

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

CASE NO: 26446/2015

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

Date: 3 March 2023

M[....]1 F[...]

First Applicant

M[....]1 F[...]
**NO TRUSTEE OF THE FREEMAN
BUSINESS TRUST**

Second Applicant

**MANDI FREEMAN NO TRUSTEE OF THE FREEMAN
BUSINESS TRUST**

Third Applicant

**JJ[....] F[....]3 NO TRUSTEE OF THE FREEMAN
BUSINESS TRUST**

Fourth Applicant

**RAMREF MANAGEMENT AND
HOLDINGS (PTY) LTD**

Fifth Applicant

FERMAR (PTY) LTD	Sixth Applicant
KAMEELDORING VLAKTE BOERDERY (PTY) LTD	Seventh Applicant
SCHWEIZER ABATTOIR (PTY) LTD	Eighth Applicant
DRIVEN DIESEL ENTERPRISES (PTY) LTD	Ninth Applicant
FERMAR CAPE TOWN (PTY) LTD	Tenth Applicant
SABLE GRANITE (PTY) LTD	Eleventh Applicant
BHEJANE MINING AND CRUSHING (PTY) LTD	Twelfth Applicant
BHEJANE GRANITE (PTY) LTD	Thirteenth Applicant
MAXON SECURITY SERVICES (PTY) LTD	Fourteenth Applicant
R & M RANCH (PTY) LTD	Fifteenth Applicant
LEGAD (PTY) LTD	Sixteenth Applicant
AFROPULSE 177 (PTY) LTD	Seventeenth Applicant
NORTHERN SPARK TRADING (PTY) LTD	Eighteenth Applicant
SILVER SNAKES TRADING (PTY) LTD	Nineteenth Applicant
BIG CEDAR TRADING 89 (PTY) LTD	Twentieth Applicant
HIGHLAND GATE BOERDERY (PTY) LTD	Twenty-first Applicant

GVDM COLLECTIONS (PTY) LTD

Twenty- second Applicant

EV PROPERTY HOLDINGS (PTY) LTD

Twenty-third Applicant

BLOEMFONTEIN EV PROPERTIES (PTY) LTD

Twenty-fourth Applicant

LOWVELD SPORTS INITIATIVE (PTY) LTD

Twenty-fifth Applicant

M[....]2 F[...]2

Twenty-sixth Applicant

JJ[....] F[....]3

Twenty-seventh Applicant

and

C[....] G[....] F[....]4

Respondent

In the matter between:

M[....]1 F[...]1

Plaintiff

and

CORNELIA GERTUIDA FREEMAN

Defendant

JUDGMENT

DE VOS AJ

[1] The parties are involved in divorce proceedings. The defendant, in the divorce proceedings, sought to join certain additional parties. Specifically, the defendant sought

the joinder of the beneficiaries and trustees of a family trust, the family trust and several companies. The defendant intends to request the Court seized with the main divorce proceedings, to pierce the corporate veil of the companies and to vest the properties of the trust in the plaintiff. The defendant has pleaded, amongst other allegations, that the plaintiff runs a massive business empire, avoids keeping his personal assets in his own name and rather secures his assets in companies and trusts and pays his personal and business expenses of the entire business empire from one company.

[2] The Court held that the test of direct and substantial interest was met and joined these additional parties. The sole relief granted was that of joinder. No other relief was granted against the additional parties. The additional parties seek leave to appeal against their joinder.

[3] The common law position was that interim and interlocutory orders are not appealable, as they are not final. The principle underpinning this approach was that courts are loath to encourage wasteful use of judicial resources and to unnecessarily increase legal costs. Indeed, permitting parties to appeal at an interim stage leads to piecemeal adjudication of disputes and delays the final determination of disputes.

[4] The position that interim and interlocutory orders are not appealable is not an inflexible rule. The rule to be applied is that of the interest of justice. If the interest of justice demands, then an interim or interlocutory order can be appealed. The test for leave to appeal requires the court to have regard to and weigh germane circumstances. A court has to weigh up several considerations, including whether the relief granted was final in its effect, definitive of the right of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.¹

¹ Von Abo v President of the Republic of South Africa (CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC) ; 2009 (5) SA 345 (CC) (5 June 2009)

[5] The defendant has alleged that the plaintiff earns an income in excess of half a million a month from the joined parties (excluding benefits in the form of shareholding).² The defendant has also alleged that the plaintiff uses the joined parties as vehicles to hold his own assets which he does not wish to hold in his personal capacity; pays all his personal and his entire business empire's expenses (including those of the other joined parties) from funds held in one of the joined parties; that the assets of the defendant was used to set up one of the joined parties and that in the time leading up to the divorce as well as during the divorce proceedings, the plaintiff attempted to estrange some of the assets in the communal estate through the joined parties.

[6] The defendant has also pleaded the shareholding of the various companies which indicate that several of the companies hold majority shares in each other and have inter-company loans. The defendant has also pleaded that the plaintiff is the director or majority shareholder in most of the companies. In this way, the defendant has pleaded a web in which the joined parties are interlinked with each other and the estate of the plaintiff.

[7] The joined parties have not indicated what harm the joined parties will suffer as a result of the joinder or what right of theirs has been infringed. Our courts have granted leave to appeal against interim orders where the parties' rights have been affected. The joined parties have not identified any right that is being infringed. The Court has made no finding on the rights of the joined parties and have not determined any portion of the relief sought in the main proceedings.

[8] Of course, the joinder of a party may inconvenience them as they have to attend to legal proceedings. However, this is mitigated by the remedy contained in an exception. If the defendant cannot sustain a cause of action against them, the joined parties will be successful at an early stage of the proceedings and can agitate for the costs they incurred. Indeed, the joined parties raised no harm other than it had to defend itself in the main proceedings. The rules of court and the law on costs provides the joined parties with the avenue to address this inconvenience and attendant costs.

² Founding Affidavit para 9.3

[9] The defendant however, stands to suffer real harm and a limitation of her right to have her dispute adjudicated in a court of law, as opposed to inconvenience, if she is not permitted to join these parties to the proceedings. If they are not joined, the defendant is legally barred from seeking relief against the trust and companies. The defendant has no true alternative remedy or avenue available to seek relief against the joined parties, other than to seek their joinder in these proceedings. The defendant, if not granted joinder at this stage, is deprived a cause of action being considered by a Court.

[10] It weighs with the Court that the order for joinder is not determinative of any rights or interests of the joined parties. Whilst the interim nature of the relief granted is not the sole determining factor in an application for leave to appeal, it remains a relevant consideration. The Court requested the parties for assistance in providing any case law in which leave to appeal was granted against an order joining a party to proceedings. I am grateful for the assistance received. The parties filed additional submissions on 7 December 2022 in this regard. The parties, represented by three sets of representatives, could not refer the Court to a body of case law that permitted leave to appeal in joinder applications. Such case law is either obscure to all three parties in this matter or the weight of jurisprudence does not assist the parties seeking leave to appeal.

[11] The only authority that could be brought to the Court's attention is the judgment in *JW v JW*³ in which the Court refused leave to appeal against a joinder decision without considering the interim nature of the joinder. The Court did not need to consider the interim nature as it concluded that it was not in the interest of justice to grant leave to appeal. Also, in *JW v JW* the Court was dealing with an application for leave to appeal on the basis that there is some other compelling reason to grant leave to appeal. No party has made such a submission in this matter.

[12] The Court also considers that if leave to appeal is granted, the matter will proceed piece-meal and the costs in an acrimonious divorce will increase. The joined parties have raised no issue relating to interest of justice other than the submissions that the Court

³ *JW v JW* 2021 JDR 3106 (ECP)

erred in its approach to the test of joinder. The relief granted is not final in effect, nor is it definitive of the rights of the parties. The joinder did not dispose of a substantial portion of the relief claimed. It would not be convenient to grant leave at this stage and it would result in undue inconvenience and piece-meal adjudication of appeals.

[13] The Court will consider the specific grounds of appeal. The joined parties form two categories. They have different legal representation and have raised different grounds of appeal. In order to afford them each consideration, I deal with them separately, commencing with the arguments of the beneficiaries and trustees (3rd, 4th, 26th and 27th respondents).

[14] The Court considered that the trustees and beneficiaries conceded that have an interest in the main proceedings. The trustees and beneficiaries submitted that they stand to be deprived of certain benefits - if the relief sought by the defendant is ultimately successful. The trustees and beneficiaries submitted that they "naturally have an interest in the proceedings" because –

"if a claim succeeds in the divorce action that the Freeman Familie Trust be declared to be the alter ego of the plaintiff, it follows that the 3rd, 4th, 26th and 27th respondents **stand to be deprived of the benefits** that may be derived by virtue of their capacities as beneficiaries of the Freeman Familie Trust. **They have an interest in the proceedings by virtue of their capacities as trustees and beneficiaries of the trust.**"

[15] The trustees and beneficiaries seek leave to appeal on the basis that the concession that the trustees and beneficiaries have an "interest" in the proceedings is insufficient to meet the test for joinder. The breadth of the concession however goes further as the trustees and beneficiaries concede that "they stand to be deprived of benefits" if the relief sought by the defendant is granted. The submission of the trustees and beneficiaries interests viewed together with the facts alleged by the defendant in relation to the additional parties, is sufficient to indicate that the test for joinder has been met.

[16] The Court now turns to the grounds of appeal raised by the trust and companies (1st, 2nd and 5th - 25th respondents). The trust and companies accept that the Court applied the correct test.⁴ The critique is that the Court did not set out the facts on which it concluded that the test for joinder had been met. They contend that the Court dealt "scarcely, if at all with the facts"⁵ on which it concluded the test had been met. The Court set out the facts it considered as relevant to the test of joinder in several paragraphs.⁶ This ground of appeal's foundation is not born out by the judgment in this matter.

[17] The crux of the application for leave to appeal by the trust and the companies is that the defendant has failed to adduce sufficient evidence in order to establish a lis between the parties. The trust and companies rely on the judgment in *Tilston v Tilston*.⁷ The crux in *Tilston* is that as there was no reference to a trust in the counterclaim the Court concluded that no lis had been made out to substantiate the joinder of the trust.

[18] The facts of this case are different to those in *Tilston*. In these proceedings, the defendant had made allegations, that if proven at trial, would ground relief against the joined parties. These allegations appear in the affidavit motivating for joinder. The defendant has also pleaded a detailed case against the trust in the proposed amendment which it will file subsequent to the joinder application. The proposed counterclaim ought not be seen in isolation. The Court also notes that the amendment is merely proposed, is not finalised and that the rules of Court will permit the defendant to file the necessary papers after the finalisation of this process.

[19] The Court must consider the joinder application not only in light of the proposed amendment but also based on the allegations contained in the affidavit motivating for the joinder of the parties. These allegations indicate that the joined parties have a direct and substantial in the relief sought by the defendant.

⁴ Grounds of appeal, para 11 (CL 21-8)

⁵ Grounds of appeal, para 11 (CL 21-8)

⁶ These appear in paragraphs [9] - [12] of the judgment and in the eleven subparagraphs of footnote 13.

⁷ *Tilston v Tilson and Others* [2021] JOL 51609 (GJ)

[20] The application for joinder certainly creates a lis between the parties. The proposed counterclaim ought not be seen in isolation. The Court also notes that the amendment is merely proposed, is not finalised and that the rules of Court will permit the defendant to file the necessary papers after the finalisation of this process.

ORDER

[21] In the result, the following order is granted:

1. The applications for leave to appeal are dismissed.

I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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Counsel

for the 3,4, 26 and 27 respondents:

I Vermaak-Hay

Instructed by:

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Counsel

for the remainder of the respondents:

FW Botes SC

Instructed by:

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Date of the hearing:

1 December 2022,

Date of judgment:

7 December 2022 (submissions)

3 March 2023