THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 505/2025

In the matter between:

B[…] E[…]	Appellant
and	
N[…] T[…]	First Respondent
1012 THE BROOK PROPERTIES (PTY) LTD	Second Respondent
BM PROPCO (PTY) LTD	Third Respondent
PLAAS GOEIE HOOP (PTY) LTD	Fourth Respondent

Neutral citation:	*B[…] E[…] v N[…] T[…] and Others* (505/2025) [2026] ZASCA 25 (11 March 2026)
Coram:	MOLEMELA P, ZONDI DP, MOCUMIE JA and STEYN and GOVINDJEE AJJA
Heard:	3 February 2026
Delivered:	11 March 2026

Summary: Jurisdiction – appealability – interim maintenance pendente lite under rule 43 – whether order constitutes a 'decision' as contemplated in s 16(1)(*a*) of the Superior Courts Act 10 of 2013 (the Act) – interests of justice enquiry – express statutory bar to appeals in s 16(3) of the Act – interim and provisional nature of rule 43 orders – absence of finality and definitive determination of rights – reconsideration and redress available in main proceedings – avoidance of piecemeal appeals and prejudice – s 173 of the Constitution and jurisdiction – appeal struck from the roll for lack of jurisdiction.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Thulare J, sitting as court of first instance):

The appeal is struck from the roll with costs.

JUDGMENT

Govindjee AJA (Molemela P, Zondi DP, Mocumie JA and Steyn AJA concurring):

Background

[1] The appellant (BE) and first respondent (NT) were married on 27 April 2018, out of community of property subject to the accrual system. The marriage deteriorated during late 2023 and the parties separated. In early 2024, NT instituted divorce proceedings in the Western Cape Division of the High Court, Cape Town (the high court), followed by an application in terms of rule 43 of the Uniform Rules of Court. In that application, NT sought interim maintenance *pendente lite* for herself and her two minor children from a previous marriage (the children), a contribution towards legal costs, and ancillary relief.

[2] BE opposed the application and disputed any obligation to maintain the children. On 11 September 2024, the high court granted an order substantially in the terms sought, including an award of interim maintenance for the children. An application for leave to appeal and for the suspension of various paragraphs of the order was dismissed by the high court. Leave to appeal was subsequently granted on petition by two Judges of this Court, limited in substance to the question of whether BE was liable to contribute *pendente lite* to the maintenance of the children.

[3] According to NT, she, BE, and her children, born in 2010 and 2012, had functioned as a unit, although BE did not adopt the children. The children continued to enjoy a strong relationship with their biological father, who contributed approximately R7000 per month towards their maintenance. NT contended that the children had become accustomed to a high standard of living due to BE's financial generosity. When they separated in late 2023, BE stopped paying for various expenses, including school fees and general maintenance, and his abrupt withdrawal, both emotionally and financially, had been traumatic. She relied, in part, on a message sent by BE to his employees upon the announcement of the separation, in which he stated:

'. . .[Insofar] as our kids go we have always strived to give them the best in terms of love, time, experience and education. None of this changes in my view and it will certainly continue … (Finally, I hope you have always seen that I am loving and supportive towards [NT]. This too will continue because that is the person I wish to be. From now on it will just be in a different role or capacity and with a different perspective).'

[4] BE maintained that he held no parental rights or responsibilities in respect of the children and denied any obligation to maintain or support them. He emphasised that both the children's biological father and NT, a dietician, remained fully involved in the lives of the children and that they are financially responsible for their maintenance. He averred that any assistance he provided had been limited to covering the children's expenses when NT experienced temporary cash flow difficulties. He had voluntarily paid the rental for her and the children's accommodation and continued to pay the children's cellular phone costs pending the finalisation of the divorce proceedings.

[5] The high court held that BE's conduct amounted to the assumption of a parental role and that it would not be in the best interests of the children to permit the withdrawal of financial support *pendente lite*. The parties had formed a new family. BE had provided significant financial assistance and conveyed the impression that he had assumed parental responsibility for the children. This was undiminished by the continued role of the children's biological father in their lives. The high court held that the children's constitutional right to parental care extended to stepparents who acted in the stead of a biological parent. On the facts, BE was found to have taken a conscious decision to assume the liability to maintain his stepchildren. Despite the

children and their biological parents placing reliance on this, BE had summarily terminated his support and thereby denied them 'a sustainable livelihood'. This was held to be impermissible by the high court. The high court accordingly ordered BE to pay cash maintenance of R40 000 per month, retain the children on his medical aid and pay medical expenses, make additional monthly payments, including a monthly amount up to R35 000 for NT's rent, and contribute towards legal costs in the amount of R1 million.

[6] The first issue formulated by BE is whether the high court was entitled to impose a duty of support on a stepparent, married out of community of property, in circumstances where the children's biological parents can maintain them. The second is whether interim maintenance may be ordered to sustain a standard of living derived from cohabitation during the marriage rather than to secure basic parental care. The antecedent question, however, is whether this Court has jurisdiction to hear the appeal.[1]

Jurisdiction

[7] This Court's jurisdiction is derived only from the Constitution and statute.[2] Section 168(3) of the Constitution provides that this Court may decide appeals in any matter arising from the high court or a court of similar status, save to the extent otherwise provided by legislation.[3] That constitutional power must be exercised within the framework of the Superior Courts Act 10 of 2013[4] (the Act), which regulates the jurisdiction, powers and procedure of the higher courts.[5]

[8] In civil matters where the high court sits as a court of first instance, the jurisdictional requirements for an appeal are twofold.[6] Firstly, leave to appeal must be granted in terms of s 17 of the Act. Secondly, the ruling sought to be appealed must

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[1] *Hanekom NO and Others v Nuwekloof Private Game Reserve Farm Owners' Association* [2024] ZASCA 154; 2025 (2) SA 128 (SCA) (*Hanekom*) para 32.
[2] *DRDGOLD Limited and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA) (*DRDGOLD*) para 13.
[3] Section 168(3)*(a)* of the Constitution.
[4] *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA); [2003] 4 All SA 117 para 4.
[5] Section 171 of the Constitution.
[6] *DRDGOLD* fn 2 para 13.

constitute a 'decision' as contemplated in s 16(1)*(a)* of the Act.[7] The result is that the existence of leave to appeal is a necessary, but not a sufficient, condition for this Court's jurisdiction.[8] If the ruling in question is not, as a matter of law, a 'decision' within the meaning of s 16(1)*(a)*, this Court lacks jurisdiction and the matter falls to be struck from the roll without any engagement with the merits.[9]

[9] Whether an order constitutes a 'decision' for purposes of appeal is a question of law, not discretion. In *United Democratic Movement v Lebashe Investment Group (Pty) Ltd*[10] (*UDM*), the Constitutional Court confirmed that this Court is obliged to determine whether the ruling sought to be appealed constitutes a 'decision' for purposes of s 16(1)*(a)* of the Act. In doing so, this Court is not bound by the assessment of the high court.

[10] In similar vein, the granting of leave to appeal by two Judges of this Court, in terms of s 17(2)*(b)* of the Act, does not preclude this Court from enquiring into its own jurisdiction.[11] Although this Court possesses inherent power to regulate and protect its own process, that power does not extend to the assumption of jurisdiction not conferred by statute.[12] The reference in s 168(3) of the Constitution to 'appeals' is to appeals properly before the court; a ruling that is not an appealable decision of the

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[7] Section 16(1)*(a)* of the Superior Courts Act 10 of 2013 provides: '(1) Subject to s 15(1), the Constitution and any other law – (*a*) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted – (i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of s 17(6); or (ii) if the court consisted of more than one judge, to the Supreme Court of Appeal…'; *Cyril and another v Commissioner for the South African Revenue Service* [2024] ZASCA 32*;* 2024 JDR 1335 (SCA) (*Cyril*) para 6. All decisions given during the resolution of a dispute between litigants are not necessarily appealable 'decisions': *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) at 35F–G and 42I. *DRDGOLD* fn 2 paras 20–21.

[8] Cf *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* (*TWK*) [2023] ZASCA 63; 2023 (5) SA 163 (SCA) para 6.

[9] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) (*UDM*) para 40.

[10] Ibid.

[11] In *Van Niekerk and Another v Van Niekerk and Another* [2007] ZASCA 116; [2008] 1 All SA 96 (SCA); 2008 (1) SA 76 (SCA); 2007 BIP 414 (SCA), for example, the matter was struck from the roll despite leave to appeal having been granted on application to this Court. This followed the high court's decision to refuse leave to appeal because the matter was not appealable.

[12] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) [1996]; *DRDGOLD* fn 2 para 13.

high court does not become justiciable merely because leave to appeal has been granted.[13]

An appealable decision in the interests of justice

[11] It is trite that an appeal lies against an order, not its reasons. Traditionally, a judgment or order was regarded as appealable if it was final in effect and not susceptible to alteration by the court of first instance, definitive of the rights of the parties, and dispositive of a substantial portion of the relief claimed in the main proceedings.[14]

[12] Over time, a more flexible approach has emerged. In *UDM*,[15] the Constitutional Court held that the interests of justice requirement is not confined to that Court but applies equally in this Court. The traditional attributes are no longer exhaustive, and the mere characterisation of an order as 'interim' or 'final' is not determinative.[16] The enquiry has evolved to accommodate the constitutional standard of the interests of justice. This is now the paramount consideration informing the assessment of appealability, also in relation to interlocutory orders.[17]

[13] Deciding what is in the interests of justice is a fact-specific enquiry, even in the context of rule 43 applications.[18] BE contends that the interests of justice favour the entertainment of the appeal. It was submitted on his behalf that the high court's order imposed a duty of support on a stepparent in circumstances said to be novel, and that

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[13] *S v Western Areas Ltd and Others* [2005] ZASCA 31; [2005] 3 All SA 541 (SCA); 2005 (5) SA 214 (SCA); 2005 (1) SACR 441 (SCA); 2005 (12) BCLR 1269 (SCA) para 10.
[14] *Zweni v Minister of Law and Order* [1992] ZASCA 197; [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 532J–533A. While this case was decided under the now repealed Supreme Court Act 59 of 1959, the position remains the same under the Act: *NSS obo AS v MEC for Health, Eastern Cape Province* [2023] ZASCA 41; 2023 (6) SA 408 (SCA) *(NSS obo AS)* para 12.
[15] *UDM* fn 9.
[16] *NSS obo AS* fn 14 para 12.
[17] *Lebashe Investment Group (Pty) Ltd and Others v United Democratic Movement and Another* [2025] ZASCA 29; 2025 JDR 1404 (SCA) (*Lebashe Investment Group*) para 2. *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA) para 20. See also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC); 72 SATC 135 (*ITAC v SCAW*) para 53; *Tshwane City v Vresthena (Pty) Ltd and Others* [2024] ZASCA 51; 2024 (6) SA 159 (SCA) para 11; *Cyril* fn 7 para 7.
[18] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 7 BCLR 855 (CC) para 32; *S v S and Another* [2019] ZACC 22; 2019 (8) BCLR 989 (CC); 2019 (6) SA 1 (CC) (*S v S*) para 47.

the high court thereby developed the common law in a manner that is final in effect. On this footing, it is argued that the order is appealable notwithstanding its interlocutory nature.

[14] NT, by contrast, relies on the express provisions of the Act in support of the contention that the order is not appealable. Section 16(3) of the Act provides that, 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*;

…'

[15] The interests of justice enquiry does not admit of a closed list of requirements. As this Court held in *Government of the Republic of South Africa and Others v Von Abo*,[19] the assessment is a balancing exercise in which several considerations may be relevant. These include the finality and effect of the relief granted, whether the rights of the parties have been definitively determined, the extent to which the relief disposes of the issues in dispute, considerations of convenience, expedition and delay, the risk of prejudice, the avoidance of piecemeal appeals, and the attainment of justice.[20]

Analysis

[16] The threshold enquiry is whether it is in the interests of justice for this Court to entertain an appeal against an order granted under rule 43.[21] That enquiry is informed by the statutory framework governing appealability, the nature and effect of the order in question, and the broader considerations relevant to the assessment of appealability and the attainment of justice, summarised above. These dimensions will be considered in turn.

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[19] *Government of the Republic of South Africa and Others v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA) para 17.
[20] *Lebashe Investment Group* fn 17 para 12.
[21] The traditional considerations are subsumed under the constitutional interests of justice standard: *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) paras 40–41.

The statutory framework

[17] A central consideration in the interests of justice analysis is the express statutory scheme. Section 16(3) of the Act provides, notwithstanding any other law, that no appeal lies from any judgment or order in proceedings in connection with an application by one spouse against the other for maintenance *pendente lite*. The relief granted in paragraph 1.1 of the high court's order, which directed the payment of R40 000 per month as cash maintenance *pendente lite*, falls squarely within the ambit of this subsection. The order was made under rule 43 and is, by its nature and terms, interim and operative only pending the final determination of the divorce proceedings. So too are the other orders the appellant seeks to appeal. The existence of a clear statutory bar is a weighty consideration against appealability, reflecting a deliberate legislative choice to exclude interim matrimonial orders from appellate scrutiny.

[18] That choice is grounded in the purpose and function of rule 43 itself. The rule exists to secure the inexpensive, expeditious and provisional regulation of financial matters pending divorce, primarily for the protection of women and children.[22] It provides a temporary remedy during divorce proceedings to ensure that neither party's ability to maintain a reasonable standard of living or to contest the main action is prejudiced by a lack of resources. The structural inequalities that characterise many matrimonial disputes, and which often place one spouse – typically the wife – at a financial disadvantage, are an integral part of this context.[23] Rule 43 is designed to mitigate those inequalities by levelling the playing field during the interim phase.[24]

[19] Non-appealability of rule 43 orders is closely connected to this rationale.[25] Entertaining appeals against interim maintenance and costs orders would ordinarily undermine the objectives of expedition and affordability by introducing delay, expense and fragmentation into proceedings legitimately intended to be summary in nature. The potential for multiple interlocutory applications, including various proceedings before appeal courts before the divorce itself is finalised, carries obvious risks of

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[22] *S v S* fn 18 para 43.
[23] Ibid paras 3 and 31; *SH v MH* 2023 (6) SA 279 (GJ) para 79.
[24] *SH v MH* Ibid para 73, citing J Heaton *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta 2015) at 544.
[25] *S v S* fn 18 para 43.

prejudice, particularly to an impecunious spouse. It also creates scope for abuse by a recalcitrant litigant intent on frustrating the interim relief regime. These concerns, together with the adverse consequences that delayed maintenance may have on children, underpinned the Constitutional Court's unequivocal rejection of the constitutional challenge to s 16(3) in *S v S*.[26]

The nature and effect of the order

[20] BE contends that the interests of justice require this Court's intervention because the high court purportedly developed the common law by recognising a duty of support resting on a stepparent, thereby rendering the order final in effect.

[21] This submission overstates the reach of the high court's reasoning. The order granted by the high court was provisional and revisable, rather than final in effect. In terms of rule 43(6), the order remains susceptible to reconsideration by the high court upon a material change in circumstances. It is also inherently capable of correction or reversal by the trial court when the divorce action is determined after the evidence has been fully ventilated.[27] The relief granted does not finally determine any right, nor does it dispose of any substantive portion of the relief claimed in the main action, which includes the dissolution of the marriage, the final determination of maintenance obligations, and the calculation of the accrual. Any legal conclusions reached were made in the context of rule 43 proceedings, *pendente lite* and for the limited purpose of regulating the extent of interim relief considered appropriate on the facts before the high court. Those findings do not bind the trial court, which remains free to determine the stepchildren's entitlement to maintenance afresh in the divorce proceedings, based on the evidence to be presented. This lack of finality, viewed together with the comity owed to the trial court, is a further indicator that appellate intervention would not be in the interests of justice.[28]

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[26] Ibid paras 30–31.
[27] *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601.
[28] *TWK* fn 8 para 32; *S v Western Areas Ltd and Others* fn 13 para 25; *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 para 8.

Other factors relevant to the attainment of justice

[22] Even if the provisional and revisable nature of the order were not dispositive, there are other considerations. Expedition, convenience, and the risk of prejudice, including the avoidance of piecemeal litigation prejudicial to vulnerable persons, are additional factors that weigh heavily against appealability in the present case.

[23] The appellant has not demonstrated prejudice of a kind that would warrant this Court's intervention at this stage in the interests of justice. In these circumstances, it cannot be said that irreparable harm or grave injustice would result if this Court does not decide the merits of the present appeal.[29] Any financial prejudice occasioned by compliance with a rule 43 order is, by its nature, temporary and remediable. By contrast, permitting an appeal would delay the finalisation of the divorce proceedings and frustrate the very purpose of interim relief. The balance of prejudice accordingly favours adherence to the statutory scheme.

[24] In *S v S*,[30] the Constitutional Court noted that any real or perceived injustices emanating from an interim maintenance order are capable of amelioration through various established mechanisms. A rule 43(6) application is the first option to be considered and is usually the appropriate way to rectify a patently incorrect maintenance order. In addition, a litigant may make out a case for an expansive interpretation of rule 43. In exceptional cases, a higher court may exercise its inherent power under s 173 of the Constitution to regulate its own process in the interests of justice by remedying a patently unjust and erroneous order.[31]

[25] In response to questions from the bench, counsel for the appellant submitted that both the high court and this Court have inherent powers to regulate their processes by correcting the patently erroneous order of the high court. Given the purpose of rule 43 proceedings, particularly the expeditious and inexpensive finalisation of divorce matters as discussed in paragraph 18 above, there is no reason why the powers envisaged in s 173 cannot be invoked in the high court. This was an

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[29] *ITAC v SCAW* fn 17 para 55; *Psychological Society of South Africa v Qwelane and Others* [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) para 40.
[30] *S v S* fn 18.
[31] Ibid paras 56–58.

avenue open to BE. To prefer an invocation of s 173 by way of an appeal would contradict the objective of rule 43 orders, in my view. This is especially the case as past financial injustices occasioned by a rule 43 order can often be righted when the final reckoning is done at the divorce.[32]

[26] This Court's decision in *Hanekom NO and Others v Nuwekloof Private Game Reserve Farm Owners' Association*[33] provides a firm basis for holding that these opportunities should be pursued before the high court. The notion that an appeal should be entertained in the exercise of this Court's inherent jurisdiction under s 173 does not extend to the assumption of jurisdiction not conferred by statute. Absent a 'decision' of the high court within the meaning of s 16(1)(*a*) of the Act, this Court lacks jurisdiction to entertain an appeal. This cannot be overlooked by virtue of the exercise of this Court's inherent power to protect and regulate its own process, and to develop the common law, considering the interests of justice.[34]

[27] It may be added that BE's argument is heavily predicated upon his asserted prospects of success on appeal based on the alleged development of the common law by the high court. That consideration carries limited weight in determining appealability. This Court has cautioned that appealability cannot depend on a litigant's own assessment of the merits. Given that the merits may ultimately be resolved either way, it is ordinarily inappropriate for this Court to pronounce on a point of law merely to justify appellate jurisdiction.[35] Moreover, whether the high court's present position is ultimately correct or not, its confirmation or rejection of that approach after a full ventilation of the evidence presented at trial, and with the benefit of further reasoning, will be of assistance to this Court should the pending matter subsequently come on appeal.[36]

[28] When all relevant considerations are weighed cumulatively – including the express statutory exclusion in s 16(3), the interim and provisional nature of the relief,

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[32] Ibid para 56.
[33] *Hanekom* fn 1 para 31.
[34] Ibid paras 31 and 35.
[35] *TWK* fn 8 para 46.
[36] Ibid para 33.

the absence of finality, the availability of alternative redress avenues, prejudice, the need to avoid piecemeal appeals, and the imperatives of expedition – the interests of justice do not favour the entertainment of an appeal.

[29] It follows that the order does not constitute a ‘decision’ as contemplated in s 16(1)*(a)* of the Act, so that the second jurisdictional fact for an appeal is absent. The result is that leave to appeal, even on a limited basis, was wrongly granted by the two Judges who considered the petition. The grant of leave to appeal cannot confer jurisdiction where the statutory framework and the interests of justice deny it. This Court accordingly lacks jurisdiction to entertain the appeal. The appropriate order is to strike the matter from the roll.

[30] In the result, the appeal is struck from the roll with costs.

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A GOVINDJEE

ACTING JUDGE OF APPEAL

Appearances:

For the Appellant:	M Tsele (Heads of argument prepared by D Borgström SC and M Tsele)
Instructed by:	Tinus Slabber and Associates, Cape Town c/o Webbers Attorneys, Bloemfontein
For the First Respondent:	R Ferreira
Instructed by:	Eunanda Fourie Inc., Struisbaai c/o Hendre Conradie Inc., Bloemfontein.