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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 19928/2024
REPORTABLE**

In the matter between:

LEON HAUPTFLEISCH VAN NIEKERK

First Applicant

JOHANNES NEL VAN NIEKERK
Applicant

Second

and

DIEDERIK JOHANNES VAN NIEKERK
Respondent

First

DAVID MORRIES CILLIERS VAN NIEKERK
Respondent

Second

THE REGISTRAR OF DEEDS, CAPE TOWN
Respondent

Third

Coram: MOOSA AJ

Heard: 14 October 2025

Delivered: 27 October 2025 (delivered via email to the parties)

ORDER

The First and the Second Respondents' application for leave to appeal is dismissed with costs. Counsel's fees are allowed on scale B. First and Second Respondents' liability for costs is joint and several, with one party paying and the other absolved.

**JUDGMENT
(LEAVE TO APPEAL)**

Moosa AJ:

[1] This judgment relates to an application ("the petition") for leave to appeal filed by the First Respondent and the Second Respondent ("the Respondents") in respect of the whole of my order issued on 21 July 2025 ("the orders"). Since appeals lie against court orders rather than the reasons that underpin them, I do not discuss the reasons for the granting of the orders, except where doing so is deemed necessary.

[2] For the sake of convenience, the parties are referred to as in the main case.

[3] The application for leave to appeal was filed late without an accompanying application for condonation. The Respondents are unrepresented (lay) litigants who are unfamiliar with the intricacies of the rules of court procedure. Mr Harmse, for the Applicants, adopted a pragmatic approach. He did not object to condonation being granted at the Respondent's request from the bar. I duly obliged and granted it in the interests of justice and ensuring that finality is brought to this matter on its merits.

[4] At this juncture, some context is useful. The Applicants and the Respondents are brothers who, some decades ago, became the registered co-owners of erf 9[...],

9[...]2, 9[...]3, 1[...], and 1[...]2 Wellington, Western Cape (“the properties”). Their co-ownership was subject to a usufruct which terminated on the death of their mother in February 2024. Shortly thereafter, the Applicants, both living overseas, commenced litigation. They sought an order to place the five (5) properties under the management and administration of Seeff Boland Winelands for the mutual benefit of the co-owners. On 24 April 2024, Mthimunya AJ granted such an order under case no. 6982/2024.

[5] On 11 September 2024, the Applicants approached this Court under a different case number. In terms of the *actio communi dividundo*, they sought an order that the joint ownership of the properties be terminated and that the properties be sold. Relief of this nature is competent on notice of motion. See *Britz v Sequeria* [2020] 2 All SA 415 (FB) para 11. The application was initiated after attempts at reaching consensus on the termination of the co-ownership and the division of the properties failed.

[6] The Respondents opposed the application. They delivered detailed answering affidavits, much of whose contents were irrelevant to the substance of the application. At all material times, the Respondents were unrepresented, although I extended opportunities to them to obtain legal representation. They could not afford it.

The impugned court order

[7] On 21 July 2025, I issued an order terminating the parties’ free (as distinct from bound) co-ownership of the properties. I also granted ancillary relief. My orders are quoted in paragraph [9] below. In reaching my conclusion favouring termination, I took into account, *inter alia*, the rights of the Respondents as property owners,

balanced against the right of the Applicants to seek termination of the free co-ownership; the parties' inability to reach consensus; the fact that the Respondents reside on some of the properties with their families, and they do not pay any rent for their occupation; and the continued retention of the properties does not benefit the Applicants at all.

[8] The termination of the joint ownership and my orders that regulate the division of properties accords with the principles discussed in relevant case law. See, for e.g., *Britz v Sequeria* supra paras 11 - 17; *Municipal Employees' Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others* 2022 (1) SA 137 (SCA); and *Z.I v W.I and Another* (13142/2022) [2023] ZAWCHC 95 (9 March 2023) paras 5 - 9.

[9] In the interests of fairness and equity to the Applicants and the Respondents as co-owners (see *Britz v Sequeria* supra para 15), I directed as follows:

'Having heard the Applicants' Counsel as well as the First and the Second Respondents acting in person, and having read the papers filed of record in this application, **IT IS ORDERED THAT:**

1. The joint ownership of the Applicants, the First Respondent, and the Second Respondent is, by the actio communi dividundo, terminated forthwith in respect of the following immovable properties situate in Wellington, Western Cape: erf 9[...], erf 9[...]² and erf 9[...]³ (commonly known as nos. 5[...]-6[...]⁴ C[...]⁵ Street, Wellington); erf 1[...]⁶ (commonly known as no. 7[...]⁷ C[...]⁸ Street, Wellington); and erf 1[...]⁹² (commonly known as no. 9[...]¹⁰ B[...]¹¹ Street, Wellington).
2. Division of the properties listed in paragraph 1 above shall occur as follows:
 - a. Erf 1[...]¹²² Wellington (no. 9[...]¹³ B[...]¹⁴ Street, Wellington), whose fair market value for purposes of case no. 19928/2024 and this order is R4 000 000,00 (Four Million Rand), shall become the sole and exclusive property to be registered forthwith by the Third Respondent in the First Respondent's name;
 - b. Erf 1[...]¹⁵ Wellington (no. 7[...]¹⁶ C[...]¹⁷ Street, Wellington), whose fair market value for purposes of case no. 19928/2024 and this order is R5 000 000,00 (Five

Million Rand), shall become the sole and exclusive property to be registered by Third Respondent forthwith in Second Respondent's name; and

c. Erven 9[...], 9[...]², and 9[...]³ Wellington shall be offered for sale together in the open market at their cumulative fair market value, subject to a reserve price of R20 200 000,00 (Twenty Million Two Hundred Thousand Rand).

3. Registration of transfer of erf 1[...] Wellington and erf 1[...]² Wellington under paragraphs 2a and 2b above shall occur immediately. Fourie Pretorius Inc of Bloubergrant, Cape Town are appointed to effect registration of these transfers. If, within ten (10) days of this order, this firm fails to accept its appointment as well as the obligations imposed, then Bill Tolken Hendrickse Attorneys of Bellville are appointed in their stead, subject to the same obligations indicated below.
4. The transferee of erf 1[...] Wellington and erf 1[...]² Wellington indicated in paragraphs 2a and 2b respectively shall be liable for the conveyancers' charges, inclusive of Value-Added Tax at the prescribed legal rate (if applicable), and transfer duty (if any) which may be incurred to give effect to the transfers contemplated by the orders in 2a and 2b above respectively: Provided that all rates and taxes, and other costs, charges, and/or disbursements of whatsoever nature incurred in respect of erf 1[...] Wellington and erf 1[...]² Wellington (as the case may be) for purposes of giving registration of transfer of these properties to their intended transferees shall be jointly borne by the Applicants, the First Respondent, and the Second Respondent in equal shares as co-owners.
5. The mandate and authority of Seeff Boland Winelands conferred by order of Ms Acting Justice Mthimunye in this Court on 24 April 2024 in case no. 6982/2024 is terminated with immediate effect in relation to erf 1[...] Wellington and erf 1[...]² Wellington. The authority to manage, control, and administer these erven shall forthwith be as follows: in respect of erf 1[...]² Wellington, the First Respondent; in respect of erf 1[...] Wellington, the Second Respondent. Pending registration of transfer of these properties, the Applicants, the First Respondent, and the Second Respondent shall share equally in all rental generated therefrom. The First and the Second Respondents respectively shall account to each other and the Applicants for their share of any nett rentals collected up to date of transfer.
6. All funds held in trust by Seeff Boland Winelands as at the date of this order in respect of erf 1[...] Wellington and erf 1[...]² Wellington shall, within twenty one

(21) days of this order be paid into the trust banking account of the attorneys responsible for effecting registration of transfer pursuant to paragraph 3 above, and such funds shall be held in trust under the Legal Practice Act, 2014 for the credit of the Applicants, the First Respondent, and the Second Respondent, each of whom shall have an equal share in those monies. These funds shall be used for purposes of these attorney trust creditor's individual and/or collective obligations contemplated in paragraph 4 above. Any excess funds remaining on registration of transfer of erf 1[...] Wellington and erf 1[...]2 Wellington shall then be paid forthwith to the attorney trust creditors entitled thereto under this order.

7. Seeff Boland Winelands shall, within ten (10) days of this order, provide the Applicants, the First Respondent, the Second Respondent, and the transferring attorneys appointed pursuant to paragraphs 3 above and 16 below with a full and proper accounting, in writing, of all funds collected and disbursed in relation to each of the five (5) immovable properties managed, controlled, and administered pursuant to the order of Ms Acting Justice Mthimunye under case no. 6982/2024.
8. By reason of the division ordered in paragraphs 2a and 2b above, the First Respondent and the Second Respondent shall be liable to compensate each other and the Applicants in the following sums:
 - a. In respect of erf 1[...]2 Wellington, First Respondent is liable to pay Applicants and the Second Respondent the sum of R3 000 000,00 (Three Million Rand) to be shared equally, that is, R1 000 000,00 (One Million Rand) to each;
 - b. In respect of erf 1[...] Wellington, the Second Respondent is liable to pay the Applicants and First Respondent the sum of R3 750 000,00 (Three Million Seven Hundred and Fifty Thousand Rand) to be shared equally, that is, R1 250 000,00 (One Million Two Hundred and Fifty Thousand Rand) to each.
9. Set-off shall apply to the First Respondent's aforementioned indebtedness to the Second Respondent, and vice versa. Applying set-off to the debts referred to in paragraphs 8a and 8b, the First Respondent's indebtedness to the Second Respondent is reduced to NIL, and the Second Respondent's indebtedness to the First Respondent is reduced to R250 000,00 (Two Hundred and Fifty Thousand Rand).
10. The First Respondent and Second Respondent's indebtedness contemplated in paragraphs 8 and 9 above shall be settled as a first draw against their respective

shares of the nett proceeds yielded from the sale and registration of transfer of erven 9[...], 9[...]², and 9[...]³ Wellington contemplated in paragraph 2c above.

11. The Applicants, the First Respondent, and the Second Respondent shall each be entitled to market the sale of the properties listed in paragraph 2c above, and each shall be entitled to do so personally and/or through an estate agent appointed by him for this purpose.
12. If the properties listed in paragraph 2c above is unsold after eight (8) months from the date of this order, then those properties shall be sold at public auction to the highest bidder through the office of the Sheriff of the High Court with jurisdiction in Wellington, subject to the reserve price stated in para 2c above.
13. The Applicants, the First Respondent, and the Second Respondent shall be entitled to payment of their respective equal share of the nett proceeds from the sale of the property upon registration of transfer into the purchaser's name(s), less any deductions permissible by the terms of this order read in its entirety.
14. In addition to any other deductible cost, charge, or debt contemplated in this order, the following expenses reasonably and necessarily incurred for the registration of transfer of erven 9[...], 9[...]², and 9[...]³ Wellington shall be permissible as a deduction against the proceeds yielded from the sale of these properties:
 - a. any commission due to an estate agent/cy who was the effective cause of the sale; alternatively, should these properties be sold at a public auction, then the auctioneer's fees payable in respect of any completed sale;
 - b. the costs of obtaining an entomologist's and electrician's certificate;
 - c. the cost of obtaining a plumbing certificate;
 - d. the cost of obtaining a rates clearance certificate; and
 - e. any other costs or charges reasonably and necessarily incurred in order to successfully conclude the sale and registration of the transfers concerned.
15. The Applicants, the First Respondent, and the Second Respondent shall co-operate with each other and each other's estate agents in the marketing of the sale of erf 9[...] Wellington, erf 9[...]² Wellington, and erf 9[...]³ Wellington including, but not limited to, providing access to these properties at all

reasonable times for the parties or their estate agents, and prospective buyers for viewing purposes.

16. Bill Tolken Hendrickse Attorneys of Bellville are appointed to attend to the registration of transfer of erf 9[...] Wellington, erf 9[...]2 Wellington, and erf 9[...]3 Wellington as contemplated in paragraph 2c above. If this firm is unwilling to accept its appointment with its concomitant obligations then, in that event, Fourie Pretorius Inc of Bloubergrant, Cape Town are appointed for this purpose, subject to the same obligations arising from this order.
17. The Applicants, the First Respondent, and the Second Respondent shall sign all necessary documentation and take all steps as is required to conclude the sale agreement contemplated in paragraph 2c and to effect transfer of their undivided shares of the properties referred to in paragraphs 2a, 2b, and 2c into the intended transferees' or purchasers' names. If any of the Applicants and/or the First Respondent and/or the Second Respondent fail to sign any documentation within ten (10) days of a written request by the duly appointed transferring attorneys acting pursuant to this order, then the Sheriff of the High Court in whose jurisdiction the relevant property/ies is/are situated, is authorized and mandated to sign any such documentation and to take such steps on such party's behalf.
18. If an application for the issue of a duplicate original of title deed T32976/1979 is required, then the transferring attorneys appointed pursuant to paragraphs 3 or 16, whichever transfer occurs first, is/are authorized to apply for same and the Applicants are empowered to be the only signatories to any affidavits or other documents required for the application. If any of the Applicants fail to sign any documentation within ten (10) days of a written request by the duly appointed transferring attorneys, then the Sheriff of the High Court in whose jurisdiction the properties are situated is authorized and mandated to sign same.
19. The mandate and authority conferred on Seeff Boland Winelands by order of Ms Acting Justice Mthimunye in this Court on 24 April 2024 in case no. 6982/2024 is extended but only in relation to erf 9[...] Wellington, erf 9[...]2 Wellington, and erf 9[...]3 Wellington and then only until the date of registration of transfer in respect of these specific properties, subject to the following restriction on its powers: Seeff Boland Winelands may not incur any expense for the improvement, repair,

or maintenance to these properties, or any of them, without the prior written consent of the Applicants, the First Respondent, and the Second Respondent, which consents shall not be withheld unreasonably.

20. All funds held in trust by Seeff Boland Winelands as at the date of this order in respect of erf 9[...] Wellington, erf 9[...]2 Wellington, and erf 9[...]3 Wellington shall, within twenty one (21) days of this order be paid into the trust banking account of the attorneys responsible for effecting transfer pursuant to paragraph 16 above (even if a sale has not yet been concluded), and such funds shall be held in trust under the Legal Practice Act, 2014 for the credit of the Applicants, the First Respondent, and the Second Respondent, each of whom shall have an equal share in those monies.
21. These funds shall be used for purposes of the relevant attorney trust creditor's individual and/or collective financial obligations contemplated in this order including, but not limited to, that enumerated in paragraphs 14 and 19 above. Any excess funds remaining on registration of transfer of erven 9[...], 9[...]2, and 9[...]3 Wellington shall then be paid forthwith to the attorney trust creditor entitled thereto in terms of this order.
22. Each party shall pay their own costs in relation to this application.'

Grounds for the leave to appeal application

[10] The Respondents contend that their intended appeal would have reasonable prospects of success. Although they do not rely on the grounds contemplated in s 17(1)(a)(ii) of the Superior Courts Act ("the SC Act"), namely, that 'there is some other compelling reason why the appeal should be heard', I considered whether any such ground exists on the facts of this case. See *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2. I did not find any basis for such a ground here.

[11] Therefore, the enquiry in this application for leave is singular, namely, whether I opine that a reasonable prospect exists that an appeal would succeed. After consideration of the basis for the application, I answered this question in the negative.

[12] The Respondents contend that an appeal has prospects of success because the effect of my orders, as quoted in paragraph [9] above, is that I have not only terminated their co-ownership of the properties, but also terminated their rights (and the rights of their respective families, including children) to continue to reside in their homes which are erected on erf 9[...]2 and 9[...]3 Wellington respectively.

[13] Shorn of all its frills, the application for leave is predicated on the contention that my orders have the effect of evicting the Respondents (and their spouses and children) from their homes without due process being followed, namely, without compliance with the prescribed procedure set out in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“the PIE Act”). In addition, the Respondents contend that my orders providing for the sale of certain properties and the allocation to them of specific ones should be varied to the effect that they could each retain possession and ownership of the erven on which their homes are erected, subject to payment by them respectively of the fair value for each property concerned.

Principles for leave to appeal

[14] Recently, in *De Wit NO and Another v Smit and Others* (19076/2024) [2025] ZAWCHC 481 (21 October 2025) paras 13 - 16, I summarised the principles which are germane to the adjudication of an application for leave grounded in s 17(1)(a) of the SC Act. I will not repeat those principles here in any detail, except to reiterate

that an intended appeal should have reasonable merits so that a different result 'would' be attained. See *MEC for Health, Eastern Cape v Mkitha and Another* [2016] ZASCA 175 (25 November 2016) paras 16 - 17. A judge must, based on proper grounds, opine that there is a reasonable, not remote, prospect of success on appeal. This requires a dispassionate analysis and examination of the facts and the law applicable to the issues sought to be appealed. See *S v Smith* 2012 (1) SACR 567 (SCA) para 7. Leave can only be granted in this case if I, on a sound, rational basis, opine that a realistic chance (i.e., a real prospect) exists that an appellate court would, not might, decide differently the outcome of the issues that are sought to be appealed on the grounds adduced by the petitioners seeking leave to appeal. See *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021) para 10.

Application of the legal principles to the facts

[15] The Respondents are dissatisfied with the orders granted by me and seek a variation thereof as regards the division of the properties. An application for leave to appeal cannot be used for the purpose of obtaining a variation of my orders. Accordingly, to succeed in their bid for leave to appeal, the petitioners bear the burden to demonstrate that the orders granted by me, properly understood, are tantamount to an eviction order in respect of the First and the Second Respondent, including their respective families. If it amounts to an eviction, then leave to appeal should be granted. If not, then leave to appeal falls to be refused and the application dismissed.

[16] To decide whether my impugned orders have the effect of an eviction order as contended for purposes of the application for leave, the orders are to be interpreted.

The relevant interpretive principles are usefully summarised in case law. In *Eke v Parsons* 2016 (3) SA 37 (CC) para 29, the apex court held:

‘... Here is the well-established test on the interpretation of court orders:

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.”

[17] Having regard to the triad of text, context, and purpose in relation to my orders quoted in paragraph [9] above, I opine that there is no sound, rational basis on which I can justifiably conclude that an appellate court would interpret my orders, or any part thereof, as having the effect of evicting the Respondents or any of them, including their respective families, from their homes. Nothing stated in my order requires them to vacate their homes. Any interpretation to that effect would have to be winkled, impermissibly so, out of the contextual crevices of my impugned orders.

[18] In the premises, I conclude that the grounds for appeal adduced do not pass the test in s 17(1)(a) of the SC Act and the application for leave must, therefore, fail.

Costs

[19] There is no reason to deviate from the usual rule that costs follow success. Mr Harmse argued that punitive costs are warranted in this matter because the application for leave was hopeless and bound to fail. He also submitted that the Respondents should not be seen as ‘men of straw’. He argued that, by virtue of my order dated 21 July 2025, they are entitled to significant sums on the sale of certain properties.

[20] For their part, the Respondents pointed out that they are unrepresented litigants who are only seeking to protect their right, and that of their spouses and children, to a home. They explained that they interpreted my order as having the effect of not only allocating unto each of them a particular property, but also requiring them to vacate the property that they currently occupy. They each informed me that their interpretation of my order to this effect was further supported by the fact that the agents at Seeff Boland Winelands directed that they are to vacate the property, or pay rent.

[21] When considering whether to mulct a litigant with costs, including the applicable scale, a court exercises a wide discretion. A judicial discretion must be exercised judiciously. Doing so in the context of a costs order requires adherence to basic notions of fairness to both sides, and necessitates proper consideration of those circumstances that are germane to a determination of the question of liability for costs, including the appropriate scale. No hard and fast rules can be laid down in advance. See *Shoprite Checkers (Pty) Ltd v Kgatle and Another* (2023) 44 ILJ 2564 (WCC) para 37.

[22] On the question of liability for costs and the scale, relevant considerations include, but are not confined to, the following: (i) the circumstances peculiar to the case at hand; (ii) the issues at stake and the degree of their complexity; (iii) the presence of poor conduct by either litigant during the litigation; (iv) whether conduct by one litigant caused prejudice to another which prejudice should be addressed through an appropriate costs order; (v) whether the poor conduct complained of may be excused, or may be mitigated, to any degree by reason of, for e.g., a lack of proper understanding of court rules or procedures, or the law generally, due to the

absence of legal representation; and (vi) the provisions of Uniform Rules 67A(2) and (3).

[23] After careful consideration of these factors and how they apply to the application before me, I am unable to acquiesce to the request for punitive costs.

[24] The Respondents are lay litigants with no legal representation. They were required to interpret on their own my orders dated 21 July 2025. It comprised 22 paragraphs and stretched over 9 pages. Although my orders do not, and were never intended to, evict the Respondents from their homes, it is conceivable that they may have misconstrued the import and the effect of my orders so far as concerns their rights to continue to reside in their homes. Owing to the importance of the right to housing and the fact that the Respondents argued, at the hearing, for relief that was designed to protect this constitutional right, I conclude that a punitive costs order against these unrepresented litigants would be unfair. They are not schooled in law. A party-and-party costs order would suffice, with Counsel's fees allowed on scale B.

Order

[25] In the result, the following is ordered:

- (a) The First and the Second Respondents' application for leave to appeal is dismissed with costs. Counsel's fees are allowed on tariff scale B.
- (b) The First and the Second Respondents' liability for costs is joint and several, with one party paying and the other being absolved.

F. MOOSA

ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicants: SA Harmse

Instructed by: Ingwersen Feenstra Marais Attorneys

(P Marais)

For the First Respondent: In person

For the Second Respondents: In person