



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 79752/2019

79753/2019

79754/2019

79755/2019

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

In the matter between:

FUZILE BALINTULO

First

Applicant

BUTI MESHACK LESIELA

Second Applicant

HERMANUS KAREL BREED

Third

Applicant

ABRAHAM JOHANNES BOSCH

Fourth Applicant

and

LINDA MBANA

Respondent

JUDGMENT: LEAVE TO APPEAL

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 29 September 2022.

INTRODUCTION

[1] The four Applicants have jointly applied for leave to appeal to the Full Court of this Division, alternatively the Supreme Court of Appeal, against the judgment and order of this Court handed down electronically on 21 April 2021.

[2] The matter is to be determined on the papers as uploaded on Caselines without oral hearing. The parties' heads of argument have also, been uploaded on Caselines.

FACTS

[3] The application for leave to appeal emanates from the defamation actions instituted separately by the four Applicants against the Respondent. The Respondent applied for the consolidation of the four actions in terms of Uniform Rule 11.

[4] There were also a number of interlocutory applications that were under case management. The Court decided the main application in favour of the Respondent and granted the following order:

1. The four actions under case numbers 79752/2019, 79753/2019, 79754/2019 and 79755/2019 are consolidated and shall proceed as one action under case number 79752/2019.
2. The provisions of Uniform Rule 10 pertaining to the joinder of defendants shall *mutatis mutandis* apply to the consolidated action.
3. All the interlocutory applications that will be required to be proceeded with after the consolidation of the four actions to be heard simultaneously on the same date.
4. The respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved.

[5] It is this order that the Applicants seek to appeal.

GROUND OF APPEAL

[6] The Applicants raised numerous grounds of appeal in the application for leave to appeal. They have, however, in their heads of argument grouped the said grounds of appeal as follows:

- a. the Court *a quo* did not properly apply the test for consolidation insofar it concerns the balance of convenience;
- b. the Court *a quo* erred in finding that "all the instances of prejudice raised" by the Applicants herein "are not real or substantial and are speculative at best";
- c. the Court *a quo* erred in finding that the Respondent herein discharged the *onus* for a consolidation and thereby granting an order consolidating the various actions as one;
- d. the Court *a quo* erred in granting the order for consolidation of the actions.

[7] The Respondent is opposing the application on the merits and submit that the consolidation order they sought in the main application was granted correctly in law and facts, and contend, further, that the decision sought to be appealed is not one that can sustain a competent application for leave to appeal, in that it is not a decision within the ambit of Sections 16 and 17 of the Superior Courts Act, 10 of 2013.

[8] The Respondent has also, in the heads of argument raised a point *in limine* on whether the consolidation order or ruling is appealable.

THE ISSUES

[9] This Court is required to determine, firstly, whether the consolidation order or ruling is appealable or not. In the event that it is found that the consolidation ruling is appealable, then in such event, the Court will be required to determine whether:

9.1. the test of balance of convenience was correctly applied in so far as it concerns the Applicants and witnesses'.

9.2. the Respondent discharged the *onus* for a consolidation of actions'.

9.3. the order will cause substantial prejudice to the Applicants.

Whether the Consolidation Order is Appealable

[10] The Respondent submits that the consolidation order or ruling is not appealable on the ground that it does not meet the attributes of a judgment as set out by the Appellate Division (as it then was) in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532G-J.

[11] The Respondent's further submission is that according to *Zweni*, for the judgment to be appealable, it must have the following attributes: (a) the decision must be final in effect; (b) it must be definitive of the rights of the parties; and (c) it must have the effect of disposing of at least substantial portion of the relief claimed in the main proceedings. According to the Respondent, the consolidation order, in this matter, does not have these attributes and is, therefore, not appealable.

[12] To the contrary, the Applicants submit that that the effect of the Consolidation Order is final in effect, and not susceptible to alteration, and, is, therefore, appealable. The Applicants support their submission by referring to the Supreme Court of Appeal judgment in *JR 209 Investments Pt Ltd and Another v Pine Villa Gumtree Estate Pt Ltd Pine Villa Count Estate Pt Ltd v JR209 Investments Pt Ltd* 2009 (4) SA 302 SCA. The Court held in that judgment that 'as regards the appealability of the interim interdict, that an interim interdict was appealable if it were final in effect and not susceptible to alteration by the court of first instance. In determining whether an order was final, it was important to bear in mind that not merely the form of the order must be considered but also, and predominantly its effect'.

[13] The Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC), held that: '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.' Therefore, where an interim order is found to have the effect of a final order, it is appealable.

[14] The question of what to consider in arriving at the finding of whether an interim order has a final effect or not, was answered in *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* [2004] 4 All SA 410 (SCA) in paragraph 24, where that Court held 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.

[15] In the circumstances, it is this Court's finding that the consolidation order granted in this matter will not be reconsidered on the same facts in the main proceedings, and is, as such, final in effect and, therefore, appealable.

Whether Leave to Appeal Should be Granted

[16] The Applicants have approached this Court for leave to appeal in terms of section 17 of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"), which provides as follows:

"17. **Leave to Appeal**

- (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."

[17] The Applicants' grounds of appeal have been fully covered and considered in the judgment the Applicants seek to appeal. Having considered the grounds of appeal raised by the Applicants and the arguments for and against such application raised by the parties in their respective heads of

argument, this Court is of the opinion that there are no reasonable prospects of success on appeal.

[18] The Applicants have not made out a case for the granting of the application for leave to appeal on the ground of some compelling reasons as envisaged in section 17(1)(a)(ii) of the Superior Courts Act.

[19] The application, as a result, falls to be dismissed.

ORDER

[20] The following order is made:

1. The application for leave to appeal is dismissed.
2. The Applicants are ordered jointly and severally to pay the costs of this application.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

APPLICANTS' COUNSEL: ADV. WF WANNENBURG

APPLICANTS' ATTORNEYS: BRITS MULLER ATTORNEYS

RESPONDENT'S COUNSEL:

ADV. E LABUSHNAGNE SC

ADV. J HLONGWANE

RESPONDENT'S ATTORNEYS:

LUCKY THEKISHO ATTORNEYS