IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***7th JUNE 2022*** Signature: _____

CASE NO: 39164/2020

DATE: 7TH JUNE 2022

In the matter between:

HUMA, BOITUMELO Applicant

and

KRUGER, STEPHAN N O,
In his official capacity as duly appointed
Executor in the Deceased Estate:
HUMA, AUDREY First Respondent

SA HOME LOANS (PTY) LIMITED Second Respondent

REGISTRAR OF DEEDS, JOHANNESBURG Third Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG Fourth Respondent

Coram: Adams J

Heard: 07 June 2022 – The 'virtual hearing' of the application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 07 June 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 07 June 2022.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal granted

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ORDER

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(1) The applicant's application for leave to appeal succeeds in part and only in respect of that portion of the judgment and the order (prayers 1 and 4) of the court *a quo* in terms of which the applicant's claim of R120 810 was dismissed, as well as in respect of the costs order.

(2) The applicant is granted leave to appeal to the Full Court of this Division on those aspects of the judgment and the order.

(3) The costs of the application for leave to appeal, including the wasted costs occasioned by the postponement of the application for leave to appeal on 19 May 2022 and on 3 June 2022, shall be in the course of the appeal.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original opposed application. The applicant is the applicant in this application for leave to appeal and the respondent herein was the first respondent in the application. The applicant applies for leave to appeal against the whole of the judgment and the order, as well as the reasons therefor, which I granted on the 16th of February 2022, in terms of which I had dismissed the applicant's application for interdictory relief in relation to immovable property in Zakariyya Park. In effect, the applicant had applied for an order declaring him to be the owner of the said property and for an order interdicting the first respondent from causing the property to be transferred out of his name. In the alternative, the applicant had applied for damages to be awarded in his favour against the first respondent. As already indicated, the

applicant's application was dismissed and he was also ordered to sign the necessary documentation which would enable the property to be transferred into the name of the first respondent in his official capacity as executor. The applicant was also ordered to pay the costs of the opposed application.

[2]. The application for leave to appeal is mainly against my legal conclusion that, if regard is had to the provisions of section 2(1) of the Alienation of Land Act, Act 68 of 1981, the applicant could not have acquired and did in fact not acquire ownership of the property pursuant to an alleged oral agreement between him and his ex-wife. I erred, so it was contended on behalf of the applicant, in finding that the ownership of the property did not transfer to the applicant during April 2018 when the said oral agreement was allegedly concluded. I should not have found, so the argument on behalf of the applicant continues, that the oral agreement between the applicant and the deceased is of no force and effect. The court *a quo* should not only have focused on the provisions of section 2(1) of the Alienation of Land Act, but should have developed the law and/or make a proper finding and assessment on the said provision in the interest of justice.

[3]. As regards, the dismissal of the application for an award of damages, the applicant submits that I erred in finding that the applicant cannot claim damages in the circumstances of the case.

[4]. I interpose here to mention that during the hearing of the application for leave to appeal on 7 July 2022, Mr Mathebula, who appeared on behalf of the applicant, indicated that the applicant was no longer pursuing the appeal on the grounds relating to the transfer of the property on the basis of the alleged oral agreement between him and his deceased ex-wife. The applicant in fact expressly 'abandoned' those grounds of appeal and was pursuing the appeal only on the basis that the court *a quo* had erred in dismissing the applicant's damages claim based on unjust enrichment. It was argued by the applicant that, at the very least, I should have referred the quantification of that claim to oral evidence if I had any reservations about whether the said claim had been quantified properly.

[5]. In my view, the implied concession made by Mr Mathebula that the appeal had very little prospect of success on the grounds that I had erred in my legal findings relating to the Alienation of Land Act, was rightly made.

[6]. Nothing new has been raised by the applicant in this application for leave to appeal. In my original judgment, I have dealt with most of the issues raised and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that s 2(1) of the Alienation of Land Act, which imposes strict formalities in respect of the alienation of immovable property, fair or unjust as it may be perceived to be, is the law as things stand at present. It has not been held to be unconstitutional or, as contended by the applicant, *contra bonis mores*. There is a very good reason for its existence as part of our law, that being certainty in respect of dealings involving immovable property.

[7]. As for the 'dismissal' of the applicant's claim of the sum of R120 810, relating to his damages based on unjust enrichment, it was argued by Mr Mathebula that it is undisputed that the applicant paid to the second respondent, for the benefit of the deceased, the said sum. It can therefore be inferred from this that the deceased estate had been enriched by the said amount, and conversely, he (the applicant) had been impoverished by the said sum. Axiomatically, so I understand the submission by the applicant, the amount was not due to the deceased estate by reason of the fact that the underlying *causa* is void *ab initio*. This, in turn, means, so the argument is concluded, that the applicant is entitled to a refund of the said amount based on unjust enrichment.

[8]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success'.

[9]. In *Mont Chevaux Trust v Tina Goosen*[1], the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*[2]. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*[3].

[10]. I am persuaded that the issue raised by the applicant in his application for leave to appeal is an issue in respect of which another court is likely to reach a conclusion different to that reached by me. It is so that another court is likely to find that the applicant is entitled to be refunded the amount of R120 810, which he alleges he paid on the bond account of the deceased, or such other sum which the court finds was paid by him. It is very probable that another court, based on the fact that the first respondent does not seriously take issue with the applicant's averment that he paid an amount of R5800 on a monthly basis from April 2018 to April 2020 (about twenty-four months), amounting to payment in total of the sum R120 810, will find that the deceased estate is liable to the applicant for the amount of R120 810 or some other sum, based on unjust enrichment. The point is simply that the applicant, on the evidence, paid these amounts, which can be interpreted as unjust enrichment in favour of the deceased estate at his expense in circumstances where the said total amount or, for that matter, a lesser sum, was not due to the deceased estate.

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[1] *Mont Chevaux Trust v Tina Goosen,* LCC 14R/2014 (unreported).

[2] *Notshokovu v S,* case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

[3] *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[11]. I am therefore of the view that there are reasonable prospects of another court coming to a legal conclusion at variance with mine. The appeal therefore, in my view, does have a reasonable prospect of success on this very specific aspect, that being the dismissal of the applicant's claim against the first and second respondents based on unjust enrichment.

[12]. Leave to appeal should therefore be granted on that limited issue, with the remainder of the judgment and the order to stand. In particular, prayers 2 and 3 of the order of the court *a quo* remains extant and can be executed by the first respondent if the need arises. The leave to appeal is in fact granted relative to prayers 1 and 4 of the court order and the related findings in the body of the judgment.

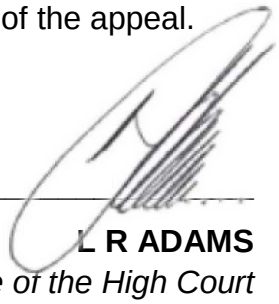
Order

[13]. In the circumstances, the following order is made:

(1) The applicant's application for leave to appeal succeeds in part and only in respect of that portion of the judgment and the order (prayers 1 and 4) of the court *a quo* in terms of which the applicant's claim of R120 810 was dismissed, as well as in respect of the costs order.

(2) The applicant is granted leave to appeal to the Full Court of this Division on those aspects of the judgment and the order.

(3) The costs of the application for leave to appeal, including the wasted costs occasioned by the postponement of the application for leave to appeal on 19 May 2022 and on 3 June 2022, shall be in the course of the appeal.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	7th June 2022 – as a videoconference on *Microsoft Teams*.
JUDGMENT DATE:	7th June 2022 – judgment handed down electronically
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FOR THE SECOND, THIRD AND FOURTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance