

REPUBLIC OF SOUTH AFRICA



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

CASE

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>
..... DATE	
SIGNATURE	

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In the matter between:

THOKO HILDA TSHABALALA

Applicant

and

DANNYBOY MBATHA
Respondent

First

REGISTRAR OF DEEDS
Respondent

Second

LEAVE TO APPEAL J U D G M E N T

LOMBARD, AJ:

1. The Applicant seeks leave to appeal against my order (**“the order”**), dated the 28th of October 2019, in terms of which I dismissed the Applicant’s application (**“the main application”**), with costs.
2. I provided my reasons for dismissing the application in Court.
3. On the 29th of October 2019, the Applicant delivered a notice of application for leave to appeal and, in so doing, failed to advance any grounds for seeking leave to appeal.
4. I was first informed of the request for reasons during November 2019.
5. On the 13th of December 2019, I furnished my reasons for the order in writing, which accorded with the reasons already provided by me in Court on the day of the hearing.
6. For reasons unknown to me, the requested reasons were only furnished to the parties on the 5th of March 2020.

THE MAIN APPLICATION AND ORDER

7. The Applicant, in terms of the main application, sought to declare invalid and of no force the purported decision by the Second Respondent to register an immovable property (**“the property”**) into the name of the First Respondent. In addition, the Applicant sought an order that the Second Respondent “cancel or reverse” the registration of the property into the name of the First Respondent.
8. The First Respondent did not file an opposing affidavit and instead raised two questions of law as envisaged in terms of Uniform Rule 6 (5)(d)(iii).
9. The first question of law addressed the relief sought based on the purported decision by the Second Respondent to register the property into the First Respondent’s name.
10. The First Respondent contended that the *iusta causa* for the registration of the property into the First Respondent’s name was not the result of a decision taken by the Second Respondent, but rather, as a result of the fact that the First Respondent had inherited the property in terms of Section 1 (1) (c) of the Intestate Succession Act No. 81 of 1987.¹

¹ Registration being a derivative method of acquiring ownership, in this case, by the operation of

11. The second question of law addressed the relief sought seeking a “*cancellation*”, alternatively, a “*reversal*” of the registration process from the name of the First Respondent. The Applicant failed to aver into whose name the property should then be transferred.
12. The First Respondent contended that were this relief to be granted, the property would revert back to the executor in the estate of the late MM Pilusa, from whom the property was inherited, being a non-suited person in the main application.
13. I upheld both points of law raised by the First Respondent.²
14. I further held that even were I to accept that the relief sought by the Applicant in the main application was competent in law, having regard to the merits, the Applicant had failed to make out a case for any entitlement to the property.³
15. The basis for this finding is grounded in the fact that the Applicant contended that her late husband became the owner of the property by way of two separate sale agreements, in circumstances where, both agreements failed to comply with

law and therefore not resulting from a decision of the Second Respondent

² Case lines section 074, paginated page 074-4, paragraphs 5.1 and 5.2

³ Case lines, section 074, paginated page 074-7, paragraph 8

the peremptory provisions of the Alienation of Land Act No. 68 of 1981.

16. The first agreement comprised of an alleged oral agreement. Section 2 (1) of the Alienation of Land Act No. 68 of 1981 requires a written deed of alienation.
17. The second agreement falls foul of the provisions of Section 6 (1) of the Alienation of Land Act No. 68 of 1981, in that the purchase price was not fixed, and the property description was defective.

GROUND UNDERPINNING THE APPLICATION FOR LEAVE TO APPEAL

18. The grounds underpinning the application for leave to appeal comprise of the following:

- 18.1. I erred in finding that the Applicant failed to demonstrate that a postponement of the main application was necessary **(the first ground)**;

- 18.2. I erred in failing to recognise that the Applicant, who is a pensioner of an advanced age, would not represent herself properly in the matter **(the second ground)**;

- 18.3. I erred in failing to advise the Applicant, whose legal representatives of record had withdrawn, to approach Legal Aid South Africa or any University Law Clinic, to obtain legal representation **(the third ground)**;
- 18.4. I erred by finding that if the deeds of transfer did not comply with the provisions of Section 2 of the Alienation of Land Act No. 68 of 1981, the transferee/alienee, was not entitled to the transferred land **(the fourth ground)**;
- 18.5. I erred by finding that if the deeds of transfer did not comply with the provisions of Section 2 of the Alienation of Land Act No. 68 of 1981, the transferor/alienator, or his successor in title, has a defence against the alienee/transferee, who has performed their obligations under the void deed of transfer in full **(the fifth ground)**;
- 18.6. I erred in finding that the Second Respondent "...did not have a choice...", as the property passed to the First Respondent by the operation of law **(the sixth ground)**;
and
- 18.7. I erred by finding that in terms of the law of succession, the property passed to the First Respondent. The

property could not pass to the First Respondent, as no blood relationship existed between the transferor/alienator and the First Respondent, and no will was in place which made provision that the First Respondent was to inherit the property **(the seventh ground)**.

THE FATAL DEFECTIVENESS OF THE APPLICATION FOR LEAVE TO APPEAL

19. Uniform Rule 49 (1) (b) prescribes that:

“When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against: Provided that when the reason or the full reasons for the Court’s order are given on a later date than the date of the order, such application may be made within 15 days after such later date: Provided further that the Court may, upon good cause shown, extend the aforementioned period of 15 days.”

20. It is settled law that an applicant seeking leave to appeal must set out her/his grounds of appeal succinctly and in unambiguous terms, in order to enable the Court and a respondent to assess

the case the applicant seeks to make out and to know which case a respondent has to meet in opposing the application for leave to appeal.⁴

21. It is also trite that an application for leave to appeal can be dismissed on the basis of non-compliance with Uniform Rule 49(1) alone.⁵
22. As stated hereinabove, the application for leave to appeal delivered on the 29th of October 2019, disclosed no grounds of appeal whatsoever.
23. This rendered the application for leave to appeal fatally defective.
24. Despite having received written reasons for the order on the 5th of March 2020, the Applicant failed to amend the defective notice of application for leave to appeal, or to deliver a renewed application for leave to appeal within 15 days after the 5th of March 2020.

⁴ Songono v Minister of Law and Order 1996 (4) SA 384 (E) at 395J to 396A

⁵ **Songono v Minister of Law and Order 1996 (4) SA 384 (E) at 386**

25. More than a year later, the Applicant attempted to amend the fatally defective notice of application for leave to appeal, in terms of Uniform Rule 28 (the notice of intention to amend (**“the notice of intention to amend”**) itself being defective, insofar as it references an amendment to *“the defendant’s plea”*).⁶

26. It is common cause that:

26.1. The First Respondent did not object to the amendment proposed by way of the notice of intention to amend; and

26.2. The Applicant failed to deliver its amended pages, within the prescribed 10 day time period, subsequent to the lapsing of the 10 day time period within which the First Respondent was entitled to object to the proposed amendment.

27. Insofar as the Applicant failed to deliver its amended pages, as aforesaid, the proposed amendment fell away.⁷

28. The Applicant never attempted to re-serve the notice of intention to amend and to, thereafter, deliver her amended pages within the time period prescribed by Uniform Rule 28.

⁶ Case lines section 075, paginated page 075-3

⁷ **Van Heerden v Van Heerden 1977 (3) SA 455 (W)**

29. Either way, a condonation application would be required, as the application for leave to appeal was delivered out of time.
30. A condonation application has never been forthcoming from the Applicant.
31. It is trite that unless and until condonation is sought and granted in respect of the late delivery of the application for leave to appeal, there is no application for leave to appeal, before the Court.⁸
32. Consequently, the Applicant's right to seek leave to appeal has lapsed.
33. This is dispositive of the application for leave to appeal. and I find that the application can be dismissed, with costs, on this basis alone.
34. As an aside, I am satisfied that even were the grounds advanced for leave to appeal properly contained in the application for leave, the grounds are meritless.

⁸ **Modder East Squatters and Another v Modderklip Boerdery (Pty) Limited [2004] 3 All SA 169 (SCA) at paragraph 46 and Panayiotou v Shoprite Checkers (Pty) Limited 2016 (3) SA 110 (GJ) at paragraphs 8, and 13 to 14**

35. In respect of the first to third grounds, I pertinently enquired from the Applicant whether she intended seeking a postponement of the main application, in light of her attorney of record having withdrawn. The Applicant insisted that the hearing proceed and resultantly waived her right to legal representation.

36. In respect of the fourth and fifth grounds, I never found that the deeds of transfer failed to comply with Section 2 of the Alienation of Land Act No. 68 of 1981.

37. In respect of the sixth ground, the Second Respondent was bound by law to effect the transfer. The Applicant has failed to advance any factual or legal basis for her contention to the contrary.

38. In respect of the seventh ground, the Applicant failed to make out any case in her founding affidavit, that the First Respondent was not entitled to inherit the property by the law of succession.

39. Section 17 (1)(a) of the Superior Courts Act of 2013, prescribes that leave to appeal may only be given, where the judge concerned is of the opinion that:

39.1. The appeal would have a reasonable prospect of success;

or

39.2. There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

40. The criterion of a reasonable prospect of success requires that there must be a sound, rational basis for the conclusion that there are prospect of success on appeal.⁹

41. In addition to the criterion of a reasonable prospect of success, the word “*would*” is used in determining the conclusion to which the Judge must come, before leave to appeal can be granted.

42. The use of the word “*would*” in Section 17, has raised the bar of the test that now has to be applied to the merits of the proposed appeal, before leave should be granted.¹⁰

⁹ **S v Smith 2012 (1) SACR 567 (SCA) at [2]**

¹⁰ **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen - Unreported decision, LCC Case No LCC14R/2014 dated 3 November 2014, cited with approval by the full Court in The Acting National Director of Public Prosecution v Democratic Alliance - Unreported decision, GP Case No 19577/09 dated 24 June 2016, paragraph 25**

43. It has been held that an applicant for leave to appeal now faces a higher and more stringent threshold, in terms of the Act, compared to the provisions of the Supreme Court Act of 1959.¹¹

44. The Applicant has not met this threshold.

45. I grant an order in the following terms:

45.1. The application for leave to appeal is dismissed; and

45.2. The Applicant is ordered to pay the costs of the application for leave to appeal.¹²

Date of hearing: 23 August 2021

Judgment handed down on: 23 November 2021

Appearances:

Counsel for the Applicant: Adv M Makhubele

Counsel for the First Respondent: Adv J Lubbe

¹¹ **Notshokovu v S - Unreported Decision, SCA Case No 157/15 dated 7 September 2016**

¹² Adv Lubbe requested in his heads of argument that these costs include the costs of counsel.

Insofar as this is a High Court order, such costs automatically include the costs of counsel

No appearance for the Second Respondent (who did not oppose the main application or the application for leave to appeal)