



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2019/18220

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: YES / NO

16 September 2020
DATE

.....
N ADAM

In the matter between:

MANAKA SEITSHIRO KGOSIMOTHU
MANAKA SEITSHIRO KGOSIMOTHU N.O

First Applicant
Second Applicant

and

MOLEFE IRENE MOKGADI

Respondent

J U D G M E N T

(APPLICATION FOR LEAVE TO APPEAL)

ADAM AJ:

[1]. This is an application for leave to appeal against a judgment handed down on 8 November 2019. The respondent (applicant in the court *a quo*) was

granted an order in her favour for the termination of joint ownership of the property known as Erf 15530 Protea Glen Extension 16 Township, Registration Division I.Q, Gauteng Province ('the property').

The first and second applicants' grounds of appeal

[2]. The Court misdirected itself in finding that the second applicant could not afford to purchase the respondent's indivisible half share of the property.

[3]. The Court misdirected itself in finding that the first and second applicants refused to agree to the termination of the joint ownership.

[4]. The Court should not have ordered that failing agreement between the respondent and the second applicant as regards the manner of the disposition of the property or the reasonable period within which this must be done, the respondent may within 30 days dispose of the property by private auction or public auction, whichever is convenient for her.

The law

[5]. Section 17 of the Superior Courts Act 10 of 2013 governs applications for leave to appeal. This section states:

"Leave to appeal

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

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[6]. In *Doorewaard and Another v S* (CC33/2017) [2019] ZANWHC 25, Hendricks J stated that the test to be applied is now higher than what it used to be. It is no longer whether another court may (might) come to a different decision than what the court *a quo* arrived at. It is now whether another court, sitting as court of appeal, would come to a different decision.

[7]. The Appellate Division held in *S v Ackerman* 1973 (1) SA 765 (A) that if there is a reasonable prospect of success on appeal for the applicant, leave to appeal ought to be granted without hesitation or reluctance.

[8]. More instructive in applications of this nature, is what was said in *S v Mabena and Another* 2017 (1) SACR 482 (SCA) at paragraph 22 that:

“It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the Judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument

and decide whether there is a reasonable prospect that a higher court may disagree”.

The merits

[9]. The application in the court *a quo* was based on the *actio communi dividundo*. It was described in *Robson v Theron* 1978 (1) SA 841 (A) as having two purposes, namely, (1) division of joint property and (2) payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property. The basic underlying notion is that no co-owner is normally obliged to remain such against his will. The court *a quo* found no obstacle to granting the respondent the relief she sought.

[10]. During argument in the application for leave to appeal it was submitted on behalf of the applicants that the joint ownership between the parties was common cause but that the parties could not agree on the method of termination of the joint ownership. It was further submitted that as affordability was not in issue, the Court should have used its wide discretion to look at an alternative, just and equitable manner of terminating the ownership.

[11]. The applicants did not suggest an alternative method of termination of joint ownership of the property in the court *a quo* but merely asked for dismissal of the respondent's claim.

[12]. In the application for leave to appeal I was referred to the decision of *Boshoff t/a Etosha Meubelvervoerders v M Pupkewitz and Sons (Pty) Ltd* 1984 (2) SA 24 (SWA) at 30E-G where the Court (sitting in appeal of a trial from the magistrates' court), exercised an equitable discretion and granted the plaintiff relief not sought in its pleadings.

[13]. In light of the above, I am persuaded that another Court may come to a different conclusion on the three grounds of appeal listed above and find an alternative manner of terminating the joint ownership.

Costs

[14]. Notwithstanding the 'Cost Order' listed as one of the grounds of appeal in the Notice of Application for Leave to Appeal, it was submitted on behalf of the applicants that the cost order in the court *a quo* was not being appealed against as costs were awarded in accordance with the general rule that the successful party is entitled to costs.

Order

In the circumstances, I grant the following order:

1. The first and second applicants are granted leave to appeal to the Full Bench of the Gauteng Local Division.
2. The costs of the application for leave to appeal is reserved for decision by the Court hearing the appeal.

N ADAM
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

DATE OF HEARING:	10 th September 2020
DATE OF JUDGMENT:	16 th September 2020
FOR THE FIRST AND SECOND APPLICANTS:	Mrs N Morwasehla
INSTRUCTED BY:	Morwasehla Attorneys
FOR THE RESPONDENT:	Adv R Goslett
INSTRUCTED BY:	R.E Makgale Attorneys