



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

**CASE NO: 3631/2018**

**HEARD ON: 24/11/2023**

**JUDGMENT: 12/12/2023**

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES / NO  
(3) REVISED.
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**IN THE MATTER BETWEEN**

**NICOLOSI, VINCENZO N.O.**

**FIRST APPLICANT**

**NICOLOSI, PENELOPE ANN N.O.**

**SECOND APPLICANT**

**MILLER, JAMES RONALD N.O.**

**THIRD APPLICANT**

**POSEMANN, MICHAEL WILLIAM  
HECTOR N.O.**

**FOURTH APPLICANT**

**AND**

**ROSE, SIMON NICHOLAS  
JAMES**

**FIRST RESPONDENT**

**ROSE, LEIGH JANET**

**SECOND RESPONDENT**

**CITY OF JOHANNESBURG  
METROPOLITAN MUNICIPALITY**

**THIRD RESPONDENT**

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**JUDGMENT (LEAVE TO APPEAL)**

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**Strijdom AJ**

1. This is an application by the first and second respondents for leave to appeal the whole of my judgment handed down on 30 October 2023 to the Full Court of this division whereof the first and second respondents' application for condonation of the late filing of their proposed counter – application (which was an irregular step), was dismissed and an Order was granted in terms of prayers 1 and 2 of the applicants' Rule 30 application.
  
2. The grounds of appeal are set out in the application for leave to appeal.<sup>1</sup>

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<sup>1</sup> Caselines: 034-1 to 034-25

3. The applicants submit that the order dismissing the condonation application ('the order') is not appealable and that the application should also fail on the merits because the appeal would have no reasonable prospect of succeeding.

### **THE APPEALABILITY OF THE ORDER**

4. In *Zweni*,<sup>2</sup> the court held that:

'a judgment or order is, for purposes of establishing its appealability ,... a decision which, as a general principle, has three attributes: first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings...'

5. In my view the order does not dispose of the real or 'main' disputes between the parties or any portion thereof. In the current matter, the 'real' or 'main' disputes between the parties are those that appear from the papers filed in the pending main application. The order does not have the effect of disposing of any portion of the disputes between the parties in the main application.

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<sup>2</sup> *Zweni v Minister of Law & Order* 1993 (1) SA523 (A). See also *Dr d gold Ltd & Ano Nkala & Others* 2023 (3) SCA [15] to [30].

6. There is nothing precluding the respondents from instituting proceedings under a separate case number for the relief they seek in the proposed counter – application. The order does not deprive the respondents of that right and is therefore not ‘final in effect’.
  
7. It is irrelevant, whether another court would have granted the application for condonation. I exercised my discretion judicially, which was one in the so-called ‘narrow’ sense. The exercise of such a discretion will only be interfered with by an appeal court if it was exercised capriciously or upon a wrong principle or where the court had not brought its unbiased judgment to bear on the question or has failed to act for substantial reasons.’<sup>3</sup>
  
8. I am also of the view that it will not be in the interest of justice to permit the respondents to appeal the order where they have the right to pursue the proposed counter- application by way of separate proceedings.
  
9. I concluded that the order dismissing the application for condonation is not appealable.

### **THE MERITS**

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<sup>3</sup> Ganes & Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA).

10. Even if I am mistaken in my view that the order is not appealable there is no reasonable prospect that another court would come to a different finding in respect of the condonation application.
11. Section 17(1)(a) of the Superior Courts' Act 10 of 2013 provides that leave to appeal may only be granted where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success, or if there is some compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration.
12. Each application for leave to appeal must be decided on its own facts.
13. The Superior Courts' Act has raised the bar for granting leave to appeal.<sup>4</sup>
14. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.
15. In respect of all the grounds of appeal raised by the respondents, my judgement deals with the facts and the law as presented by the parties and how the court arrived at each conclusion on the contentions raised by the parties.

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<sup>4</sup> Mont Chevaux Trust v Tina Goosen and 18 Others 2014 JDR 2325 (L CC)

16. When the facts and the law were examined, there is in my view no sound or rational basis for the conclusion that the appeal would have a reasonable prospect of success.

17. I am further of the view that there are no compelling reasons why the appeal should be heard.

18. In the result, the application for leave to appeal is dismissed with costs.

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**STRIJDOM J J  
ACTING JUDGE OF THE  
HIGH COURT OF SOUTH  
AFRICA  
GAUTENG  
LOCAL DIVISION  
JOHANNESBURG.**

**Appearances:**

For the applicant: Adv J Botha SC

Instructed by: Strauss Scher Inc.

For the first respondent: Adv M Novitz

Instructed by: Nochumsohn & Teper Attorneys