REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED:

……

DATE 14/11/23. SIGNATURE

Case Number: 58969/2018

In the matter between:

LEBASHE INVESTMENT GROUP (PTY) LIMITED First Applicant

HARITH GENERAL PARTNERS (PTY) LIMITED Second Applicant

HARITH FUND MANAGERS (PTY) LIMITED Third Applicant

WHEATLEY, WARREN GREGORY Fourth Applicant

MAHLOELE, TSHEPO DAUN Fifth Applicant

MOLEKETI, PHILLIP JABULANI Sixth Applicant

and

UNITED DEMOCRATIC MOVEMENT First Respondent

HOLOMISA, BANTUBONKE HARRINGTON Second Respondent

JUDGEMENT FOR LEAVE TO APPEAL

BOKAKO AJ

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 14 November 2023.

INTRODUCTION

1. This is judgment in the leave to appeal against the court's judgment and order of this court handed down on 17 August 2023. In that judgment, this court dismissed the applicant's exception application. It is that order that the applicant seeks to challenge before the SCA. The respondents opposed this application.
2. The applicant seeks leave to appeal against the judgment of 17 August 2023, and the grounds upon which the application for leave to appeal is premised are set out in the written notice of application for leave to appeal.

3. This is an application for leave to appeal to the Supreme Court of Appeal ("the SCA") in terms of section 17(1)(a)(i) and section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"), Leave to appeal may only be granted where the Judge or Judges concerned believe that:

   (a) the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard, including the conflicting judgments under consideration;

   (b) With regard to the word 'would' in s 17 of the Superior Courts Act 10 of 2012 (the Act) sub-section 17(1)(a)(i) above, the Supreme Court of Appeal has found that the use of the word in the section imposes a more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959.

4. In *MEG Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016) the Supreme Court of Appeal said the following about the granting of applications for leave to appeal (a reference to other authorities omitted):

   "[16] Once again it is *necessary to* say *that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of* success. *Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned* is *of the opinion that the appeal would have* a *reasonable prospect of success, or there* is some *other compelling reason why it should be heard.*

   [17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success *on appeal. A mere possibility of* success, *an arguable case, or one that* is *not hopeless, is not enough. There must be* a *sound, rational* basis *to conclude that there is a reasonable prospect of success on appeal."*

5. The facts foundational to this case are that the excipients instituted an action for defamation against the defendants in August 2018. Arising from the impugned publication and statements in which the defendants petitioned the President of the Republic to investigate alleged impropriety at a public institution, the Public Investment Corporation. The President obliged and established a Commission of Inquiry. Three years later, after the original plea was delivered in October 2018, the defendants amended their plea by inserting paragraphs 6A and 15A. It is these amendments that cause discomfort to the plaintiffs. In this case, the excipient brought this application in terms of Rule 23 of the

Uniform Rules of Court, wherein it excepts to the amended plea of the defendants, for it is vague and embarrassing and lacks the averments necessary to sustain a defense. This court dismissed the application because the defendant's pleading did not lack the required averments to defend the action.

GROUNDS OF APPEAL

6. The grounds of appeal filed on behalf of the applicant can be summarised as follows:

6.1. This court erred in viewing the impugned paragraphs as pleading a defense of justification when the impugned paragraphs are instead expressly argued concerning the meaning of the allegedly defamatory statements.

6.2. The learned acting Judge erred in finding that paragraphs 6A.1 to 6A.67 and 15A of the plea ('the offending paragraphs') may establish a defense to the allegations in the particulars of claim that the letter and the tweet ('the published material') are per se defamatory of the applicants.

6.3. The learned acting Judge erred in finding that the offending paragraphs are not directed solely at the meaning of the published material.

6.4. The learned acting Judge should have found that Upon the only reasonable construction of the plea, the offending paragraphs plead what meaning the trial Court should ascribe to the published material. The offending paragraphs are directed solely at the meaning of the published material.

6.5. The trial Judge is required to determine what was conveyed by the published statement to a reasonable person of ordinary intelligence. The evidentiary proof is not admissible in determining the meaning of the published statement.

6.6. The learned acting Judge erred in finding that it is permissible for the respondents to plead the contents of the offending paragraphs by cutting and pasting large extracts of the report of the Commission and further that the offending paragraphs contain a clear and concise statement of the material facts with sufficient particularity to enable the applicants to replicate, if necessary. The learned acting Judge ought to have found that The offending paragraphs comprise a rambling, long-winded, poorly constructed, and improper breach of the ordinary rules of pleading. The offending paragraphs are not reasonably susceptible to the applicants' right to replicate them.

6.7. The learned acting Judge erred in finding that the Commission sustained the allegations in the published material. The learned acting Judge ought to have found that The

Commission was not called upon to adjudicate, and did not adjudicate, the correctness of the published material.

7. At the hearing of this application, Mr Burger contended on behalf of the applicant that this matter raises very complex, novel, and weighty issues that merit the attention of higher courts. He further submitted that dismissing this application would shred the matter of its great latent to put essential issues concerning conflicting decided case laws to bed. Also, contending that the interest of justice warrants granting the sought order. Therefore, these compelling reasons are sufficient to grant the leave to appeal.
8. In this matter and before determining the necessity or otherwise of having regard to the grounds of appeal, the first question for determination is the appealability or otherwise of the order made. It is not in dispute that the order was made pending the finalization of the action under case no 58969/2018, and it is the respondent's stance that the judgment and order are not appealable.
9. Our courts have, over time, developed the law concerning the appealability of interim or interlocutory orders. See ATKIN v BOTES 2011 (6) SA 231 (SCA).
10. In Metlika Trading Ltd and Others v Commissioner, South African Revenue Service 2005 (3) SA 1 (SCA) (2004) JTLR 73; [2004] 4 All SA 410), this court held that an interim interdict is appealable if it is final in effect and not susceptible to alteration by the court of first instance. The decision also emphasized that in determining whether an order is final in effect, it is essential to bear in mind that 'not merely the form of the order must be considered but also, and predominantly, its effect".
11. When addressing the aspect of the appealability of the order, Counsel for the applicants contended that there are conflicting judgments on this particular issue. He referred to a Constitutional Court judgment and the SCA judgment, namely UDM & Another v Lebashe Investment Group & Others 2023 (1) SA 353 (CC), Zweni v Minister of Law-and-Order 1993 (1) SA 523 (A), and TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd & Others 2023 (5) SA 163 (SCA).
12. In summary, the applicant contended that the superior courts have repeatedly held that an order of the court will be rendered appealable if such an appeal would be in the interests of justice. The Constitutional Court reinforced the test in the application for an urgent interim interdict brought by the plaintiffs against the defendants as a precursor to the defamation action. Thus, this is a sufficient ground for leave to appeal to be granted.
13. Further submitting that before UDM v Lebashe came before the Constitutional Court, the Supreme Court of Appeal struck it off the roll. The striking-off was based on the majority

finding by the SCA that the interim interdict, which the High Court had granted in favour of the plaintiffs, was not appealable primarily because the relief was not final, as required by Zweni v Minister of Law and Order. The SCA also held that an appeal against the interim interdict would not be in the interests of justice. The Constitutional Court unanimously rejected the majority finding of the SCA. The court made it clear that the requirements of Zweni are no longer applicable as the sole or even the primary arbiter of appealability and that the accurate measure is in the interests of justice.

14. Further contending that granting leave to appeal in this matter will advance the certainty, allowing the much-needed clarity of the relevant court decisions.
15. Counsel further contended that it is contrary to the interests of justice that the plaintiffs be compelled to face a case on the pleadings, which are deficient in law for the reasons set out in the PIC Report. Emphasizing that there are reasonable prospects of an appeal court finding that the exception was well taken and should be upheld.
16. Mr. Siboto, who appeared for the respondents, submitted that this application is a manifest abuse of process as the applicants were aware that granting the exception would not bar the respondents from seeking the same amendment again. Further, the applicants continue to take the amendment and exception points to avoid the significance of the PIC Report that is scathing against them and that the applicants have never challenged because it contains truths about the applicants.
17. The respondent's contentions regarding the appealability of the order argued contrary to the applicant's interpretation of the SCA TWK decision, and they contend that TWK is binding on this court until it is set aside by the Constitutional Court, meaning the applicants are misguided in their notion that the SCA did not consider the Constitutional Court interest of justice jurisprudence.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

18. The applicant’s application for leave to appeal is based squarely on section 17(1)(a) of the Superior Courts Act. Section 17 of the Superior Courts Act regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

'(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;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a);

and

(c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

19. The test applied previously in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion. With the enactment of section 17 of the Superior Courts Act, the threshold for granting leave to appeal a judgment of the High Court has been significantly raised.
20. The use of the word 'would' in subsection 17(1)(a)(i) of the Superior Courts Act imposes a more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959.4 In Mount Chevaux Trust IT 2012/28 v Tina Goosen and 18 Others, Bertelsmann J stated as follows:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test of whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion. See Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343H. 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". See S v Notshokovu [2016] ZASCA 112 at para 2. 2014 JDR 2325 (LCC) at para 6.

21. What is required of this court is to consider, objectively and dispassionately, whether there are reasonable prospects that another court will find merit in the arguments advanced by the applicants.
22. Reverting to this case, it is undeniable that the issues raised by the applicants and the respondents in their leave submissions are weighty and of great public importance. Also, the above-mentioned authorities establish that the principle on appealability of interim and interlocutory orders at common law has, in certain circumstances, evolved and that where the interests of justice demand leave to appeal should be considered.
23. It has always been a standing principle that interim orders are not appealable, as it is a known fact that an interim order is a temporary order of the court pending a final hearing. The reasoning is based on the fact that orders of this nature are not absolute, and "generally,

it is not in the interest of justice for interlocutory or interim relief to be subject to appeal as this would defeat the very purpose of that relief. See Mathale v Linda and Others 2016 (2) SA 461. See Machele and Others v Mailula and Others 2010 (2) SA 257 (CC). Both the Machele and Mailua cases dealt with interim orders of execution of eviction orders awaiting appeal. The court in Machele found that the interests of justice needed to drive the decision-making process.

24. Recently, the courts have recognized that, in some instances, the general rule can result in irreparable harm to the parties involved. "While the rationale for the non-appealability of interim orders is generally sound.
25. The Constitutional Court in UDM and Another v Lebashe Investment Group (Pty) Ltd and Others held that the test of appealability for interim orders is now in the interests of justice.
26. In Zweni v Minister of Law and Order 1993 (1) SA 523 (A), the court ruled against the appealability of the interim order made by the court of first instance. It tested the interim order against (i) the finality of the order, (ii) the definitive rights of the parties, and (iii) the effect of disposing of a substantial portion of the relief claimed. Subsequently, in Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A), the court held that the test parameters applied in Zwane were not exhaustive.
27. Therefore in deciding what is in the interests of justice, each case must be considered in light of its facts. In this case, I must consider the parties' respective constitutional rights and resolve previous conflicting decisions.
28. I have carefully considered the submissions of the applicant and the respondents, and I find redeeming features that are persuasive to this court and that there are reasonable possibilities that another court would come to a different conclusion.
29. Therefore, leave in these circumstances should be granted, and the issues raised are of importance and certainty and as such, this matter should be considered by the Supreme Court of Appeal.
30. s17(1) of the Superior Courts Act, No 10 of 2013, which provides for the specific circumstances in which a judge may grant leave to appeal, and this section is ideal for the appeal in question for particular reasons. Firstly, there are several conflicting judgments.
31. In Zweni, the court found that an interim order was not appealable. In Moch v Ned Travel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A), the court held that the test parameters applied in Zwane were not exhaustive. In Philani-Ma-Afrika v Mailula 2010 (2) SA 573 (SCA), the court held that the interest of justice was paramount in deciding whether orders were appealable, with each case being considered in light of its

own facts. Secondly, the appeal would lead to a just and prompt resolution of the fundamental issues between the parties, as provided for in section 17(1).

32. In deciding what is in the interests of justice, each case must be considered in light of its own facts.

33. See Mathale v Linda and Others 2016 (2) SA 461. See Machele and Others v Mailula and Others 2010 (2) SA 257 (CC). While the rationale for the non-appealability of interim orders is generally sound, it only sometimes provides for situations where the injustice that arises falls not on the party in whose favor the interim order is granted.

34. In the circumstances, an application for leave to appeal to the SCA will be in the interest of justice.

35. I have listened intently to the submissions advanced by all Counsels in the present application. Given the various authorities involved, as well as issues of interpretation and questions of legality that may arise, an appeal would have reasonable prospects of success. It may also be in the public interest to have some finality on the issues raised by the applicants. For these reasons, leave to appeal should be granted.

Order

As a result, I make the following order:

1. The application for leave to appeal to the Supreme Court of Appeal is granted against the whole of this court's judgment delivered on 17 August 2023.
2. Costs occasioned by the applications shall be costs in the appeal.

TP BOKAKO, AJ

Acting Judge of the High Court
Gauteng Local Division, Pretoria

HEARD ON: 27 OCTOBER 2023

JUDGMENT DATE: 14 NOVEMBER 2023

FOR THE APPLICANT Adv. D I BERGER SC and B M SLON

FOR THE RESPONDENT : Adv. MM KA-SIBOTO