

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

Case number: 57158/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 26 FEBRUARY 2025

SIGNATURE:

In the matter between:

MARYNA SYMES NO

First Applicant

ELSIE WAGNER NO

(in their capacities as the duly appointed trustees of the insolvent estate of Anna-Marie Pottas, Identity number 6[...])

Second Applicant

and

WYNAND JOHANNES LIEBENBERG

First Respondent

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Second Respondent

THE MASTER OF THE HIGH COURT, PRETORIA

Third Respondent

JUDGMENT FOR LEAVE TO APPEAL

BOKAKO AJ

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 26 February 2025.

INTRODUCTION

1. This is an application for leave to appeal. The applicants seek permission to appeal to the Full Court of the High Court of South Africa, Gauteng Division, Pretoria, against the entirety of the judgment and order of this court rendered on 3 October 2023. In that judgment, this Court ordered:
 - (a). The parties' joint ownership of the immovable property described as ERF 2[...] P[...] E[...] [...] Township, Registration Division I.R. Gauteng Province ('the property') is terminated,
 - (b). The applicants are ordered to transfer the insolvent's 50% to the first respondent.
 - (c). The applicants and the first respondent must sign all documentation necessary to effect the property transfer to the first respondent,
 - (d). In the event of the applicants and/or the first respondent failing to comply with the order, a Sheriff of the High Court is authorised and directed to sign such documentation on their behalf.
2. The applicant submits this application with a firm belief that there is a reasonable prospect of success for the appeal. The Respondents did not oppose this application.
3. The Applicant seeks to challenge that order. This property serves as the primary residence of the first respondent. The first respondent has consistently argued that allowing the insolvent estate of the applicant to benefit from 50% of the respondent's property would not only place him in a precarious position but also unduly enrich the insolvent estate with a share of a property that the applicant has never genuinely valued. Her co-ownership has always been a matter of form, not substance.

4. The grounds for the leave to appeal are succinctly stated in the notice of application for leave to appeal as follows:

- 4.1. In finding that the applicants should transfer the 50% undivided share in the immovable property held by the applicants to Liebenberg.
- 4.2. In relying on Liebenberg's unsubstantiated and impermissible hearsay evidence in reaching the conclusion that it was never the intention of the insolvent to be an owner of the 50% undivided share in the immovable property, without having due regard to the common cause evidence that in order for the insolvent and Liebenberg to purchase the immovable property, the insolvent and Liebenberg jointly applied for a home loan with Standard Bank, which home loan was approved on the strength of that application, and that both the insolvent and Liebenberg entered into the home loan agreement with Standard Bank, signed the necessary documents in order to effect transfer of the immovable property into both their names and caused a mortgage bond to be registered over the immovable property in favour of Standard Bank.
- 4.3. In disregarding the fact that the insolvent estate remains jointly and severally liable, together with Liebenberg, for payment of the outstanding amount due on the home loan account to Standard Bank, despite taking cognisance of the fact that Standard Bank is a secured creditor in the insolvent estate by virtue of the mortgage bond registered over the immovable property in favour of Standard Bank.
- 4.4. In disregarding the rights of Standard Bank as one of the contracting parties to the home loan agreement, and in whose favour the mortgage bond has been registered, without having due regard to the principle of *pacta sunt servanda* and/or the common cause evidence that Liebenberg is not in a financial position to be substituted as the sole debtor to the home loan agreement.
- 4.5. In relying on Liebenberg's unsubstantiated and impermissible hearsay evidence in reaching the conclusion that the insolvent's estate would be unjustly enriched, without having due regard to the case law put forward by the applicants on the principles

4.6. In finding that the applicants have failed to disclose *who the creditors and how much is owed* without having due regard to the certificate of balance annexed to the applicants' founding affidavit confirming the amount due and payable to Standard Bank in respect of the home loan agreement and

4.7. The applicants should pay the costs of the application.

5. It is a trite principle of our law that leave to appeal may only be granted where the Judge or Judges presiding are of the opinion that the appeal would have a reasonable prospect of success or where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. (See section 17 (1) (a) (i) and (ii) of the Superior Courts Act, 10 of 2013).

5. In terms of section 17(1)(a)(i) and section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"), leave to appeal may only be granted where the Judge or Judges concerned believe that:

(a) The appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard, including if there are conflicting judgments under consideration.

(b) Regarding the word 'would' in s 17 of the Superior Courts Act 10 of 2012 (the Act) sub-section 17(1) (a) (i) above, the Supreme Court of Appeal has found that the use of the word in the section imposes a more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959.

6. In *MEC for Health, Eastern Cape v Mkhita* 2016 JDR 2214 (SCA), the Supreme Court of Appeal emphasized the application for the test for leave to appeal and found as follows in paragraphs [16] to [17]:

"[16] Once again, it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior

Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why it should be heard”.

“[17] 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 not hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal”.

THE APPLICANT'S CASE

7. The representative of the applicant, Advocate N. Diederichs, stated that in order to acquire the immovable property, both the insolvent party and Liebenberg jointly entered into a home loan agreement with Standard Bank. They executed the necessary documents to facilitate the transfer of the property into their names and registered a mortgage bond over the property in favour of Standard Bank as collateral for the home loan.
 - 7.1. The parties express their intention to be legally bound by the contracts with Standard Bank. No evidence of fraud or misrepresentation has been identified; accordingly, the home loan agreement and mortgage bond are deemed valid and enforceable.
 - 7.2. The circumstances pertaining to the case indicate that, from an objective perspective, the parties involved- most notably the insolvent party (prior to her insolvency)- possessed both the capacity and the intent to enter into legally binding contracts for the purpose of securing ownership of the immovable property, an objective they successfully achieved in 2007. This unequivocally demonstrates the insolvent party's aspiration to obtain ownership of the property.
 - 7.3. Further, the court did not consider Standard Bank's contractual rights, particularly the principle that contracts are entered into voluntarily and equitably. Upholding the sanctity of contracts is fundamental to contract

law. Consequently, contracts entered into freely and seriously must be honoured.

- 7.4. While the court ordered the applicants to transfer the insolvent estate's 50% undivided interest in the property to Liebenberg, the court overlooked that a mortgagor cannot convey the property unless the mortgage debt is fully paid and the bond is cancelled.
- 7.5. Although the Court possesses significant equitable discretion in property division, it can grant the entire property to one joint owner if a division is impractical, as long as this owner compensates the other for their shares.
- 7.6. The Court failed to delineate which party bears the responsibility for the expenses incurred in cancelling the mortgage bond and registering the transfer of the insolvent estate's shares in the property to Liebenberg.
- 7.7. Furthermore, the Court failed to recognize that the insolvent estate remains indebted to Standard Bank, despite the order to transfer its share in the property to Liebenberg without any form of compensation.
- 7.8. The division of the immovable property as ordered is deemed impractical and fails to yield a just and equitable outcome under the prevailing circumstances.
- 7.9. The court focused solely on the limited and unproven evidence from Liebenberg to conclude that the insolvent estate would be unjustly enriched.
- 7.10. It was additionally contended that the court's determination of the property being the primary residence of the first respondent was erroneous. Consequently, granting the insolvent estate a benefit from 50% of the respondent's property would not only place him in a precarious situation but would also unjustly enrich the insolvent estate with a 50% share of a property in which she has not had any substantive concern. Her co-ownership has been solely a matter of form rather than substance.

- 8. I have considered all the issues raised in this application for leave to appeal. Therefore, another Court may come to a different conclusion in this case.

9. A compelling argument exists for why the appeal warrants consideration, particularly in regard to the practical implementation of an order.
10. It is entirely plausible that another court may deem this court's assessment to be erroneous, given the findings of the court in that the *actio communi dividundo* is a recognised remedy within our legal system. This principle is grounded in the notion that any co-owner of property possesses the right to petition for a division of the jointly owned property at their discretion.
11. Furthermore, the other court might reach a different conclusion, suggesting that an agreement does not establish perpetual joint ownership. It is unclear whether either co-owner can request separation at any time.
12. The other court may find that the first respondent's explanation lacks validity since he initially intended to purchase the property in his own name. The first respondent contended that his intention has always been to be recognized as the sole owner of the property, as evidenced by the events of August 2007 and August 2011.
13. Another reason is that the first respondent and the insolvent were in a relationship for less than a year when the house was bought and were not in a relationship when the property was registered in their names.
14. It was also not in dispute that the applicant and the first respondent thus agreed that they would purchase the property jointly but that the first respondent would be liable to pay the bond payments.
15. Based on the premise, I find that the application for leave to appeal deserves to be successful, and leave to appeal to the full court of this Division is therefore granted.
16. In the circumstances, I make the following order:

1. The application for permission to appeal to the Full Court of the High Court of South Africa, Gauteng Division, Pretoria, against the judgment and order dated 23 October 2023, has been granted.
2. Costs of the application for leave to appeal are costs in the appeal.

T BOKAKO

***Acting Judge of the High Court
Gauteng Local Division, Pretoria***

APPEARANCES

Counsel for Applicant: Advocate N. Diederichs

Attorneys for Applicant; VEZI DE BEER INC

Counsel for 1st Respondent: Advocate L Peter

Attorneys for Respondent: THYNE JACOBS INC

Date of Hearing: 6 February 2025

Date of Judgment: 26 FEBRUARY 2025