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REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/10620

In the matter between:

W : T

First Applicant

W : T N O

Second Applicant

W: N N O

Third Applicant

W : C N O

Fourth Applicant

D : J

Fifth Applicant

P : S N O

Sixth Applicant

and

W : HB
(born G)

Respondent

JUDGMENT

[1] This is an application for leave to appeal against the judgment delivered on 12 June 2012. The Applicants applied for leave to appeal by way of notice on 26 June 2012. There were endless problems in arranging a date for the matter to be heard. The matter eventually proceeded on 18 October 2012.

[2] During the course of the argument, the parties were urged to settle the matter. It was even made known to them that judgment would be reserved in this application give them a further opportunity to settle this matter. They have, however, failed to do so.

[3] The application for leave to appeal concerned essentially the following six issues:

- a. G's maintenance;
- b. The usufruct;
- c. Second to Sixth Applicants being held to be in contempt of a Court Order;
- d. Repatriated funds;
- e. Reimbursement of computer repairs and plumbing repairs; and
- f. Costs.

G's maintenance

[4] This was dealt with in paragraphs 10 to 44 of the judgment on the merits.

[5] The First Applicant unilaterally claimed the amount that he had previously paid by paying the Respondent an amount in respect of board and lodging for thenights that G spent in her household.

[6] This unilateral change to the amount that had been paid in respect of G's maintenance was based upon the fact that G had reached the age of majority and on the advice of unnamed Senior Counsel.

[7] As detailed in paragraph 27 of the judgment on the merits, the Applicant [which one] described this payment as a *"reimburse of payment for Gs residential board and lodging costs"*.

[8] Having described this payment as being reimbursement payment, it is quite clear that the First Applicant was aware that it was in respect of monies owed to the Respondent for the cost incurred of maintaining G.

[9] There is therefore no merit in the application for leave to appeal on this point.

The usufruct

[10] This is dealt with in paragraphs 45 to 63 of the judgment on the merits.

[11] The crux of this issue was whether the First Applicant was liable to pay the transfer duty in respect of the registration of the usufruct.

[12] Despite the agreement, which was made an Order of this Court having stated unequivocally that the First Applicant was to bear the costs, the First Applicant, on the advice of the unnamed Senior Counsel, contended that transfer duties were a tax and therefore not part of the costs.

[13] The First Applicant further contended that the bond holder of the property, First National Bank, had declined to register a usufruct over the property because it would negatively influence the security value as well as the market ability of the property.

[14] In essence, therefore, the First Applicant's defence for his failure to register a usufruct was one of relying upon legal advice and the impossibility of performance due to the bond holder's refusal.

[15] The Respondent, on the other hand, contended that First National Bank had not refused to consent to the registration of the usufruct and that the First Applicant's obligation remained to provide First National Bank with security for their interest in the property.

[16] In relation to the contention that the payment of transfer duties does not form part of the costs associated with the registration of the usufruct, there is no prospect of another court coming to a different conclusion.

[17] There is therefore no basis to grant leave to appeal in this regard.

The finding that the Second to Sixth Applicants were in contempt of the Court Order

[18] This issue is dealt with in paragraphs 3, 6 and 92, 103 and 109.6 to 109.8 of the judgment on the merits.

[19] Having signed the agreement had known that it would be made an Order of Court, but therefore failing to comply therewith, the Second to Sixth Applicants are in fact in contempt of the Court Order.

[20] There is thus no merit to this argument in support of an application for leave to appeal as there is no possibility of another court coming to a different conclusion in this regard.

The repatriated funds

[21] This is dealt with in paragraphs 64 to 85 of the judgment on the merits.

[22] In relation to these funds, theunilaterally imposed various conditions to such payment and conceded having made a calculation error.

[23] The Respondent contended that the payment of this money is unconditional and could not be related to any other terms of the agreement.

[24] At the end of the day, the First Applicant remained indebted to the Respondent in the revised amount of R9 702.45, and despite having signed the agreement which was made an Order of Court, failed to comply therewith.

[25] In the circumstances, there is no merit to this basis for leave to appeal.

The computer and plumbing repairs

[26] This is dealt with in paragraphs 86 to 89 and 90 to 102 of the judgment on the merits.

[27] There is no dispute that these amounts were unilaterally deducted by the First Applicant from the amount due in respect of maintenance and not paid by either the First Applicant or the Second to Sixth Applicants.

[28] In the circumstances, there is no merit in this argument for leave to appeal.

Costs

[29] The general rule being that costs follow the result unless there is a justification for ordering otherwise, there is no merit on this basis for leave to appeal.

Order

[30] Having regard to all of the above detailed factors and having reconsidered this matter, in order to determine whether there is a reasonable prospect of success on appeal, there is unfortunately no such prospect of success and leave to appeal ought to be refused on all of the above detailed grounds and costs ought to follow the result.

[31] I therefore make the following Order:

- a. Leave to appeal is refused; and
- b. Applicants are to pay the costs of this application for leave to appeal, jointly and severally, the one paying the other to be absolved from such payment.

L M HODES S.C
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG
18 March 2013