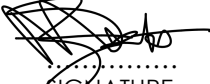




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
5 April 2023	
.....	
DATE	SIGNATURE

Case no: 6972/2022

In the matter between:

SHERYL LYNN BRICKER

FIRST APPLICANT

CARL BRICKER

SECOND APPLICANT

AND

DOMINIQUE HOBKIRK

RESPONDENT

JUDGMENT

Mazibuko AJ

1. The applicants seek leave to appeal to the Full Court; alternatively, the Supreme Court of Appeal, against this court's whole judgment and order delivered on 23 January 2023, confirming the interim interdictory order granted by Wepener J on 2 August 2022 against the applicants.

2. In terms of the interdict, the applicants are prohibited from making any form of contact with the respondent, from videoing or photographing her to interfering with her employer and place of employment.
3. This court does not purport to set out the exhaustive grounds of appeal again or repeat that which is set out in the judgment as that which was relevant was dealt with in the judgment.
4. The grounds for leave to appeal are submissions and contentions about how this court should have exercised its discretion.
5. In summation, the following are the grounds of the bout on the judgment in that: this court erred in
 - 5.1. Finding that there exist allegations relating to the second applicant.
 - 5.2. Finding that the second applicant acted in concert with the first applicant. There was no reference to the second applicant having been complicit in any shape or form. Therefore the court erred in finding that they were both party to the sending of the e-mail.
 - 5.3. Not having construed that the e-mail was protected by qualified privilege.
 - 5.4. Not considering the purpose of the e-mail, which was to obtain information and documentation from the respondent's employer to test the respondent's version. Further that there were emails.
 - 5.5. Finding that no cogent facts were presented that set out the prejudice which the applicants would suffer should the interim order be made final, also, by not having regard to the applicants' contention that the terminology employed by the order would severely limit the applicant a right to use and enjoy their property.
6. Further ground was that the court erred in
 - 6.1. applying the test set out in Webster as qualified by Gool.

- 6.2. Not considering that given the real dispute of fact, the applicants' version was supposed to have been accepted, which would have resulted in dismissing the respondent's claim.
- 6.3. Considering that the respondent had made out a sufficient case in that there was actual harm. Further, by not considering the absence of wrongfulness when considering or finding that the applicants' conduct was defamatory.
7. The respondent filed no cross-appeal. It opposed the application and argued in favour of the judgment that the court's reasoning was fully set out in the judgment.
8. The issue to be determined is whether there is a reasonable prospect of success in terms of section 17 (1) (a) (i) of the Superior Courts Act, Act 10 of 2013 ("The Act"). Also, whether there is a compelling reason to grant leave to appeal as contemplated by section 17(1)(a)(ii) of the Act, namely the interests of justice.
9. In *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015)(2016) ZASCA 176 (25 November 2016), the Supreme Court of Appeal held that: *"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."*
10. The applicants contend that there is a misjoinder of the second respondent and that the court ought not to have granted an order against the second respondent on the basis that the respondent only implicated the first applicant. Further, only the first applicant sent the email to the respondent's employer. The evidence presented before the court was that the first and second applicants acted in consort, and both infringed on the applicant's rights. To the extent that the first

applicant refers to “we” and us in their affidavits. In the email, a reference is made by the first applicant to “*my brother and myself*”, “*our attorney “we”, and “us”*”.

11. The second applicant stated that she observed the respondent to the point of knowing what she was doing, how she was spending her time, and with whom. The second respondent referenced bringing the CAP to witness what the respondent said. There was also evidence that the court accepted that the second applicant recorded the respondent without her knowledge or consent.
12. The respondents contend that the order limits their freedom. The order clearly prohibits the appellants from coming within 20 meters of the respondent. According to the applicants, their apartment is far away from the respondent. Nothing prejudices them in so far as the contents of the order are concerned.
13. The applicants have been legally represented since 3 May 2022. The email partly falls under legal privilege and/or qualified privilege. Even if the court could accept that nothing precluded the applicants from securing the information from the respondent’s employer, it was argued on behalf of the applicants that the email could not be defamatory as it was only meant to request information. On reading the email in question, it is clear the email was meant to belittle and harass the respondent by both applicants.
14. In relation to the dispute of facts, considering all the evidence presented, the court could not find material dispute of facts that required the referral of the matter to open court for adjudication. No other court, presented with the same evidence, would find that there was material dispute of facts. Therefore, the application for leave to appeal cannot succeed due to lack of reasonable prospect of success.
15. It was argued on behalf of the applicants that it was required of the respondent to prove that she had a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy.

16. The respondent made out a case to protect her rights. This court correctly confirmed the interim interdictory order granted by Wepener J on 2 August 2022 against the applicants to protect the respondent from any further harm by the applicants.
17. Regarding the compelling circumstances as envisaged by Section 17(1)(a)(ii) of the Superior Courts Act. The applicants submitted that it was in the interest of justice that leave is granted as there were new points of law.
18. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para [2] that: *“A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here, too, the merits remain vitally important and are often decisive.”*
19. Applying the test in *Caratco* and assessing the merits of the applicants’ case, including their grounds of appeal, the court could not find any compelling factors necessitating the hearing of the applicant’s appeal.
20. Consequently, the application for leave to appeal must fail. The following order is made:
Order
The application for leave to appeal is dismissed with costs.



N. Mazibuko

Acting Judge of the High Court of South Africa
Gauteng, Pretoria

This Judgment is digitally submitted by uploading it onto Caselines and emailing it to the parties.

Representation

Counsel for the Applicants:

Ms B Brammer

Instructed by:

Gary Rachbuch & Associates

Counsel for Respondent:

Ms N Strathem

Instructed by:

Ulrich Roux & Associates

Date of hearing:

10 March 2023

Judgment delivered on:

05 April 2023