

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 01670/2020

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

SIGNATURE

DATE

In the matter between:

GRACE KELLY MAKUBIRE

First Applicant

GRACE KELLY MAKUBIRE NO

Second Applicant

(In her capacity as executrix in the deceased estate of
Thabane Keipele Modise Leo Makubire)

ALL OCCUPIERS OF ERF 56 STRATFORD TOWNSHIP

Third Applicant

REGISTRATION DIVISION J.R GAUTENG

and

VISION POINT PROPERTIES CC

Respondent

JUDGMENT

(Leave to Appeal Application)

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 26 November 2021*

SENYATSI J:

- [1] This is an application for leave to appeal the eviction order that was granted by this court on 18 August 2021 in terms of which the applicant was evicted from the property known as Erf 56 Stratford Township, Registration Division JR Province of Gauteng situated at 6 Nicholas Crescent Stratford Gardens, Broadacres.
- [2] The applicant attacked the judgment and raises two main grounds of appeal namely:
- (a) “The court erred when dealing with section 30 of the Administration of Estate Act 66 of 1965 that “the first respondent was the executrix of the estate of her late husband. She has not adduced evidence on what steps she had taken after her appointment by the Master of the High Court, as an executrix to bring the administration of her late husband's state to finality. She has also not disclosed evidence of how far she was with that liquidation and distribution account of her late husband's estate. There is no evidence to suggest that she took any action to protect the interests of creditors and heirs to the estate. Consequently, I hold the view that the defence is intended to delay the vindication of the applicant's rights to the property.

- (b) The court erred in not dealing with the provision of “Rule 46A of the Uniform Rules, as the application before this court has nothing to do with it”.

- [3] The applicant contends there is a reasonable prospect that another Court would come to a different conclusion if the property sold in execution was the primary residence of the respondents and was sold without reserve.
- [4] In opposing the application for leave to appeal the respondent, Vision Properties CC, who was the applicant in the main eviction application contends that in opposing papers against the eviction the applicant in the present leave to appeal application had filed an answering affidavit which was later supplemented by a supplementary affidavit. The point about the section 30 defence of the Administration of Estates was not raised in the papers and no evidence was adduced in the opposing affidavit setting out the facts upon which the alleged defence was based. The defence was put up for the first time in the heads of argument in the eviction proceedings. The respondent furthermore contends that the ground had no basis in the papers before court.
- [5] As regards the opposition to the second ground of appeal regarding the failure to decide on Rule 46A, the respondent contends that the court was correct in its findings as the application before it was for eviction. Default judgement had been granted in favour of the mortgage Bond holder and the Rule 46A should have been dealt with when the sale in execution took place, so contends the respondent in opposing leave to appeal.

[6] The issue for determination is also based on the grounds of appeal raised, whether another Court would come to a different conclusion and whether they are reasonable prospects of success.

[7] Leave to appeal is regulated by section 17(1) of the Superior Courts Act 10 of 2013 ("the Act") which provides as follows:

"(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, 10 including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real 15 issues between the parties."

[8] The provisions of section 17(1) raise the bar higher when it comes to the requirements to be met in order for leave to be granted. In *Starways Trading 21 CC v Pearl Island 714 (Pty Ltd)*¹, It was held that there are three requirements for the granting of leave to appeal pursuant to section 17(1) of the Act, namely:

- (a) that there is a prospect of success;
- (b) there are some other compelling reasons to Grant the leave to appeal
- (c) the matter is of substantial importance to one or both parties concerned and that a practical result can be achieved by the appeal.

¹ [2017] 4 All SA 568 (WCC)

[9] If the applicant fails to meet the requirement that another Court would come to a different conclusion, then leave to appeal must be refused. In the present application, the applicants seek to challenge the finding. Section 30 of the Administration of Deceased Estates Act which was neither raised in the papers nor even canvassed when the first applicant applied for rescission of judgment which was dismissed. As regards to the challenge based on Rule 46A, the applicant failed to appreciate that the Rule 46A challenge would have been relevant when she attempted to challenge the rescission of judgment against the mortgage bond holder and that this defence could not be raised in an eviction application of a *bona fide* third party purchaser of the property. It follows therefore that the application for leave to appeal must fail just on these grounds.

[10] As regards, compelling reasons which might exist to Grant leave to appeal, it was held in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* ², that a compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on the future disputes. I am of the respectful view that no such compelling reason exists in the present application to enable this court to favourably consider the application for leave to appeal.

[11] It is trite that the test for granting leave to appeal is indeed a stringent one. ³
The failure to meet the requirement is fatal to such an application.

² 2020 (5) SA 35 (SCA)

³ See *Acting National Director of Public Prosecutions and Other v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [19577/09] [2016] ZAGPPHC 489

[12] Having considered the papers filed of record and the written submissions prepared by both counsel, I am of the view that the applicant has failed to meet the stringent test set by Section 17(1) of the Act.

ORDER

[27] The following order is made:

(a) The application for leave to appeal is dismissed with costs.

SENYATSI ML

Judge of the High Court of South

Gauteng Local Division,

Africa

Johannesburg

REPRESENTATION

Date of hearing: 11 November 2021

Date of Judgment: 26 November 2021

First, Second and Third Applicants Counsel: Adv V van der Merwe

Instructed by: KG Tserkezis Attorneys

Respondent Counsel: Adv B Bhabha

Instructed by: Bruno Simao Attorneys