

IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, PORT ELIZABETH

Case No 819/2012  
Date heard: 18 February 2014  
Date Delivered: 25 February 2014

NOT REPORTABLE

In the matter between

VIRGINIA SARRAHWITZ

Applicant

and

HERMANUS MARITZ N.O.

Respondent

---

JUDGMENT

---

GOOSEN, J.

- [1] The applicant seeks leave to appeal against a judgement delivered on 7 February 2013. The application for leave to appeal was initiated in September 2013 and, following arrangements made by applicant's counsel, this matter was argued on 18 February 2014. The application

is not opposed by the respondent. The applicant seeks condonation for the late filing of the application and an order granting leave to appeal to the Full Court, alternatively the Supreme Court of Appeal. In addition, for reasons which will become apparent more fully hereunder, the applicant also seeks the joinder, at this stage of the proceedings, of the Minister of Trade and Industries, who is the Minister responsible for the administration of the Alienation of Land Act, Act 68 of 1981.

- [2] When the application came before me on 7 February 2013 the applicant was represented by Stuart Laubscher Attorneys. An order was sought compelling the respondent, who is the trustee of an insolvent estate, to pass transfer to the applicant of an immovable property purchased by her from the insolvent. The applicant had paid to the insolvent the full purchase price for the immovable property being the sum of R40 000 prior to entering into a deed of sale on 17 September 2002. Transfer of the immovable property was not given for various reasons despite the passage of a considerable period of time following the payment of the agreed purchase price. In 2006 the estate of the insolvent was sequestrated and the respondent was appointed as the trustee. The application was commenced on 8 March 2012. In seeking to compel the respondent to pass transfer of the property reliance was placed on sections 21 and 22 of the Alienation of Land Act. I found that those provisions do not apply in the circumstances of

this matter and accordingly applied the principles at common law to decide the application. I did not consider it necessary in the circumstances to deal with the plea of prescription. I accordingly dismissed the application with costs.

- [3] The applicant now applies for leave to appeal upon a wholly different basis to that upon which the application was brought. The principal findings made by this court, namely that sections 21 and 22 of the Alienation of Land Act do not apply and that ownership of the property sought to be transferred, vests, at common law, in the trustee of the insolvent estate, are not challenged. Instead the applicant seeks to advance the case that the circumstances of this matter warrant a development of the common law by reason of the fact that the applicant's constitutional rights to equality, dignity, housing and fair administrative action have allegedly been breached. It is accordingly submitted that had the court been called upon to decide these issues in the application the court would have found for the applicant and therefore that there is a reasonable prospect of success on appeal. Furthermore the applicant indicates that she wishes to bring an application to adduce further evidence on appeal, which evidence relates to the facts and circumstances not brought to the attention of the trial court. Since the applicant now proposes to raise constitutional

issues she wishes to join the Minister responsible for the relevant legislation.

[4] Applicant's counsel conceded that the case that the applicant now seeks to make out on appeal is wholly different to that which served before this court. When pressed on this aspect the applicant's counsel was constrained to suggest that the applicant was ill served by the legal representative that she then engaged. I was urged to find that the applicant was in fact not properly represented at all in the original application and that therefore, in the interests of justice, the applicant should be permitted to pursue an appeal upon this wholly different basis.

[5] The application for leave to appeal is some seven months out of time. Accordingly, it is necessary for the applicant to establish a basis for condonation for the late filing of her application. In the affidavit filed in support of the application, the applicant alleges that she only became aware of the fact that she had a right of appeal when she consulted her present legal representatives in regard to defending eviction proceedings brought against her by the respondent. It was only at that stage when the attention of legal representatives was drawn to the existence of the order made by this court that she was advised that she had a right to pursue an appeal against that order. According to

the applicant she immediately commenced these proceedings to obtain leave to appeal.

[6] In considering an application for condonation, it is necessary to consider not only the explanation given for the delay but also the prospects of success. In this instance the applicant has indeed offered some explanation for the delay. Even if one accepts that she is an indigent person who was not aware of her rights and that she was apparently not advised of her right of appeal, her explanation alone does not entitle her to condonation. She must also demonstrate reasonable prospects of success in the application for leave to appeal.

[7] The evaluation of that question concerns an assessment of the basis upon which the application for leave to appeal is made and, of necessity, the question of whether she enjoys reasonable prospects of success in the appeal itself. In this regard there is in my view little doubt that her prospects of success are slim indeed. In the first instance the applicant now seeks to pursue a cause of action on appeal, which is wholly different to that which served before this court in the original application. The constitutionality attack was not raised in the application papers and was not dealt with in argument presented to this court. At this stage of the proceedings it is a wholly novel point intended to be taken on appeal.

- [8] In the case of *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) the requirements for raising a constitutional challenge to a statute on the pleadings are set out at para 22 as follows:

"Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of relevant information is necessary to warn the other party of the case it will have to meet, so as to allow it the opportunity to present a factual material, and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make the case on appeal."

- [9] The Constitutional Court specifically applied this test in the case where a party seeks to have the common law developed in line with constitutional principles. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) the court stated, at para 52:

"That test, however, is of equal force, where, as in the present case, a party seeks to invoke the Constitution in order to adapt or change an existing precedent, or a rule of the common law or customary law in order to promote the spirit, purport and objects of the Bill of Rights. Litigants who seek to invoke provisions of section 39 (2) must ordinarily plead the case in the court of first instance in order to warn the other party of the case it will have to meet and the relief sought against it. The other obvious benefit is that the High Court and the Supreme Court of Appeal will be afforded the opportunity to help shape the common law and customary law in line with the normative good of the Constitution."

- [10] As these cases demonstrate an appeal court will be very slow to permit a party to raise a constitutional challenge on appeal, which has not been adjudicated by the trial court. Quite apart from requiring that the opposing party be afforded a proper opportunity to meet the case advanced by the applicant, the approach is informed by the fact that the raising of a new point of law, which was not taken before the trial court, on appeal, will only be permitted if the point of law is foreshadowed on the pleadings and does not involve any prejudice to the opposing party.
- [11] What the applicant envisages in this instance is that she be permitted to make out a wholly different cause of action on appeal. In addition she seeks or intends to seek the leave of the appeal court to adduce further evidence on appeal in order, no doubt, to make out her case founded upon the new cause of action. Further, she seeks an order joining parties that are necessary parties in a suit founded upon the new cause of action. In effect she wishes to prosecute a different case under the guise of an appeal.
- [12] None of the findings made by the trial court are challenged and it is not submitted that the trial court erred in any manner or misdirected itself in respect of the facts placed before it. This court is therefore called upon to decide that there is a reasonable prospect that another court

faced with a wholly different cause of action premised upon a different set of facts may come to a conclusion different to that to which this court came in dismissing the applicant's application.

- [13] I know of no authority which suggests that such a speculative assessment of a different case constitutes a reasonable prospect of success in relation to the case that this court was required to decide. This court cannot be expected to second-guess decisions that may yet be made by an appeal court either to allow further evidence or disallow it or to permit an effective amendment of the papers before that court. I am left with only one conclusion, namely that the applicant cannot and has not demonstrated any reasonable prospects of success in following the course of action she proposes to follow in prosecuting a new case on appeal. It must follow therefore that no reasonable prospects of success in pursuing the application for leave to appeal have been demonstrated.
- [14] I was urged to consider that the applicant ought to be permitted to now adapt the cause of action because she was, as it was put, not properly represented at all. There is in my view no basis for such a finding. The fact that a legal representative may have pursued a particular course in prosecuting the applicant's case, albeit unsuccessfully, does not necessarily mean that that legal representative did not competently



prosecute the applicants case. The proposition advanced by applicant's counsel amounts to this: the applicant has a better case to make out and since that was not prosecuted originally you must find that the applicant was not then properly represented. There is no merit in the proposition.

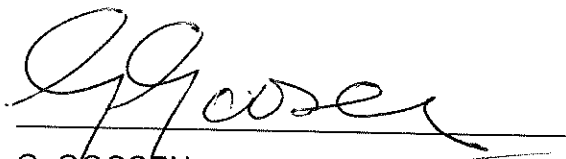
[15] Finally, I was urged to take cognizance of the fact that the applicant is an indigent person who, if she is not permitted to prosecute the appeal upon the basis envisaged, will in all probability face eviction from the property she now occupies to her significant prejudice. When asked why applicant could not pursue a wholly separate application founded upon the different cause of action she now seeks to advance, by way of an original application, rather than on appeal, I was informed that she may not be able to do so by reason of the fact that she may be met by a plea of issue estoppel and / or prescription. I needn't consider whether any one of these points pose realistic challenges to pursuing a separate application. What the answer demonstrates however is that the applicant is faced with some significant difficulties, but elects to pursue the new cause of action by way of an impermissible procedure of appealing against this court's judgement.

[16] I am constrained to deal with the matter before me in accordance with legal principles. Those legal principles properly applied to the facts and

circumstances of this matter lead me to conclude that the application for leave to appeal cannot succeed.

[17] In the result I make the following order:

"The application for condonation for the late filing of the application for leave to appeal is refused."



G. GOOSEN  
JUDGE OF THE HIGH COURT

Appearances: For the Applicant  
Ms. L Crouse  
Legal Aid Board

For the Respondent  
No appearance