i) is phrased the court can rely on the decision of the Appellate Division , as the Supreme Court of Appeal then was, in Rex v Baloyi 1949 (1) SA (A), for guidance as how to approach an application for leave to appeal in a context where it is prescribed that leave to appeal should not*

[4] 2013 (6) SA 520 (SCA) at para [24]
[5] *Childerley Estate Stores v Standard Bank of SA Ltd* 124 OPD
[6] *M v M* (15986/2016) [2018] ZAGPJHC 4 (29 January 2018)

be granted unless the applicant will have (would) have a reasonable prospect of success on appeal. Centlivres JA stated at 524-525: 'For the trial judge must, in the nature of things, find it somewhat difficult to look at the matter from a purely objective standpoint; he has a natural reluctance to say that his own judgment is so indubitably correct that the Judges of appeal will concur therein. But the test laid down … is the only test that can be applied'.

[12] In R v Kuzwayo 1949 (3) SA 761 (A) 765, a criminal case, the court explained:

'That test must, to the best of the ability of the trial judge, be applied objectively. By that is meant that he must disabuse his mind of the fact that he himself has no reasonable doubt as to the guilt of the accused: he must ask himself whether there is a reasonable prospect that the judges of appeal will take a different view. This applies to questions both of fact and of law: there is, in this respect, no distinction between a question of fact and a question of law'.

[13] In matters where the best interests of children are at stake this would mean that a trial court should carefully and objectively re-consider the judgment in view of the facts of the case and the grounds of appeal advanced by the applicant for it would not be in the best interests of the children to (a) grant leave to appeal just as a matter of caution, this will come down to a court 'passing the buck', although this might seem to be an attractive option or easy way out, this is not the statutorily prescribed approach and such an approach may further unduly delay the finalisation of the matter and as such be contrary to the statutory prescripts of s 6(4)(a) of the Children's Act, No 38 of 2005 or (b) dismiss an application for leave to appeal because the trial judge stubbornly persists in his or her views without taking a step back to objectively determine the possibility of another court coming to a

different decision on either the facts or the law. Neither (a) or (b) meets the required standard set by s 17(1)(a)(i).'

[14] In the event that it is found that no reasonable prospect of success exits, then the court must determine whether there are compelling circumstances that exit that would necessitate that an appeal should be heard.

[15] Firstly, Mr Garvey submitted that the court had misdirected itself and misapplied the principles in *Childerley* as I had, in the judgment, quoted the principles thereof as set out by Dos Santos AJ in *LC v LC*[7] wherein Dos Santos AJ had set out the principles incorrectly. On a reading of both *Childerley* and *LC* together with the quotation contained at paragraph 44 of my judgment, I am not persuaded that the failure of Dos Santos AJ to include the word *'or'* in the line which reads *'cases in which the judgment was founded on a presumption of law, (or) on the opinion of a jurisconsult or on expert evidence'* has any bearing of the court's understanding and application of the applicant's case or on the exceptional circumstances as set out in *Childerley.*

[16] The applicant's case is set out in the court's judgment at *inter alia* paragraphs 6, 7, 8,10,11, 12, 13 and 39. Notably, this was not disputed by the applicant in his notice or listed as a ground of appeal either as a finding of fact or issue of law on which it is alleged that the court erred.

[17] Mr Garvey's submissions that he would have argued the main application differently and further, that he would not have made the concession that there were multiple disputes of fact on the papers, do not assist the applicant.

[18] It is also not disputed that the applicant, subsequent to the grant of the Adams order which he sought to set aside *in toto* on the basis of the invalidity of Mr Carr's report, employed the services of clinical psychologist, Dr Townsend, and Ms Els, to provide opinions on the report of Mr Carr. Mr Garvey in fact emphasised during his address to the court that these opinions / reports were obtained subsequent to the Adams order.

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[7] *LC v LC* case number 2023/004515, Gauteng Division, Johannesburg, 15 November 2023 at paragraph 23 – 24

[19] These opinions / reports were thus not in existence at the time of the hearing before Adams J.[8]

[20] *Childerley* states that *'justus error is not a good ground for setting aside a judgment save in certain exceptional cases based on instrumentum noviter repertum.'* The doctrine of *instrumentum noviter repertum* means the 'coming to light of as yet unknown documents'[9]

[21] *Childerley* sets out that the undoubted rule of the Roman law was that a judgment could not be set aside on the ground of the discovery of new documents after judgment to which rule there are however certain exceptions. Dos Santos AJ in *LC* sets out the exceptions in detail. As set out in my judgement, the Supreme Court of Appeal in *Fraai Uitzicht*[10] and in *Freedom Stationary*[11] refer to the 'discovery' of new documents that were missing or lost at the time that the matter was adjudicated on, not new documents that came into existence after the fact.

[22] In the circumstances and as set out in paragraph 46 of my judgment the 'discovery of new documents' on which an applicant seeks to rely is the hurdle over which such an applicant must get before any of the exceptions find application. The fact that Mr Botes SC who argued the application on behalf of the applicant was aware of the hurdle he faced in this regard is clear from his submission that I was *'to read into Childerley the words 'new information' when reference was made to new documents which were not found and produced before judgment.'*[12]

[23] As observed by Trengove AJA in *Swadif (Pty) Ltd v Dyke NO*[13] and referred to by the Supreme Court of Appeal in *Phillips '. . . I do not consider it necessary to enter upon a discussion of the grounds upon which the rescission of a judgment may be sought at common law because, whatever the grounds may be, it is abundantly clear that at common law any cause of action, which is relied on as*

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[8] Paragraphs [48] and [49] of the court's judgment dated 11 July 2024
[9] *National Director of Public Prosecutions v Phillips and Others* 2005 (5) SA 265 (SCA) at para [21]
[10] *Fraai Uitzicht 1798 Farm (Pty) Limited v McCullought* 2020 JDR 0945 (SCA) at
[11] *Freedom Stationary (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465D
[12] Paragraph [10] of the court's judgment of 11 July 2024
[13] 1978 (1) SA 928 (A) at 939D-F

a ground for setting aside a final judgment, must have existed at the date of the final judgment.'

[24] In the circumstances, the applicant did not get over the first hurdle and as such none of the exceptions found application and the applicant's reliance on *Childerley* was indeed misplaced.

[25] In so far as the applicant contends that the court could and should have granted some, if not all of the additional relief sought by the applicant in his notice of motion, such relief is clearly inextricably linked to the Carr report and the Adams order and as such did not stand independently. The applicant came to court on a narrow ground on which he sought to set aside Mr Carr's report which formed the substratum of the Adams order which he sought to similarly set aside *in toto.*

[26] The problem with this approach is that this was not the applicant's case. As set out in paragraph [6] of my judgment, the applicant's case was that the point of departure was to declare the report and recommendations of Mr Carr to be wrong and invalid as a result of inaccuracies and mistakes, and then to set aside the Adams order, the substratum for the order having eroded by virtue of the setting aside of the report.

[27] It must also be born in mind that neither Dr Townsend nor Ms Els interviewed, consulted or had any contact with the minor child in this matter and further that the only current information as to the minor child's best interests and well-being was provided for by the curator, Mark Haskins SC.

[28] Mr Haskins SC in his aforesaid report included recent information obtained from Dr Robertson, the minor child's therapist, and the minor child himself.

[29] As set out in paragraphs [20] and [21] of my judgment Mr Haskins SC in his final report of 31 May 2024 opposed the relief sought in the main application on the basis that it would be contrary to the minor child's best interests should such relief be granted. He stated therein that *'it is essential that the disputes between the parties be resolved in the action which is pending where a thorough hearing may take place.'*

[30] The compelling circumstances on which the applicant sought to rely was the 'best interests' principle.

[31] It is trite that in accordance with the Constitution and the Children's Act 38 of 2005, as amended, in any matter concerning minor children / a minor child, their best interests are paramount.

[32] As stated, I am satisfied that I did not misdirect myself on the law and the principles enunciated in *Childerley.* The applicant sought an order setting aside the report and recommendations of Dr Leonard Carr dated 22 February 2023 on which report the Adams order of 13 July 2023 was based. This was the basis for all of the relief sought by the applicant in the main application.

[33] It was submitted by Mr Garvey that a court sitting as upper guardian could in certain circumstances set aside an expert report. As set out in the judgment neither party could refer me to any authority on this point.

[34] As I have explained above, the principles enunciated in *Childerely* do not assist the applicant in so far as no new documents have been discovered, and in so far as one such exception may address judgments based on expert opinion, that does not provide authority for the setting aside of an expert report.

[35] The relief sought by the applicant in the main application was thus not competent and as such I dismissed the main application without going into the merits which would have entailed an adjudication of which expert's evidence and opinion was correct in respect of the minor child's best interests on motion.

[36] It was furthermore not in the minor child's best interests to do so in the circumstances of this matter as there is a trial pending between the applicant and the first respondent at which trial the experts, on whose reports the applicant relied on, as well as other experts, will give *viva voce* evidence.

[37] As enunciated by Judge Van Der Schyff it is not in the best interests of minor children to simply grant leave to appeal *'just as a matter of caution'.* Such an approach would further be contrary to the statutory prescripts of section 6(4)(b) of the Children's Act which prescribes *'that a delay in any action or decision to*

be taken must be avoided as far as possible'. Miss Bezuidenhout for the first respondent argued, as she did in the main application, that the application for leave to appeal was yet a further *'spanner in the works'* which would result in further delays in reaching finality in the litigation.

[38] I did not fail to properly and adequately take the minor child's best interests into account in dismissing the main application but did so having due regard to his best interests which require finality in the litigation between his parents. In doing so I directed the parties to focus on the trial and to hold a pre-trial conference which had yet to take place. The parties did so on Wednesday 5 June 2024 and filed a pre-trial minute which formed part of the order of 7 June 2024.

[39] I accordingly find that an appeal would not have a reasonable prospect of success, with reference to the words utilised in the statute and in *Mkitha* above referred, and further that there are no compelling circumstances why an appeal should be heard.

[40] Consequently, the application for leave to appeal does not succeed.

ORDER

[41] Leave to appeal is refused.

[42] Applicant is to pay the costs of the application on scale C.

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M ABRO

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant: C Garvey

Instructed by Cuthbertson & Palmeira Attorneys Inc.

For the First Respondent:	F Bezuidenhout Instructed by Etienne Cloete Attorneys
Date of Hearing:	16 September 2024
Date of Judgment:	07 October 2024