

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2022/045978

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

SIGNATURE

...08/03/2024.....
DATE

In the matter between:

VANTAGE MEZZANINE FUND II PARTNERSHIP

First Applicant

VANTAGE MEZZANINE FUND II (PTY) LTD

Second Applicant

and

NOMVETE SANDILE HOPESON

First Respondent

MRIGA JABULANI VINCENT

Second Respondent

MAGWAZA JOHANNES BHEKUMUZI

Third Respondent

COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION

Fourth Respondent

LEAVE TO APPEAL - JUDGMENT

Manoim J

- [1] This is an application for leave to appeal a decision I gave on 24 November 2023. What I was called upon to decide was an application by the plaintiffs for leave to appeal their particulars of claim. The third defendant (“now the applicant in the leave to appeal”) opposed the application on the grounds that it was excipiable.¹
- [2] In brief the plaintiffs are creditors of a company in which the third respondent, *inter alia*, served as a director. The plaintiffs seek to rely on section 162(2) of the Companies Act 71, 2008 (“the Act”) to declare all the defendants in the matter, including the third, delinquent directors. Although that section of the Act does not expressly give a creditor standing to make such an application, the plaintiffs sought to rely on section 157(1)(d) of the Act which in general terms gives extended standing to apply for relief in terms of the Act, to a “... *person acting in the public interest with the leave of the court.*”
- [3] In opposing the application for amendment the third defendant raised a number of points by way of exception. One of them principally is what I have termed the sequencing issue. On his interpretation of section 157(1)(d), “*leave of the court*” means that the plaintiffs required leave of the court before they issued summons. I decided this point against the third defendant reasoning that the Act makes out no such requirement. Rather, following two other previous decision on this point (*REDISA* and *OUTA*) I held that there was no such

¹ The other two defendants did not oppose the application to amend.

prerequisite, and the matter could be decided by the court hearing the matter as a special plea as it was in *OUTA*.²

- [4] The third defendant argues that I erred because I did not follow the SCA decision in *REDISA*, which overturned the decision I, and the court in *OUTA* had followed.³ It is correct that in the appeal of *REDISA*, the SCA overturned the court a quo's decision, as I noted in my judgment; but it did not opine on this point. In the application for leave to appeal Mr Broster, who appeared for the third defendant, sought reliance on several passages from the majority and minority judgment, to try and persuade me that it had. With respect I cannot read those passages to deal with the sequencing point. The closest he could get to the point was this paragraph from the majority in the SCA *REDISA* decision.

*"In my view both applications should have failed at the ex parte stage of the proceedings because the Minister had not established the right to obtain this remedy- the provisional liquidation order — in the public interest."*⁴

- [5] But I do not read this paragraph as one deciding the sequencing issue. Rather this states the Minister had to establish the right to the remedy in the public interest. I have not decided anything to the contrary. I have not decided by

² The Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC 2018 (3) SA 604 (WCC).(*REDISA* 1) and Organisation Undoing Tax Abuse and Another v Myeni and Others (15996/2017) [2019] ZAGPPHC 957 (12 December 2019) <https://www.saflii.org/za/cases/ZAGPPHC/2019/957.html>.(*OUTA*)

³ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA).

⁴ *Supra*, paragraph 136.

allowing the amendment that the plaintiffs have established they are acting in the public interest. That is a factual enquiry to be determined later as I made clear in the decision.

[6] The next exception point was that a creditor does not have standing in terms of the Act to seek disqualification. I decided that this was a question of fact and that a creditor could bring such relief. But I did not determine that the plaintiffs had established this fact at this stage. The argument now being made by the third defendant is that I have decided a point of substantive law on standing and hence my decision on this point is final and hence appealable.

[7] The plaintiffs argue that the entire appeal is misplaced because the order I have given is not final on any of the issues. They argued that it may well be that the court that gets to decide the issue on the facts, may conclude that the plaintiffs do not have standing.

[8] The plaintiffs are correct. A court might still conclude that the plaintiffs are not entitled to this remedy because they are not acting in the public interest. For my decision to be final it would require a finding that a creditor could never seek such a remedy, and hence, any finding, that it still may, is final.

[9] But in *Zweni*, which both parties agree is the leading decision on this point, the question of whether an order is final, in the sense that is appealable, rests on whether it has the following three attributes:

- (i) the decision must be final in effect and not susceptible to alteration by the Court of first instance;

- (ii) it must be definitive of the rights of the parties; and
- (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.⁵

[10] The plaintiffs argue correctly that my order has none of these three attributes. The issue raised in this litigation which is of final effect is whether the plaintiffs can seek the disqualification relief. I have not decided this relief.

[11] The other objection to granting leave to appeal at this stage is that it invites piecemeal litigation. Even if a court on appeal were to uphold my decision, the matter could still come back at a second stage, if the trial court were to decide that the creditor had established public interest standing. Then there might be another appeal. If that failed then there might be a further appeal on whether the court had correctly or not granted relief in terms of section 162(2) which sets out a further test. It is not difficult to see how the matter will never get to final determination if it was broken up into pieces like this. Whilst later cases suggest that the *Zweni* trilogy might not always constitute the definitive test, because despite this test leave could be granted if it was “in the interests of justice”, no such case is made out here. There has been no new case law on this point that either side has drawn to my attention since I heard the matter in November last year.

⁵ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

- [12] Leave to appeal should not be granted lightly especially when it would prolong, not curtail litigation. As Coleman J observed in *Swartzberg v Barclays National Bank Ltd* 1975 (3) SA 515 (W)

“...what has to be considered in an application for leave to appeal against the grant of provisional sentence, is whether the appeal - if leave were given - would lead to a just and reasonably prompt resolution of the real issue between the parties. If it will not do that, but will merely be concerned with procedural matters and possibly costs incurred in relation to such matters, that, so the authorities say, is a ground for refusing leave to appeal.”

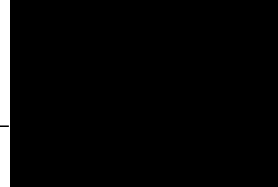
- [13] I consider that the order I have granted is not final and hence not appealable. But even if I am wrong on this point an appeal court would have to consider the law point – whether a creditor of a company can seek disqualification of a director, on the pleadings only, without the benefit of a record. In short having to decide a law point in abstract. That would not be in the interests of justice. Thus, to the extent that post *Zweni* case law adds this factor into consideration of whether an order is final and hence appealable, I consider that this interest also forms another basis to refuse leave to appeal.

- [14] The application for leave to appeal is dismissed. Both parties made the services of two counsel, so I consider it uncontroversial to order costs to include the services of two counsel.

ORDER: -

- [15] In the result the following order is made:

1. The application for leave to appeal is dismissed.



N. MANOIM

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

Date of hearing: 07 March 2024

Date of judgment: 08 March 2024

Appearances:

Applicants' Counsel:

GW Amm SC

(Respondent in the leave to appeal):

SG Dos Santos

Instructed by:

Cliffe Dekker Hofmeyr Inc.

Third Respondent's Counsel:

LB Broster SC

(Applicant in the leave to appeal):

JP Broster

Instructed by:

Bruce Rist Inc.