

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 43599/2019

DOH: 27 May 2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
01 July 2022

In the matter between:

MAKHUBELA, DAVID ZOMA

(Identity number: [...])

First Applicant

MAKHUSHE, SHISO DAVID

(Identity number: [...])

Second Applicant

MAKHATSHWA, BOY

(Identity number: [...])

Third Applicant

And

SILINDA, MESHACK THEMBINKOSI N.O.

(Identity number: [...])

First Respondent

In her capacity as trustee of The Mjejane
Trust IT 63358/04

NGOMANE, SIMEON N.O.

Second Respondent

(Identity number: [...])

In his capacity as trustee of The Mjejane

Trust IT63335/04

ZITHA, TIKI LAZARUS N.O.

Third Respondent

(Identity number: [...])

In his capacity as trustee of The Mjejane

Trust IT63335/04

LEDWABA, MPONYANA LAZARUS N.O.

Fourth Respondent

(Identity number: [...])

In his capacity as trustee of The Mjejane

Trust IT63335/04

SILINDA, MESHACK THEMBINKOSI

Fifth Respondent

(Identity number: [...])

In his capacity as trustee of The Mjejane

Trust IT63335/04

NGOMANE, SIMEON

Sixth Respondent

(Identity number: [...])

In his capacity as trustee of The Mjejane

Trust IT63335/04

ZITHA, TIKI LAZARUS

Seventh Respondent

(Identity number: [...])

In his capacity as trustee of The Mjejane

Trust IT63335/04

**THE MASTER OF THE HIGH COURT,
PRETORIA**

Eight Respondent

PETRUS ZEELIE N.O.

Ninth Respondent

FIRSTRAND BANK LIMITED

Tenth Respondent

JUDGEMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON
CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 01 JULY
2022**

BAM J

A. Introduction

1. This is an opposed application for leave to appeal brought by the first, second, third, fifth, sixth and seventh respondents against the decision of this court of 7 March 2022, in which I declined the respondents' application for a conditional postponement (application for postponement) and awarded costs to the applicants, including the costs occasioned by the employment of two counsel. I should at this stage note that I refer to the parties as they are in the underlying application.

2. The respondents had brought their application on the same day which had been pre-arranged to hear Part B of the main application. Soon after I had dismissed the application for postponement, the applicants presented their case in connection with Part B of the main application, at which point, Mr Mosoma, counsel for the respondents, had already asked to be excused as his brief pertained only to arguing the application for postponement. After hearing the applicants, I granted the order which saw the final removal of the first to the third respondents as trustees of Mjejane Trust, including certain ancillary relief as against all the respondents.

3. On 11 March, the respondents requested reasons for my refusal of their postponement application. Those reasons were delivered on 22 March 2022. I add for convenience that in the reasons, I dealt with the history of how the date of 7

March 2022 for hearing Part B of the main application came about; that it was agreed upon by all the parties, way back in November 2021. I set out how the respondents had engaged in delaying tactics, and how the notion of a conditional postponement had come about; that it was premised on the failure of the application for intervention brought by a third party whom I found to have no *locus standi* whatsoever. I further set out that the respondents' application for postponement was filed on 4 March being a Friday, while the hearing of the main application was set down for 7 March 2022, in other words, on the eleventh hour.

4. The respondents, conveniently, do not deal with the absence of a cogent case for bringing their application for postponement on the eleventh hour in their application. I pointed out in my reasons that the respondents had failed to file their supplementary answering affidavit. Initially, they had said they required a postponement of two weeks, on the basis that the senior counsel in charge of settling their supplementary answering affidavit required two weeks to finalise. The two weeks' postponement morphed into a postponement until the administrator had filed his 'final and decisive report' but the respondents could not state when and where the administrator had said he was to file such a report and by when it was expected. I had stated in my reasons that the administrator is required in terms of an order issued by this court to file interim reports on the governance of the trust and that all the parties had agreed to the dates pertaining to the filing of their affidavits and for hearing Part B of the main application knowing that the administrator is bound to file those interim reports. The respondents do challenge these points in their application for leave.

5. I should add before I look at the respondents' grounds, that with the present application, the respondents do not seek leave to appeal the order granted in Part B of the main application. They only seek leave to appeal the outcome of the application for postponement. In the circumstances, the order made in part B will still remain regardless of the outcome of this application.

B. Grounds for appeal

6. The respondents' grounds are set out in their application for leave to appeal. I do not repeat them in this judgement, save to highlight that the respondents submit that I erred in reaching certain conclusions and further that I did not exercise the discretion I am meant to exercise judiciously.

7. The broad thrust of the respondents' submissions is that I erred in not finding that the provenance of the 'proper and decisive report' was in the administrator's interim report. The same point is replicated throughout the application and it is used to amplify other submissions. A few examples will suffice. The respondents state that:

(i) The court misdirected itself in relying on the Tuchten judgment, which judgement related to the interim position and unfairly used same against the respondents prematurely to determine the merits of part B of the application, including the administrator's express statement that he was still to file his 'proper and decisive report'.

(ii) The court erred in not appreciating that the respondents had in fact furnished the trust financial statements from January 2015 till to-date and such filing had informed the administrator's comment of a proper and decisive report.

(iii) The court's insistence in continuing with the hearing without the proper and decisive report of the interim administrator would not only deprive the respondents of their entitlement to a fair hearing in accordance with the law *'but also egregiously inconsistent with the respondents' entrenched rights provided for in the Constitution'*.

8. Thus, the thread of the court having erred in observing that there was indeed such a proper and decisive report appears to be the mainstay of the respondents' application for leave. I dealt with this in my reasons and noted that there was no such indication from the administrator and that the respondents' claims that they were awaiting the administrator's proper and decisive report was simply something they had coined on their own. In any event, the respondents have still never filed audited financial statements with the administrator.

9. There are of course further grounds on which the respondents state that the court misdirected itself, such as, that the applicants put their fate on the success of an application for intervention by a party who had no locus standi, which is undeniable judging from the timing of the application for intervention and the fact that the respondents' application was indeed premised on the fate of the application for intervention. Had the application for intervention have been successful, the respondents would have enjoyed a postponement without having applied for one. Nonetheless, the court cannot be criticised for stating what had indeed occurred.

10. The respondents further criticise the court for not allowing them opportunity to file a replying affidavit following the answering affidavits of the applicants. The respondents have themselves to blame here. They brought their application on the day earmarked for hearing the main application. They cannot now complain that the court should have allowed them an opportunity they had denied themselves in the first because of the late filing of their application. The assumption that the court should have allowed the exchange of affidavits in a situation that was clearly engineered to delay hearing Part B of the main application is misinformed.

11. A further point of criticism is that the court placed reliance on the Tuchten judgement to decide Part B of the main application. There is no merit to this point. The court did not place reliance on the Tuchten judgement to decide any of the applications. The court referred to the judgement as part of its illustration of how the matter had evolved.

12. A further ground deals with how the court erred in dealing with the intervention application. In this regard the respondents have taken time to set out how the court should have handled the intervention application from a procedural point of view. Counsel for the respondents, Mr Shakoane SC, conceded on the day of arguing the application that the respondents were not party to the intervening application. He nonetheless persisted in elaborating on how the court had erred in respect of dealing with the application for intervention. This, respectfully, is a ground that should not have concerned the respondents at all.

13. The respondents complain that the court should have taken into account that this was their first application for postponement. It is true that the respondents had made the point that this was their first application for postponement but that did not take their case any further. Their application simply lacked merit. I provided reasons for this conclusion. There is no need to repeat those reasons in this judgement.

14. Finally, the respondents state that they have reasonable prospects of success in that another court would come to a different finding and, that the facts and grounds upon which they rely raise important legal issues to the parties. In all, the respondents suggest that it is in the interests of justice that leave to appeal be granted. The submission that the grounds raise issues of legal importance is a conclusion without foundation. The respondents have not set out what issues of legal importance are presented in this application. The applicants argued that the law in relation to both postponements and leave to appeal decisions relating to postponements is fairly settled, and that there is absolutely nothing in the respondents' application that raises issues of legal importance. I agree.

C. The Law

15. Section 16 (2) (a) (i) of the Superior Courts Act provides:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'¹

16. In terms of section 17 (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; and
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a).'

¹ Act 10 of 2013

17. The law pertaining to discretion and whether a superior court will interfere with how the court of first instance has exercised its discretion is set out in *Myburgh Transport v Botha t/a S A Truck Bodies*, where the court remarked:

‘A The trial Judge has a discretion as to whether an application for a postponement should be granted or refused.

(a) That discretion must be exercised judiciously. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.

(b) An appeal court is not entitled to set aside the decision of a trial court granting or refusing a postponement in the exercise of its discretion merely on the ground that if members of the court of appeal had been sitting as a trial court they would have exercised the discretion differently.

(c) An appeal court is, however, entitled to and will in an appropriate case set aside the decision of a trial court granting or refusing a postponement where it appears that the trial court had not exercised its discretion judiciously, or that it had been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which in the result could not have been made by a court properly directing itself to all the relevant facts and principles. ‘²

18. On the same question of interference by an appellate court on the discretion exercised by the High Court, Mogoeng CJ as he then was, writing as minority in *Public Protector v South African Reserve Bank* made these comments, citing the principle as an old standing one and relying on *Florence v Government of the Republic of South Africa*³. I note that the comments were in relation to the discretion of the High Court in relation to the question of punitive costs. Nonetheless, the principle quoted deals with the exercise of the High Court’s discretion and in what instances an appellate court may interfere:

‘The discretion exercised by the High Court when awarding personal costs on an attorney and client scale against the Public Protector is a “true” or

² 21991 (3) SA 310 at 314 paragraphs F- J

³ [2014] ZACC 22 at paragraph 113

“strong” discretion. It is a discretion that is not to be easily interfered with on appeal. And it would only be permissible for this Court to interfere with that discretion if it can be shown that the court whose decision is under attack—
“had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all relevant facts and principles.”⁴

19. What informs the appellate restraint according to the court in *Florence v Government of the Republic of South Africa*⁵ is, ‘ ... judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.’

D. Analysis

(i) Section 16 (2) (a) (i)

20. The question whether to grant the respondents leave to appeal must first be answered with reference to section 16 (2) (a) (i). The common cause facts are:

- (i) Following the unsuccessful application for postponement, the applicants presented their case in connection with with Part B of the main application and the court upheld their case and granted the final order.
- (ii) The final order, removing the first to the third respondents stands and has not been rescinded nor is it subject to any application for leave to appeal.
- (iii) The respondents seek leave to appeal only the decision relating to the postponement.

21. The applicants submitted that on this basis alone, leave to appeal should not be granted as it would serve no practical effect because the final order will still remain. I agree that on this basis alone, leave must be refused.

(ii) Whether the decision is appealable

22. The question whether the decision is appealable at all requires some doing. More than three decades ago, the highest court, as it then was, answered this

⁴ [2019] ZACC 29 at paragraph 107

⁵ [2014] ZACC 22 at paragraph 113

question in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*, and it said:

‘ ..But not every decision made by the court in the course of judicial proceedings constitutes a judgment or order. Some may amount merely to what is termed "a ruling", against which there is no appeal. The distinction between a ruling on the one hand and a judgment or order on the other hand was first drawn in this Court in the leading case of *Dickinson and Another v Fisher's Executors* 1914 AD 424, at pp 427-8:

”But every decision or ruling of a court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the Court must be duly asked to grant some definite and distinct relief, before its decision upon the matter can properly be called an order. A trial Court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin: the Court decides it, and the hearing proceeds. But that decision, though it may be of considerable practical importance, is not an order from which an appeal could under any circumstance lie, apart from the final decision on the merits.”⁶

23. The applicants’ counsel, Mr Strydom SC together with Mr van den Bogert argued that the decision refusing the postponement is not appealable as it did not determine the rights of the parties in the underlying dispute. They referred this court to *Zweni v Minister of Law and Order*, where Harms AJA, as he then was, said:

‘For different reasons it was felt down the ages that decisions of a ‘preparatory or procedural character’ ought not to be appealable (*per* Schreiner JA in the *Pretoria Garrison Institutes* case *supra* at 868). One is that, as a general rule, piecemeal consideration of cases is discouraged. The importance of this factor has somewhat diminished in recent times (*SA Eagle*

⁶ 1987 (4) SA 569 (A) at paragraph 12, 14

Versekeringsmaatskappy Bpk v Harford [1992] ZASCA 42; 1992 (2) SA 786 (A) at 791B – D). The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution (*Priday t/a Pride Paving v Rubin* 1992 (3) SA 542 (C) at 548H – I).”⁷

24. The respondents did not deal with the question whether the decision refusing their application to postpone had resolved any issue or portion thereof on the relief sought in the underlying application. In *Absa Bank v Mkhize*, the Supreme Court of Appeal had the following to say, in connection with an appeal lodged against an interlocutory of preparatory decision:

‘To my mind paragraph 2 of the order, on which the present debate turns, did not render what would otherwise have been a non-appealable order... , appealable. For, it amounted to no more than a direction from the high court, before the main action could be entered into, as to the manner in which the matter should proceed. Being a preparatory or procedural order that was incidental to the main dispute, it fell into what has been described as the general category of ‘interlocutory’....[61] In the present case the ‘main suit’ or ‘main action’ is Absa’s claim. An order such as that in paragraph 2 is, I conceive, a ‘preparatory or procedural order’ which does not bear upon or in any way affect the decision in the main action. In *Tropical (Commercial & Industrial) Ltd v Plywood Products Ltd*. 1956 (1) SA 339 (A) at 344 Centlivres CJ held:

‘As the order made by the trial Judge "decided no definite application for relief" and was merely a direction as to the manner in which the case should proceed it was not an order in the legal sense.... Not being an order in the legal sense, it was not an order which fell within the meaning of the words "judgment or order" in sec. 2 (c) of the Act.’⁸

⁷ 1993(1) SA 523 (A) at paragraph 8

⁸ (716/12) [2013] ZASCA at paragraph 59

25. More recently, in *Grobler v MFC*⁹, this court, relying on the dictum in *Friday t/a Pride Paving v Rubin*¹⁰, turned down an application for leave to appeal a decision refusing a postponement. The court reasoned that such a decision did ‘not dispose of any substantial portion of the merits, determine their rights of the parties or bear any of the other commonly apprehended hallmarks of finality of which interlocutory orders are ordinarily required to be possessed in order to qualify for appealability’.

26. In *Moch v Nedtravel (Pty) Ltd. t/a American Express Travel Service*¹¹, the court cautioned that the factors set out in *Zweni v Minister of Law and Order*¹² do not purport to be exhaustive or cast the relevant principles in stone. Taking into account the *ratio* in the aforementioned cases, including the caveat sounded by the court in *Moch v Nedtravel*, the ineluctable conclusion one reaches is that the decision refusing the respondents’ application for postponement is not appealable.

(iii) Does the respondents’ case meet the requirements of section 17 (1) (a) (i)

27. Having interrogated the respondents’ application for leave to appeal through the lenses of section 16 (2) (a) and concluded that the issues sought to be appealed would have no practical purpose and that the appeal should be dismissed on that basis alone, and having concluded that the decision was not appealable, I nonetheless consider whether the application meets the threshold set out in section 17 (1) (a) (i). The test set out in section 17 (1) (a) (i) has been the subject of interpretation by this and the superior courts. It is articulated in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*, where the court reasoned that the Superior Courts Act has raised the bar for granting leave to appeal. With reference to *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*, the court noted:

‘ “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 whether leave to appeal should be granted was a reasonable prospect that another

⁹ (1548 of 2019) [2021] ZAGPJHC 469 (08 December 2021)

¹⁰ see para 11 of this judgement

¹¹ (329/95) [1996] ZASCA 2; 1996 (3) SA 1 (SCA); (22 February 1996)

¹² para 11 supra

court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 T at 343H. 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." ¹³

E. Conclusion

28. I find that the respondents have failed to make a case and there is no prospect that another court would come to a different finding on the decision I had made refusing postponement. The mainstay of the respondents' case in this application is that the court erred in not allowing them the postponement because they were waiting for the unknown 'proper and decisive report'. They did not file their supplementary answering affidavit for reasons that evolved over time with no connection to each other. Reasons, I found to be baseless. To add weight to their application, they included grounds such as how the court erred in dealing with the intervention application, a matter that had no bearing in their application. They claimed that the court did not exercise its discretion judiciously but failed to identify in what respects the court acted capriciously or was influenced by incorrect legal principles. Simply, this was a conclusion with no foundation. The respondents' application raises no issues of legal importance. The application falls to be dismissed.

F. ORDER

29. The application for leave to appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

NN BAM
JUDGE OF THE HIGH COURT,
PRETORIA

DATE OF HEARING: 27 May 2022

¹³ (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at paragraph 25

APPEARANCES

APPLICANTS' COUNSEL:

**Adv Strydom SC with Adv Adv D
van den Bogert**

Instructed by:

Murphy Kwape Maritz Attorneys
% Phosa Loots
Attorneys, Boardwalk, Fearie
Glen, Pretoria

First, Second, Third, Fifth, Sixth and Seventh Respondents' counsel:

Adv Shakaone SC with Adv Mosoma

Instructed by:

Ngomane Inc Attorneys, Pretoria