THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

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Reportable: YES/NO

Case No: 1955/2016

In the matter between:

BAREND JACOBUS VAN DEN BERG Applicant

and

THE LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA 1st
Respondent
SUIDWES LANDBOU (PTY) LTD 2nd
Respondent
LORRAINE MARLENE VAN DEN BERG 3rd
Respondent
BAREND JACOBUS VAN DEN BERG N.O. 4th Respondent
LORRAINE MARLENE VAN DEN BERG N.O. 5th
Respondent
HENDRIK STEPHANUS LODEWICUS
DU PLESSIS N.O. 6th Respondent
THE REGISTRAR OF DEEDS 7th
Respondent

***IN RE*:** **Case No: 1955/2016**

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA 1st
Plaintiff
SUIDWES LANDBOU (PTY) LTD 2nd
Plaintiff

and

BAREND JACOBUS VAN DEN BERG 1st
Defendant
LORRAINE MARLENE VAN DEN BERG 2nd
Defendant
BAREND JACOBUS VAN DEN BERG N.O. 3rd
Defendant
LORRAINE MARLENE VAN DEN BERG N.O. 4th
Defendant
HENDRIK STEPHANUS LODEWICUS
DU PLESSIS N.O. 5th Defendant
REGISTRAR OF DEEDS, BLOEMFONTEIN 6th
Defendant

Coram: Opperman J

Heard: 29 September 2023

Delivered: 22 December 2023. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII

on 22 December 2023. The date and time of hand-down is deemed to be 15h00 on 22 December 2023

Judgment: Opperman J

Summary: Application for leave to appeal

JUDGMENT

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[1] The applicant applies for leave to appeal against an order issued on 21 August 2023. This is the order:

> [44] ORDER
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> The application to condone the late filing of an expert notice and summary in terms of rules 36(9)(a) and (b) as well as an order directing the parties in the main action to comply with the purported interlocking provisions of rule 36(9), rule 36(9A) and rule 37(A) are dismissed with costs that includes the costs of two counsel.

[2] The order followed upon an opposed application in the main action in a trial that is partly heard on various issues separated in terms of rule 33(4) ("The rule 33(4)-trial").

[3] Brought after the rule 33(4)-trial had already commenced on 27 November 2019 and pleadings that closed on 13 July 2016, it is to now condone the late filing of an expert notice and summary as contemplated in terms of rules 36(9)(a) and (b) as well as an order directing the parties in the main action to comply with the purported interlocking provisions of rule 36(9), rule 36(9A) and rule 37(A).

[4] I gave extensive reasons for the refusal of the application and will not repeat it and burden this judgment. Nothing more can be said. Nothing can be added to what was already submitted in the grounds for appeal, the heads of argument for the applicant and the heads of argument for the first and second respondents in respect of the application

for leave to appeal in the application to call an expert witness. *The arguments of the respondents are irrefutable and is it the law. These documents must be read with this judgment for context.*

[5] This case may not be allowed to go on appeal because:

1. The order is not appealable, and the decision sought on appeal will have no practical effect or result;
2. the application for leave to appeal is fatally defective;
3. there is no reasonable prospect that another court would reach a different conclusion; and
4. the appeal would not lead to a just and prompt resolution of the real issues between the parties as contemplated in section 17(1)(c) of the Superior Courts Act 10 of 2013 ("the SC Act").

[6] The order that is sought to be appealed is an interlocutory application and not appealable and the decision sought on appeal will have no practical effect or result. The test and major factors to consider in an application for leave to appeal on an interlocutory order have finally been established.

1. The interest of justice and thus potential for irreparable harm are vital factors;
2. guidance of future cases;
3. incorrect statements of law in the judgment *a quo*; and
4. the milieu and perception in which the law must be interpreted may cause a need for the adjudication of an interlocutory order on appeal.[1]

[7] Each case must be adjudicated on its own peculiar facts. A fixed maximum of factors will not suffice and must be read with the test as pronounced in sections 16 of the SC Act and the law that evolved around it. As was eloquently put *in United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (1032/2019) [2021] ZASCA 4 (13 January 2021) at paragraph [9] the assessment is now: "…to accord with

[1] *Ba-Mamohlala and Big Mash JV v Mafube Local Municipality and others*, Coram: Opperman, J, Date of hearing: 25 February 2022, Order Delivered: 7 March 2022, Free State Division of the High Court of South Africa, https://www.saflii.org/za/cases/ZAFSHC/2022/43.pdf.

the equitable and the more context-sensitive standard of the interests of justice favoured by our Constitution."

[8] The law that is applicable on the appealability of the issue of interlocutory orders has been declared upon in numerous cases since the Zweni-judgment (*Zweni v Minister of Law-and-Order* 1993 (1) SA 523 (A)).[2] The Cipla-dictum evolved hereafter (*Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and others* 2018 (6) SA 440 (SCA)). As said, the final word was now spoken in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (1032/2019) [2021] ZASCA 4 (13 January 2021). The majority judgment, Sutherland AJA (Cachalia and Mbha JJA concurring) ruled at paragraph [9] with reference to case law that "courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court *a quo* when final relief is determined. Also, allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes":

> [7] What is required to render an order appealable is well trodden judicial turf. It is to the law on appealability in this regard we now turn.
>
> [9] ... More recently, in *Philani-Ma-Afrika v Mailula*, the Supreme Court of Appeal had to decide whether an order of the high court which puts an eviction order into operation pending an appeal was appealable. In a unanimous judgment by Farla JA, the Court held that the execution order was susceptible to appeal. It reasoned that it is clear from cases such as *S v Western Areas* that "what is of paramount importance in deciding whether a judgment is appealable is the interests of justice." As we have seen, the Supreme Court of Appeal has adapted the general principles on the appealability of interim orders, in my respectful view, correctly so, to accord with the equitable and the more context-sensitive standard of the interests of justice favoured by our Constitution. In any event, the Zweni requirements on when a decision may be appealed against were never without qualification. For instance, it has been correctly held that in determining whether an interim order may be appealed against regard must be had to the effect of the order rather than its mere appellation or form. In *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* the Court held, correctly so, that where an interim order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings it will generally be final in effect. Lastly, when we decide what is in the interests of justice, we will have

[2] *Mannatt and Another v De Kock and Others* (18799/2018) [2020] ZAWCHC 54 (22 June 2020).

> to keep in mind what this Court said in *Machele and Others v Mailula and Others*. In that case, the Court had to decide whether to grant leave to appeal against an order of the High Court authorising execution of an eviction order pending an appeal. In granting leave to appeal, Skweyiya J, relying on what this Court held in TAC (1), reaffirmed the importance of "irreparable harm" as a factor in assessing whether to hear an appeal against an interim order, albeit an order of execution: *"The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is, therefore, whether irreparable harm would result if leave to appeal is not granted".'* (Emphasis added)

[9] Whether irreparable harm will eventuate will depend on the merits of each case. It is not the case here; there are other remedies to be resorted to. This brings the added hurdle to be jumped by the applicant and that is the leave to appeal itself on the facts of the case.

[10] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Access to justice is access to justice.

[11] The Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021 ruled that:

> [10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as oppose to "could" possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on

> proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. *A sound rational basis for the conclusion that there are prospects of success must be shown to exist.* (Accentuation added)

[12] The fact remains that the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal is that it should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate court.[3]

[13] In the instance the words of Binns-Ward J in the Mannat-case *supra* is eerily applicable to this case:

> [9] … It did not have any of the three attributes of a 'judgment or order' identified in Zweni. On the basis of the authorities just referred to that counts strongly against it being regarded as appealable. In addition, there are no considerations that would make it susceptible to appeal 'in the interests of justice'. *On the contrary, it would be inimical to the interests of justice to permit or encourage the applicants to continue on their misguided path in the current litigation. It is purposeless, and nothing more than an abusive imposition on the court's resources and an unwarranted derogation from the prima facie rights of those of the respondents who are applicant's judgment creditors*. (Accentuation added)

[14] The grounds for appeal are out of context and fatally defective. The general arrangement of the grounds on which the applicant seeks leave to appeal is to criticise the judgment on an almost paragraph-by-paragraph and word-by-word basis without specifying what effect any asserted erroneous finding or conclusion has on the correctness of the substantive order. The disjointed approach in which the applicant has expressed his application for leave to appeal influences against the importance of interpreting the judgment of the court as a whole and in context. The first and second respondents are correct where they stated that the grounds on which the applicant seeks leave to appeal are not set out in precise, and succinct and unambiguous terms. It is difficult to distinguish what and on what basis the applicant seeks to impugn the substantive order made by the Court.

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[3] *S v Smith* 2012 (1) SACR 567 (SCA) at [7].

[15] In *Democratic Alliance v President of the Republic of South Africa and Others* (2124/ 2020) [2020] ZAGPPHC 326 (29 July 2020) at paragraphs [4] – [5] the Full Court held as follows:

> …This dictum serves to emphasise a vital point: *Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.* (Accentuation added)

[16] I reiterate what was remarked in the judgment *a quo* and the other judgments in this case and the sentiments that were expressed in the previous judgments caused by the applicant, are significant:

> [43] In conclusion, the record of this case will show that much of the delay in this case was caused by the continuous issues that arose after the trial commenced and initiated by the applicant *in casu* and the other defendants in the main action. With due respect to the right to access to justice and courts, continuous conduct of this nature will lead to a waste of financial and judicial resources and obstruct the administration of justice that may not be allowed. The time has come for the matter to be vented at trial and concluded.

[17] **ORDER**

The application for leave to appeal is dismissed with costs; including the costs of two counsel.

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M OPPERMAN J

APPEARANCES

On behalf of the applicant — **H.S.L. DU PLESSIS**
HSL du Plessis Attorneys
c/o Lovius Block Attorneys

BLOEMFONTEIN

On behalf of the first and second respondents
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