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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT. PRETORIA)

CASE NO: 4606/2005

DATE:07/12/2012

In the matter between:

K: E

APPLICANT

And

K: L

RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] The applicant seeks leave to appeal to the Full Bench of this Division, alternatively the Supreme Court of Appeal against the whole judgment, including costs on 23 September 2010.

[2] The applicant had brought an application seeking an order compelling the respondent to comply with the applicant's notice in terms of Rule 35(3) and Rule 36(5) and that the

respondent particularly make available items referred to therein relating to the inherited and donated assets by his father.

[3] On behalf of the applicant it was submitted, inter alia, that the order against the leave to appeal is sought, is final and of definitive effect and accordingly capable of being appealed against. It was further submitted that the Court erred in refusing to grant an order as was claimed by the applicant and dismissing the application with costs.

[4] It was further submitted on behalf of the applicant that the parties were married to each other for more than 30 years and that the inheritance and donations vested with the respondent about fifteen years ago. Regard being had to the issues in the divorce action between the parties, that the assets and liabilities and income of the respondent in entirety and inclusive of inheritance assets is relevant to the applicant's claim in the divorce for maintenance and redistribution of assets, also considering o the provisions of ss7 (2), 7(3), 7(4) and 7(5) of the Divorce Act 70 of 1979.

[5] It was further contended that to the extent that the order sought was in the discretion of the Court a quo, it erred in the exercise of its discretion and refusal to order discovery of the documents and the relief sought by the applicant.

[6]It was further submitted on behalf of the applicant that the Court erred in following the Beira v Beira¹ without distinguishing it from the facts of this matter. It was further submitted that the latter decision was distinguishable from the facts of the present case because in the Beira case the inheritance had not as yet vested with the respondent whereas, in casu, it had

1 1990 (3) SA 802.

already vested with the respondent. It was also submitted that the Court a quo erred in not following the *Jordaan v Jordaan*² decision to the present matter. It was contended further that the very fact that there are two opposite decisions on the central issue relevant in this matter, that is indicative that there are reasonable prospects that another court may come to a different decision and follow the *Jordaan* decision.

[7] It was further submitted that the Court a quo erred in that it prejudged what the divorce court would have to decide, namely whether the relevant assets derived from the inheritance should be included or excluded, for purposes of determining the respondent's means to support the applicant.

[8] It was further submitted on behalf of the applicant that the Respondent did not deny that the relevant documents were in his possession nor rely on privilege in refusing to discover them, and as he had no reason to refuse to discover them and the decision was therefore appealable. In this regard reliance is made in the matter of *Santam v Segal*³. It was further contended that the said documents are relevant in enabling the applicant to proving her claim as is required by s7 (3) of the Divorce Act.

[9] On behalf of the respondent it was submitted, inter alia, that the matter of *Zweni v Minister of Law and Order*⁴ is not applicable in casu. It was submitted that the order of the Court a quo in this matter, related to the process and not the merits of the divorce action and therefore not appealable. It was further submitted that the applicant would have to await the finalization of the divorce action before she can seek to appeal.

² 2001 (3) SA(CPD).

³ 2010 (2) SA 160 at 164 para [9J].

⁴ 1993 (1) SA 523 (A).

[10] It is trite that leave to appeal will be granted when:

10.1 There is a reasonable prospect of success on appeal;

10.2 The amount in dispute is not trifling. In the consideration of this aspect the Court must have regard only to the amount of the claim itself and not to the costs that have already been incurred;

10.3 The matter is of substantial importance to one or both of the parties;

10.4 That a practical effect or result can be achieved by the appeal⁵.

[11] It is equally trite that in an application for leave to appeal, the applicant must satisfy the Court that he has a reasonable prospect of success on appeal, and that the appeal is not frivolous and that the case is of importance to him.⁶ In *R v Boya*⁷ it was held that what is meant about reasonable prospect of success is that the Court considering the application for leave to appeal must be satisfied that on the findings of fact or conclusions of law involved the Court of Appeal may well take a different view from that arrived at by the Court a quo.

[12] In the matter of *Goodwin Stable Trust v Douhex (Pty) Ltd and Another*⁸ it was held that: “Whilst there may be a tendency to seek to grant leave to simply to allow outstanding questions to be finally determined, it seems to me that, balancing the rights of the parties to the litigation, the Court’s responsibility is to avoid the temptation simply to take the opportunity to have a question answered and rather to apply its mind as to whether or not the answer will probably be in favour of the applicant for leave to appeal.”

5 Vide Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa*, fifth Edition at page 1212.

6 Vide *Odendaal v Loggerenberg en Andere, NN. O.* (2) 1961 (1) SA 724 at 727B and the authorities therein cited, inter alia, (*Rv Baloi*, 1949(1) SA 523 (AD); *R v Kuzwayo*, 1949 (3) SA 761 (AD) at 764.

7 1952 (3) SA 574 (CPD) at 577B-C.

8 1999(3) SA 353 (CPD) at 354J-355A.

[13] In an application for leave to appeal, the Court, in deciding the prospect of success on appeal, must also have regard to whether the cumulative effect of all other factors relevant to the application is such as to render the application wholly and obviously unworthy of consideration. The Court is bound to assess the prospects of success on appeal, and to weigh such assessment together with all other relevant circumstances of the case; vide *Finbro Furnishers (Pvt) Ltd v Registrar of Deeds, Bloemfontein, and Others*.⁹ The Divorce Act preceded the Matrimonial Property Act.

[14] In my view, the important aspect upon which this appeal revolves is whether the Court a quo erred in following the Beira decision and not the Jordaan decision. In my view, where there are two diametrically opposed decisions, it is within the Court's discretion to decide which of these decisions it would follow. Because the Beira decision emanates from the Witwatersrand Local Division, which is within the North Gauteng High Court, I consider myself bound to follow this decision, rather than the Jordaan decision, which emanates from the Cape Provincial Division. In my view, a Court of appeal is not likely to interfere with the exercise of a judicial discretion, as in this matter.

[15] I further bear in mind that the Matrimonial Property Act, No 88 of 1984 was preceded by the Divorce Act, No 70 of 1979. In my view, if it was the Legislature's intention that the Divorce Act should supersede the Matrimonial Property Act, the Legislature would have crafted the s5 Matrimonial Property Act, in such a way as to harmonize it with the provisions of sub sections 7(2), 7(3), 7(4) and 7(5), which is not the case.

⁹ 85 (5) 773 (A).

[16] Where the Court in the exercise of its discretion, decided to follow one or the other of diametrically opposed decisions, it cannot, in my view, be held to have erred in the exercise of its choice. I am therefore of the view that there are no prospects of success on appeal, that the discretionary exercise of this Court would be tempered. Consequently, in my view, the application for leave to appeal should be refused.

[17] In the result I make the following order:

1. That leave to appeal to the Full Bench of this Division is granted;
2. That costs of this application be costs in the appeal.

N.M. MAVUNDLA

JUDGE THE HIGH COURT

DATE OF HEARING : 27 NOVEMBER 2012

DATE OF JUDGMENT : 07 DECEMBER 2012

APPICANT'S ATT: SHAPIRO & SHAPIRO INC.

APPLICANT'S ADV : MR. M L HASKINS SC.

RESPONDENTS' ATT : DU PLESSIS DE HEUS & VAN WYK

DEFENDANT'S ADV : ADV VAN NIEWENHUIZEN (MS)