



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

Case No: 2016/19982

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

E LABUSCHAGNE

DATE: 28 JULY 2023

In the matter between:

RUELE, LISBETH AND TWO OTHERS

Applicant/Appellant

and

ROAD ACCIDENT FUND

First Respondent

MALATJI & CO ATTORNEYS

Second Respondent

In re:

ROAD ACCIDENT FUND

Applicant

and

RUELE, LISBETH

First Respondent

THE SHERIFF, PRETORIA EAST

Second Respondent

MALEPE ATTORNEYS

Third Respondent

THE LEGAL PRACTICE COUNCIL

Fourth Respondent

APPLICATION FOR LEAVE TO APPEAL: JUDGMENT

- [1] The RAF brought an urgent application for the suspension of a court order of Basson J dated 15 February 2021, and all writs of execution pursuant thereto, pending the finalisation of an application to rescind the court order. The urgency of the application lay in a sale of execution scheduled for 25 July 2023.
- [2] The court order in question had already previously been suspended by Davis J on 6 October 2021 pending the institution of an application by the RAF to rescind the court order dated 15 February 2021 within 20 days of his order and finalisation of the application.
- [3] A day after Davis J granted the order, the attorneys acting for the plaintiff in that matter, and who had obtained an order against the RAF on 15 February 2021, suggested that the matter be retried. This was accepted by the RAF, who asked for a Rule 42 notice abandoning the judgment.
- [4] The attorneys for the plaintiff have however failed to set the matter down for trial, as agreed, but, after a two-year hiatus, proceeded to again execute on the court order.
- [5] In June 2023 the RAF launched an application for the rescission of the order of Basson J, dated 15 February 2021. That application is pending and places the causa giving rise to the Basson judgment in dispute.

- [6] I was persuaded to, in the light of these circumstances, grant an order in terms of Rule 45A suspending the order pending finalisation of the review application and interdicting the Sheriff from proceeding with the execution of warrants of execution against the RAF's movable assets. I granted an order that costs be paid by the first and third respondents, namely the plaintiff and her attorneys.
- [7] These aforesaid plaintiff, Ms Lisbeth Ruele and two other unidentified persons, have brought an application for leave to appeal against the order that I granted. In a lengthy notice of appeal, the appealability of the judgment is raised and addressed with reference to **Zweni v Minister of Law and Order** 1993(1) SA 523 A and also to a Constitutional Court judgment in **United Democratic Movement and Another v Lebashe Investment Group (Pty) Limited and Others** 2023(1) SA 353 (CC). Appealability lies central to the current application. I will deal with this issue primarily, as the order I granted is, as is explained below, not appealable.
- [8] The principles upon which appealability must be tested were summarised in **Zweni v Minister of Law and Order** *supra* at 531 F to 533 F, where Harms, JA states the following:

"While any comprehensive re-examination would serve little purpose, a proper perspective nevertheless requires a brief exposition and a critical review of some of the general propositions commonly (and sometimes loosely) advanced in the decided cases. I would summarise the matter as follows:

1. For different reasons it was felt down the ages that decisions of a 'preparatory or procedural character' ought not to be appealable (per Scheiner JA in the Pretoria Garrison Institute 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 Versekeringsmaatskappy Bpk v Harford 1992(2) SA 786 at 791 B – 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 548 H – I).
2. In order to achieve this result, a number of different legislative devices have been employed from time to time. The requirement of leave to appeal is one. Another is to prohibit appeals unless the order appealed against has the effect of a final judgment. And the courts have, by way of interpretation, held consistently that rulings are not appealable decisions.
3. The expression 'judgment or order' in s 20(1) of the Act has a special, almost technical meaning; all decisions given in the course of the resolution of a dispute between litigants are not 'judgments or orders' (Constantia Insurance Co Ltd v Nohamba 1986(3) SA 27 (A) at 35 F – G; 42 I).

4. The word 'judgment' has (for present purposes) two meanings, first the reasoning of the judicial officer (known to American jurists as his 'opinion'), and second, 'the pronouncement of the disposition' (Garner, A Dictionary of Modern Legal Usage *sv* 'judgments', 'Appellate Court') upon relief claimed in a trial action. In the context of s 20(1) we are concerned with the latter meaning only. An 'order' is said to be a judgment for relief claimed in application proceedings (Dickinson and Another v Fisher's Executors 1914 AD 424 at 427; Administrator Cape and Another v Ntshwaqela and Others 1990(1) SA 705 (A) at 714 I – 715 F). I would venture to suggest that the distinction between 'judgment' and 'order' is formalistic and outdated; it performs no function and ought to be discarded.
5. Section 20(1) of the Act no longer draws a distinction between 'judgments or orders' on the one hand and interlocutory orders on the other. The distinction now is between 'judgments or orders' (which are appealable with leave) and decisions which are not 'judgments or orders' (Van Steepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987(4) SA 569 (A)).
6. Whether so-called 'simple interlocutory orders', i.e. 'all orders pronounced by the Court upon matters incidental to the main dispute preparatory to or during the progress of the litigation' and not having a final or definitive effect, are either 'judgments or orders' or simply 'rulings' has not yet been decided by this Court (Van Steepen & Germs (Pty) Ltd case *supra* at 581 I – 584 D).

7. In determining the nature and effect of a judicial pronouncement, 'not merely the form of the order' must be considered but also, and predominantly, its effect' (South African Motor Industry Employers' Association v South African Bank of Athens Ltd 1980(3) SA 91 (A) at 96 H).
8. A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd case supra at 586 I – 587 B; Marsay v Dilley 1992(3) SA 944 (A) at 962 C – F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992(4) SA 202 (A) at 214 D – G).
9. The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability (South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) SA 534 (A) at 550 D – H). To illustrate: the exclusion of certain evidence may hamper a party in proving his case. That party may notionally be able to prove it by adducing other evidence. In that

event an incorrect exclusion would not necessarily have an effect on the final result. In deciding upon the admissibility of evidence a court is not called upon to speculate upon or divine (with or without the assistance of the parties) the ultimate effect of its decision on the course of the litigation. Should it appear at the conclusion of the matter that an incorrect ruling amounted to an irregularity which may have had a material effect on its outcome, the court of appeal may, in adjudicating the 'merits', set aside the final judgment on that ground and in an appropriate case, remit it back to the trial court (Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Fur Schädlingsbekämpfung MBH 1976(3) SA 352 (A); Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another 1990(3) SA 547 (A) at 566 C – D)."

[9] The test for appealability as set out in **Zweni v Minister of Law and Order** was endorsed by the Constitutional Court in the aforesaid **UDM v Lebashe Investment Group (Pty) Ltd** judgment (at par [41]).

[10] At par [42] the Constitutional Court held that:

"An interim order may be appealable even if it does not possess all three attributes, but has final effect or is such as to dispose of any issue or portion of the issue in the main action or suit, or if the order irreparably anticipates or precludes some of the relief which would or might be given at the hearing, or if the appeal would lead to a just and reasonable prompt solution of the real issues between the parties."

- [11] The suspension order that I granted in terms of Rule 45A was aimed at providing breathing space to the RAF while the application for rescission runs its course. If the rescission application fails, the suspension would fall away. If the rescission application is successful, then the suspension would have prevented execution pending the retrial, ie it would, in the interim, be an injustice. As the only practical effect of the suspension of the order is to suspend execution, which execution may proceed if the rescission fails or the trial delivers the same result, the order has interim effect only.
- [12] As the suspension order does not finally decide the rights of parties, or even part of the issues, the order granted is interlocutory and not final in effect. It is the type of decision, even if leave to appeal were competent, where its interim operation would not be suspended in terms of section 18(2) of the Superior Courts Act, 10 of 2013.
- [13] The suspension order granted has none of the qualities which would render it a judgment or order that is appealable in terms of the test in **Zweni**.
- [14] Even applying the test in the **UDM** matter as set out in par [42] thereof, the suspension order that I have granted does not have final effect. Further, it does not dispose of any issue or portion of the issues in the rescission application or, if the rescission were to succeed, the retrial of the main action. The suspension order does not irreparably anticipate or preclude some of the relief which might be given at the hearing. The prompt resolution of the rights

of the parties in this instance would be to bring the rescission application to finality. An appeal would not lead to a *"just and reasonably prompt resolution of the real issues between the parties"*. An appeal in this instance would merely decide whether the court order would be suspended or not. The issues remain, in my assessment, truly interlocutory, without being final in effect.

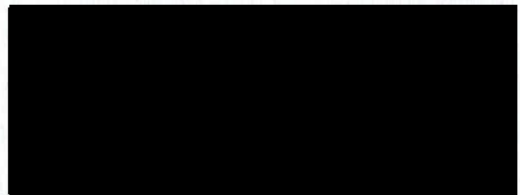
[15] As none of the tests for appealability are met, the order that I granted is not a decision that is appealable in the context of section 17 of the Superior Courts Act, 10 of 2013.

[16] In the light of this finding, it is not necessary to consider in detail the other grounds of appeal. I have had regard to those grounds of appeal. In my assessment there are no reasonable prospects of another court coming to a different conclusion. The attorney for the applicant was on record for the third respondent as well, if one has regard to the notice of opposition. The costs order that was granted is consistent with this.

[17] The applicant is suggesting that the RAF is, by means of my judgment, obtaining an own dispensation that entitles it to ignore judgments and to reassess quantum awards at its leisure. This is certainly not the case. What distinguishes this case is the fact that there is a pending rescission based on an alleged agreement to retry the case. The retrial issue emanated from the applicant's attorneys. The acceptance of that proposal is the core issue to be decided in the rescission application. Until that takes place, further execution needs to be halted.

[18] I am therefore not persuaded that there are any other compelling reasons why leave to appeal should be granted.

[19] In the premises the application for leave to appeal is dismissed with costs.



**E. LABUSCHAGNE
ACTING JUDGE OF THE HIGH
COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

Appellant's Counsel: Adv. S Malatji

Appellant's Attorneys Instructed by: Malepe Attorneys.

First and Second Respondent's Counsel: Adv. T Pillay

First and Second Respondent's Attorneys: Malatji and Company Attorneys.