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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 58823/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 21 October 2024

Signature

In the matter between:

LUNGILE H. SHONGWE

1ST Applicant

LUNGILE H. SHONGWE N. O

2ND Applicant

And

FIKELEPHI A. MEYIWA

1ST Respondent

REGISTRAR OF DEEDS, PRETORIA

2ND Respondent

THE MASTER OF THE HIGH COURT (JHB)

3RD Respondent

JUDGMENT

SETHUSHA- SHONGWE AJ

Introduction

[1] This is an application for leave to appeal against cost order dated 14 March 2024, and judgment order dated 17 July 2023 granted by this court against the applicant.

Parties

[2] The 1st applicant is Lungile Happiness Shongwe. The 2nd applicant is Lungile Happiness Shongwe, N.O. (in her capacity as executrix of the estate of the late Themba Joseph Shongwe with identity number 6[...] under estate number: 025650/2021. The 1st respondent is Fikelephi A. Meyiwa, an adult female. The 2nd respondent is the registrar of deeds, Pretoria. The 3rd respondent is the Master of the High Court, Johannesburg. The second and third respondent are not opposing the application.

Factual background

[3] On 11 May 2023, the applicant brought an application in her personal capacity and as the executor of the deceased estate of the late Joseph Shongwe (the deceased) seeking a declaratory order in terms of part B of the Notice of Motion to the following effect:

- (i) That the donation in terms of section 15(3) of the Matrimonial property Act¹ in the sum of R3 500 000.00 (three million five hundred thousand rand) made by the deceased and used to purchase an immovable property on behalf of the 1st respondent, be declared null and void.
- (ii) That the said immovable property be sold and then the proceed thereof be paid to the estate of the deceased within 15 (fifteen) days of granting this order.

[4] In part A of the applicant's main application, declaratory relief was sought by way of an interdict wherein the respondent was interdicted from selling the immovable property pending finalization of part B. The relief sought by under part A was granted by agreement on 20 December 2021.

¹ Matrimonial Property Act 88 of 1984

[5] The 1st respondent opposed to the application on the following grounds;

(i) That the immovable property referred to by the applicant was bought and registered in her name as a family home for her and the deceased.

(ii) That the company assets used by the deceased to purchase the immovable did not form part of the joint estate with the 1st applicant. The money belonged to the company as a separate legal entity, as such the applicant do not have locus standi to sue on behalf of the company as a separate entity.

[6] On 17 of July 2023, this court dismissed the declaratory order with costs on the basis that it cannot be said that the immovable property amounted to donation of the joint estate. What was in dispute was property belonging to a company, a separate legal entity from the deceased and the 1st applicant. The property of the company does not form part of the deceased estate. Instead it is the shares representing an ownership stake in the company itself that belong to the joint estate. [see paragraph 35 and 36 of my judgment]

[7] On 14 March 2024, the applicant brought an application for leave to appeal against my judgment and order which I handed down on 17 July 2023. The respondent opposed to the application and sought the court's indulgence to deal with the points *in limine* before the main application for leave to appeal on the merits.

[8] Respondent raised the following points in limine;

(i) That the application failed to comply with rule 6(2)(a) in the respondent was not served with the application for leave to appeal within 15 (fifteen) days.

(ii) That the application for leave to appeal was not properly before court as it is non-compliance with rule 49(1) (b), the application is not accompanied by application for condonation of late filling of application for leave to appeal.

(iii) The respondent further submitted that; on 4 August 2023, Voyi Incorporated Attorneys for the applicant uploaded on case line a notice to substitute T Hadebe Attorneys as well as an application for leave to appeal. On 7 August 2023 T Hadebe

Attorneys served an application for leave to appeal to Langa Desmond Incorporated, the pt respondent's Attorneys on record. On 8 August 2023, T Hadebe Attorneys withdrew as Attorneys of record for the 1st applicant and also withdraw the application for leave to appeal. The appointment of Voyi Incorporated Attorneys was irregular, it was not preceded by either termination or withdrawal of T Hadebe Attorney of record for the 1st applicant as such, the application for leave to appeal is improper and irregular before court, it should therefore be dismissed with cost.

[9] The applicant opposed to the points *in limine* raised and stated that the application for the leave to appeal was filed on 4 August 2023 within the prescribed period of 15 (fifteen) days in compliance with rule 49(1)(b) of the Uniform Rules of Court. The judgment was delivered on 17 July 2023, the 15 days expired on 7 August 2023. Applicant further submitted that they served an application for leave to appeal by way of email as per notice of service dated 25 November 2021 which was uploaded on case line in compliance with the division directive.

[10] The applicant submits further that the removal from the roll of the matter by the court on 14 March 2024 and ordering the applicant to pay costs was based and relied on incorrect information from the respondent.

[11] On 27 September 2024, the applicant brought an application for leave to appeal against the costs order granted by this court on 14 March 2024. As well as the application for leave to appeal the entire judgment granted on 17th July 2023 dealing with the merits of the case.

[12] Respondent stood by its submissions made on 14 March 2024 and seeks relief to have the matter struck off the roll on the point *in limine*.

[13] Applicant submits that they complied with Rule 49(1)(b) of the uniform rules and that the application for leave to appeal was served timeously on 4 August 2023 to the chosen email address of the 1st Respondent delivery of service. The notice was dated 25 November 2021 and it was delivered in terms of Rule 6(5)(d)(i) of the uniform rules of court. In the notice of intention to oppose, it was stated thus

'Kindly note further that the [first] Respondent is willing to accept services of all pleadings and notices via the following email; m[...].com '. And that was in compliance with the Judge President s Consolidated Directive published on 11 July 2021,

The said Directive was referred to as the Revised -18 September 2020 Consolidated Directive.

[14] The applicant further submits that the respondent snuck in notice of appointment as Attorneys of records on 12 March 2024, way after the initial application for leave to appeal was uploaded and served relying on the notice of appointment dated 25 November 2021 as being the address of service and being the only one uploaded on caselines.

[15] The applicant further submits that this court in removing the matter from the roll with costs on 14th March 2024, it was misled into believing the incorrect view that the application for leave to appeal was delivered out of time and that condonation was necessary. As such the cost order granted was unjustifiable and it was based on wrong appreciation of the facts of the matter. Reference was made to '*Giddey No v JC Barnard and Partners*,² wherein it was held as follows:

"The ordinary approach on appeal to exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances for example, if it is shown that the discretion was not exercised judicially or has been based on wrong appreciation facts or wrong principles of law."

[16] The respondent further argued on the point *in limine* that in having two Attorneys of record at the same time when the application for leave was uploaded, it was irregular. On 27 September 2024, the respondent admitted that on 4 August 2023 when the applicant uploaded the application for leave to appeal, it was within

² *Giddey NO v JC Barnard and Partners* (CCT65/05) [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) (1 September 2006)

the prescribed days as per rules. The respondent further submits that the applicant's notice of application for leave to appeal as it stands, it still bears the address details of the previous attorney being T. Hadebe Attorneys, as such the notice is irregular.

[17] In response, the applicant contends that the respondent did not give the applicant written notice in non-compliance with rule 30(2) and rule 30A(1) of the uniform rules to deal with the cause of complainant relating to the notice still bearing the old address of the previous attorneys of the applicant in fact respondent has taken further step while well knowing of an irregular point by filling heads of argument. Therefore, the respondent cannot at this stage raise an irregular point as a point of law. Respondent did not even raise the same in his heads of argument.

[18] Ruling on points *in limine* was reserved and the applicant was permitted by this court to deal with the main application being application for leave to appeal the merits of the order dated 17 July 2023.

[19] The applicant submitted that the court erred in finding that the amount of R3 500 000.00 (three million - five hundred thousand rand) which the deceased (the late Mr Shongwe used to purchase an immovable property on behalf of the 1st respondent (Mrs Meyiwa) was not an asset of the joint estate. The court applied a narrower interpretation of section 15(3) of the matrimonial property Act as opposed to a wider approach.

[20] The applicant referred to *Standard Bank SA Ltd v Ocean Commodities Inc*³ at 180E-F, where it was held that a shareholder in a company has a conglomeration of incorporeal rights against a company. Therefore, the applicant being a 50% (fifty percent) shareholder, the applicant is laying a claim to funds that were released from the company and that these funds were a 'distribution' without the 1st applicant's consent and knowledge, despite both the deceased and the first applicant being the directors of the company with equal shares. A further reference was made to section 163(1) of the companies Act of 2008.

³ *Standard Bank of South Africa Ltd & another v Ocean Commodities Inc & others* 1983 (1) SA 276 (A) at 292A-B at 180 E - F.

[21] The applicant further submits that the court in its judgment as per paragraph 34 in relying on *Stellenbosch Farmers Winers Ltd* 1962(1) SA 458(A) misdirected itself as the 1st applicant in this matter is not laying a claim to assess to the assets of the company but to a 'distribution' already made by the company which distribution form part of the joint estate.

[22] Respondent submits that the court should refuse the application on the basis that the first applicant is now raising several points of law which were not raised before in the pleadings. In that this court was called upon to determine only one point of law being:

"whether the money belonging to the company used to purchase an immovable property for the 1st respondent was a donation in terms of section 15(3)(c) of the matrimonial property Act".

[23] Therefore, this court had no jurisdiction or duty to extend the issues beyond what the parties had voluntarily decided to confined themselves to.

[24] The respondent further argued that this court was correct in finding that the applicant reliance of section 15(3)(c) of the matrimonial property Act is misplaced.

[25] The respondent submitted that applicant in arguing his case during the motion proceedings, the applicant relied on *Marais v Maposa & Others*⁴ matter . However, the *Marais* case was concerned about membership interest in the company, whereas the current case was dealing with assets belonging to the company not distributed. The respondent argued that the difference is material and significant.

[26] Respondent argued further at paragraph 21 of the Heads of Argument;

"The company was not a party to these proceedings and the relief sought. There was no application made in terms of section 163 of the companies Act

⁴ 2020 (5) SA (SCA).

71 of 2008. As a result, the company (being 311 Acquisition (Pty) Ltd) was not joined as a party to this proceeding."

[27] The respondent submits that the first applicant is raising some arguments that are not consistent with allegations made in the founding affidavit. When the first applicant argues that the company made profits and these profits were then "distributed "by the company as dividends as such the deceased used those dividends to purchase an immovable property on behalf of the first respondent. That fact was not raised in the founding affidavit. Therefore, it should not be entertained by this court to determine the test of application for leave to appeal.

The law

[28] Both parties referred this court to several authorities and I have noted them in arriving at a determination. Applications of this nature is governed by the provision of section 17(1) (i) and (ii) of the Superior Court Act 10 /2013, which provides:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that;

- (i) The appeal would have reasonable prospects of success, or
- (ii) There is some other compelling reasons why the appeal should be heard including conflicting judgements on the matter under consideration."

[29] *South African Breweries (Pty) Ltd v The Commissioner of the South African Revenue Service*,⁵ reads;

"An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is hopeless is not

⁵ *South African Breweries (Pty) Ltd v Commissioner For The South African Revenue Service and Another* (01740/21; 3889/21 and 7772/21) [2022] ZAGPPHC 695; 85 SATC 495 (13 September 2022).

enough. There must be a sound rational basis to conclude that there is a reasonable prospect of success on appeal."

See also *Manaka v University of Witwatersrand* (2023/02/837) [2024] ZA GP JHC 1571 (29 February 2024)⁶.

Discussion

Point in limine - cost granted by this court to the applicant on 14 March 2024.

[30] When this matter was removed from the roll by this court, having had submission by both parties, it is clear that in terms of the directive of this court's division namely consolidative directive 1/2021 page 8, paragraph 23, page 139. Notices must be uploaded at the given address of the notice of service, paragraph 11 further state that practitioners must adhere to the rules of court. The reason for filing and uploading on caselines is for proper administration of justice in that both parties will be in compliance with the directives and rule 5 (1) of the Uniform Rules of Court.

[31] From the notices uploaded, the only notice where delivery of document to the respondent is through the notice dated 5 November 2021, which states that the respondent is willing to accept service at Muziwakhe Langa Attorneys address. The applicant served same on 4 August 2023 within the prescribed date of 15 days in terms of rule 49 (1)(b). Therefore, there was no need for the applicant to file condonation.

[32] The respondent only uploaded the notice of service as attorneys of record on 12 March 2024, months after application for leave to appeal has been uploaded and served in the given address of the notice of service date 5 November 2021.

[33] I am of the view that granting of the cost order to the applicant by this court, upon proper consideration it calls for a prospect of success as another court might arrive at a different conclusion on the granting of cost order date 14 March 2024.

Main application for leave to appeal judgment date 17 July 2023.

⁶ *Manaka v University of Witwatersrand* {021837-2023} [2024] ZAGPJHC 1774 (29 February 2024).

[34] As correctly argued by the respondent, this court was invited to decide the motion proceedings of a declaratory application on a limited point of law being;

"Whether the money belonging to the company used to purchase an immovable property for the first (1st) respondent was a donation in terms of section 15(3)(c) of the matrimonial property Act."

[35] The applicant in the application for leave to appeal is raising several points of law including the applicability of section 163(1) of the Companies Act of 2008, which was not in the applicant's founding affidavit in the application for declaratory order.

[36] The court on considering that the applicant argues that there is a need for this court to have approached section 15(3)(c) of the matrimonial property Act on a wider spectrum in order to have drawn a distinction between shares in a company from funds distributed as well as taking into account the facts of this case. This court is of the view that there is prospect of success upon which another court might arrive at a different conclusion.

[37] I therefore make the following order;

1. Leave to appeal is granted to the full bench.
2. Cost in the appeal.

SIGNED AT Pretoria ON THIS 21ST DAY OF OCTOBER 2024.

N.C. Sethusha - Shongwe
Acting Judge of the High Court
Gauteng Division, Pretoria

Appearances

Counsel for the Appellant : Advocate Kela (douglas@kelalaw.co.za)

Instructed by : Voyi Incorporated Attorneys

Counsel for the Respondent: Advocate J.P Mthembu

Instructed by : Langa Attorneys

Date of hearing : 27 September 2024

Date of Judgment :