

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

**APPEAL CASE NO: A71/2021**

**COURT A *QUO* CASE NO: 73418/2016**

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

25 January 2022

DATE

SIGNATURE

In the matter between:

**PETER THEMBEKILE MALGAS**

First Appellant

**ALFRED DISCO BIYELA**

Second Appellant

**BOSWELL JOHN MHLONGO**

Third Appellant

and

**MINISTER OF JUSTICE AND CORRECTIONAL  
SERVICES**

Respondent

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**JUDGMENT**

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**Coram: NOKO AJ, (VAN DER WESTHUIZEN J *et* MUNZHELELE J concurring)**

### **Introduction**

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, (Baqwa J), which adjudicated over two special pleas delivered by the respondent. The first special plea was for the non-joinder of Mafikeng Justice Centre on the one hand and Sneller Verbatim (Pty) Ltd and or Ms Rency Smit t/a L & C Typing Services on the other hand<sup>1</sup>. The court a quo upheld a special plea of non-joinder of Sneller Verbatim (Pty) Ltd and or Ms Rencey t/a L&C Typing services. The second special plea was of misjoinder of the respondent which was dismissed by the court a quo.

[2] The respondent delivered a cross-appeal against the judgment and order of the court a quo, firstly, in terms of which special plea of non-joinder of Legal Aid office or Mafikeng Justice Centre and Office of the Chief Justice and or Secretary-General, office of the Chief Justice was dismissed. The second cross-appeal delivered by the respondent was in respect of the judgment and order in terms of which the special plea of misjoinder of the respondent was dismissed.

### **Background**

[3] The appellants were convicted in 2004 by the North West High Court, (Leeuw J) of murder, robbery and other offences and were sentenced to, inter alia, life imprisonment. The appellants enlisted the services of the Mafikeng Justice Centre (now Legal Aid Board)

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<sup>1</sup> The court a quo was invited to decide on non-joinder of Mafikeng Justice Centre and the transcription service providers. See Vol. 1, p37 at paras 1.3 and 1.4. The respondent's notice of cross appeal referred Office of the Chief Justice and /or Secretary-General, Office of the Chief Justice, see Vol 9, p887 of the record. The respondent's heads of argument at para 18-20 makes reference to misjoinder of Leeuw J.

in 2004 to assist with the prosecution of the appeal. Due to budgetary constraints, Mafikeng Justice Centre (*Justice Centre*) requested the appellants to raise funds to pay for the transcription of the record. The appellants' attempts to source funds from the State and its organs<sup>2</sup> were unsuccessful. Ultimately families and friends of the appellants raised funds and paid for the record in 2006. The appeal was then prosecuted and both convictions and sentences were set aside by the Constitutional Court in 2015. The prosecution of their appeal was therefore delayed for a period of 8 years (between 2004 and 2012) as they could not receive complete record of hearing timeously.

[4] The complete record as required by Leeuw J was only furnished in 2012. The appellants alleged in their particulars of claim that the delay in making available a complete record, firstly, between 2004 and 2006 was as a result of the Justice Centre's failure/refusal and or neglect to assist in procuring the record<sup>3</sup>, and secondly, between 2006 and 2012 was allegedly due to the failure, refusal and or neglect of various functionaries of State which included Leeuw J, Registrar of the North West Division of the High Court of South Africa, Justice Centre and the transcription service providers, namely, Sneller Verbatim (Pty) Ltd (*Sneller*) and Rencey Smit t/a L & C Typing Services (*Rencey Smit*).<sup>4</sup> The appellants have now instituted a delictual claim against the respondent for damages suffered due to wrongful detention. The respondent is sued in terms of State Liability Act 20 of 1957 in his capacity as the Minister responsible for the administration of Justice. The appellants alleged in their particulars of claim<sup>5</sup> that the State directly breached its constitutional duty to ensure that the record is provided timeously;

<sup>2</sup> Appellants' heads of argument refer to the following organs of the state: The office of the state President, the Minister of Justice, the Parliamentary Portfolio Committee on Justice, The Public Protector, The Human Rights Commission, The judge President of the North West High Court, the Judicial Services Commission, and the legal Aid Board.

<sup>3</sup> See appellants' particulars of claim, Vol 1, p8, para 13.1 of the record.

<sup>4</sup> See appellants' particulars of claim, vol 1, p8, para 13.2 of the record.

<sup>5</sup> See para 4 of the appellants' particulars of claim.

hence the appellants were wrongfully detained from June 2004 and released in 2015. Therefore, the appellants' constitutional right to freedom and security of the persons was infringed.

[5] The respondent raised two special pleas, namely, non-joinder of other interested parties and misjoinder of the respondent.<sup>6</sup> The respondent argued special plea of non-joinder before the court a quo which upheld a special plea in respect of Sneller and or Rencey Smit<sup>7</sup> and did not uphold the special plea in respect of the Justice Centre. Though it was not part of the special plea it was contended during argument before court a quo that the appellants should have also joined the Registrar of the High Court, Office of the Chief Justice, and the Secretary General of OCJ. This special plea was also not upheld. And this was because, so went the judgment, section 316 of the CPA "...was explicit as to the officer responsible for the preparation and the production of the record."<sup>8</sup>

[6] The respondent unsuccessfully argued the special plea of mis-joinder of the respondent.<sup>9</sup> The appellants brought an appeal against the decision of the court a quo regarding the order to join the transcribers, and the respondent brought a cross-appeal regarding the dismissal of the special plea of non-joinder of Legal Aid or Mafikeng Justice Centre and/or Secretary General, Office of the Chief Justice and also cross-appeal in respect of the dismissal of the special plea of misjoinder.<sup>10</sup>

**Before the court a quo.**

<sup>6</sup> The special plea of misjoinder does not appear in the record before the Full Court.

<sup>7</sup> See order of the court a quo, vol 9, p855.

<sup>8</sup> See para 24 of the judgment of the court a quo, vol 9, p852.

<sup>9</sup> The records do not contain the special plea of misjoinder.

<sup>10</sup> See vol 9, p887.

[7] The respondent contended before the court a quo that Justice Centre and the transcription companies were referred to in the appellants' particulars of claim as having been both negligent and contributed to the delay to avail complete record. In contrast, the appellants contended that their claim is not based on vicarious liability in terms of which negligence of certain functionaries is *sine qua non* for their claim's success. Instead, the appellants' claim is brought in terms of the State Liability Act, and it is predicated on the argument that the State has failed in its constitutional duty to ensure that the rights of the appellants to access a materially complete record of proceedings is without unreasonable delay.

[8] The respondent also contended before the court a quo that the respondent is an executive authority in respect of functionaries in the Department of Justice and Correctional Services (*Department*) and cannot be accountable for Leeuw J, transcription companies, and the Justice Centre, (who were allegedly played part in failing to avail record timeously) as they are not functionaries in the Department.

[9] The court a quo determined that in terms of section 316 of the Criminal Procedure Act, the registrar of the high court is the official responsible for the preparation of the record as such non-joinder against the registrar of the high court was unsustainable.

[10] The court a quo further held that the unreasonable delay in making record available should ordinarily be frowned upon. In this regard, the court referred to the judgment in *Alves v LOM Business Solutions (Pty) Ltd and Another* (2011) 4 All SA 490 GSJ (*Alves* judgment) where reference was made of Erasmus J in *S v Manyonyo* 1997 (1) SACR 298 (E) where the learned judge said

*“The reason for the statutory insistence on the expeditious despatch of records on review is generally to promote the speedy and efficient administration of justice, but in particular to ensure that an accused is not detained unnecessarily in cases where the court of review set aside the conviction or reduces the sentence.”*

[11] To this end, the court a quo held that there was no basis for the joinder of Chief Justice, Secretary-General of the OCJ, the Mafikeng Justice Centre, and Leeuw J.<sup>11</sup> In addition the court dismissed the argument on non-joinder of the registrar as “...*the registrar is a functionary in the Department of the defendant...*”<sup>12</sup>

[12] The court a quo stated that there are averments which were made in the appellants’ list of admissions<sup>13</sup> sought for trial where it was made clear that some portions of the records were missing from the records prepared by the transcription company and ergo the court a quo held that it is only that company which can proffer an explanation and therefore the special plea of non-joinder was meritorious.

[13] The court a quo further held that the special plea of mis-joinder had no merits. The Registrar of the High Court falls under the respondent's authority, and to that extent, the respondent is correctly cited.<sup>14</sup>

### **On appeal**

<sup>11</sup> The special plea only complained about non-joinder of the Justice Centre and the Transcription Company and not other parties referred to herein.

<sup>12</sup> See Vol 9, p 852 at para 22.

<sup>13</sup> See Vol 9, p853 at para 28

<sup>14</sup> The court a quo referred at Vol 9, p850 at para 15 to Alves's judgment where it was held that “That the Minister owed a duty to the appellants in the position of the plaintiff to ensure that records were prepared for the hearing of an appeal within a reasonable time. The constitutional rights of the plaintiff could not be rendered nugatory by unreasonable delays in the offices for the Minister was responsible.

***Non-Joinder: The appellants' contentions***

[14] The appellants' counsel contended that the legal principles relative to non-joinder were misinterpreted by the court a quo. The test to determine the question of non-joinder is whether a party has a direct and substantial interest in the outcome of the matter before the court. To the extent that the order requested by the appellants is only against the respondent, any other possible defendant would not be affected by such an order and as such the requirement that such a party should have direct and substantial interest in the outcome of the *lis* would not be met.

[15] If one has regard to the provisions of the State Liability Act, the respondent is liable for the misdeeds which led to the appellants suffering damages as it occurred in this case. In contrast to the vicarious liability, negligence of the state functionaries would need to be proved, and in this instance, the argument is predicated on the failure of the respondent to have ensured that the constitutional rights of the appellants are protected. The court was directed to the findings in the *Alves* judgment, which confirms that the relevant Minister is liable for the failure to ensure that the constitutional rights of the populace are protected.

[16] In support of the contention that the test for non-joinder as set out above what is of relevance is the relief being sought and not the facts or issues in dispute, the appellants' counsel referred to judgment in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 653 (*Amalgamated Engineering Union case*) where it was held that:

“The question of joinder should ...not depend on the nature of the subject matter of the suit...but ...on the manner in which, and the extent to which, the Court’s order may affect the interests of third parties.”

[17] Appellants further contended that parties are generally free to cite a defendant of their choice amongst several wrongdoers. In this instance the appellants have chosen the respondent. Reference was made to the judgments in *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1982 (3) SA 618 D and *Myeni v Organization Undoing Tax Abuse NPC* (15996/2017) [2019] ZAGPPHC 565, both of which confirmed that a party may choose whoever his defendant is amongst the wrongdoers or joint or several creditors.

[18] The appellants’ counsel contended further that the finding by the court *a quo* that the transcription company is the party which would provide an explanation of the delay hence should be joined fails to appreciate the fact that the transcription company was contracted by the respondent to provide transcription service. The respondent may have outsourced the transcription service but cannot outsource its obligation to provide the records. In addition, there is admission by the Registrar of the High Court who allegedly admitted under oath to having made a mistake by requesting incorrect records from the transcription company.

[19] In any event, so went the argument, the court *a quo* erred in finding that Sneller should be joined as Sneller is no longer in business. This finding that Sneller is no longer in existence was also made in *Alves’s* judgment. Besides any claim against any other party would be met with a special plea of prescription regards had to the fact that the cause of action arose over a period of three years.

*Respondent's contentions*

[20] As a prelude to the respondent's arguments, counsel contended that the order of the court a quo does not bring to finality the *lis* between the parties, and as such, it is not appealable. What was open to the appellants was to join the parties as ordered by the court a quo and proceeded with the case to finality. In the event the appellants fail to prove a case against the said joined parties, the court may order costs against the respondent as such parties would have been joined at the instance and insistence of the respondent. In addition, the fact that the court a quo was prepared to order that the costs be reserved is indicative of the fact that the issue was not determinative of the *lis* between the parties, hence not appealable.

[21] The respondent's counsel contended further that the appellants' particulars of claim<sup>15</sup> clearly identified that Leeuw J, the transcription companies, Justice Centre were, inter alia, negligent which negligence led to the delay to avail the record, which culminated in the continued unlawful incarceration of the appellants. Counsel referred specifically to para 13.2 of the appellants' particulars of claim where the appellants stated that "*the cause of action of the unreasonable delay was due to the failure, refusal and or neglect of the Mafikeng Justice Centre [and] by various functionaries of the State [which] includes the Honourable Justice Leeuw, The Registrar of the North West Division of the High Court of South Africa, Mahikeng Justice Centre, and the Transcription Service Providers.*"

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<sup>15</sup> Para 4 of the respondent's heads stated that "... the special plea of non-joinder of the transcribers was correctly upheld given the cause of action as pleaded by the applicants in their particulars of claim."

[22] Counsel further contended that appellants' argument regarding the respondent as being accountable for other identified alleged functionaries is flawed. Firstly, Leeuw J is in a separate department and not under the executive authority of the respondent. Regard had to the provisions of section 239<sup>16</sup> of the Constitution, Leeuw J is not a functionary of the State. In addition, schedules 1 and 2 to the Public Service Act promulgated under proclamation number 103 of 1994, established a new department called Office of the Chief Justice under which Leeuw J falls. To this end, Leeuw J does not report to the respondent, and the latter is not executive authority over Justices in terms of the State Liability Act. Leeuw J should have then been cited alternatively cited Office of the Chief Justice or Secretary General.

[23] Secondly, the respondent's counsel contended further that the transcription companies are private companies with independent legal personalities, and having rights and obligations. Such a legal *persona* should be cited and be sued directly. It cannot be a refuge for the appellants to contend that Sneller is no longer in business and should therefore not be cited. The issue of prescription of claim as raised by the appellants against such a company can also not avail the appellants.

[24] Thirdly, Justice Centre was a branch of the Legal Aid Board (now Legal Aid South Africa) being a statutory body<sup>17</sup> established to provide legal assistance to indigent persons. The Justice Centre has its board with rights and obligations and is also a legal *persona*. To this end, the State Liability Act, which enjoins the respondent to be liable for the acts of those under his executive authority, would not include the Justice Centre.

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<sup>16</sup> Section 239 of the constitution specifically excludes the courts and judicial officers in the definition of an organs of state.

<sup>17</sup> Established in terms of legal Aid South Africa Act 39 of 2014.

[25] Reference to *Alves* judgment was misguided, so contended the respondent's counsel, and should not have been employed to assist the court a quo is deciding the application before court a quo. In *Alves*' case, the issue before the court was to request the records to adjudicate the appeal, whereas in this case, the required record was needed for the application for leave to appeal. Reference to section 316 of the CPA by the court a quo would have been correct only in respect of prosecuting the appeal and not for the purpose of applying for leave to appeal. This case is therefore distinguishable. The other distinction is the fact that in *Alves* case there was a concession which was made to the effect that the Minister of Justice was liable and, in this case, there is no such a concession.

[26] The respondent's heads of argument further articulated the point that the argument by the appellants that they are immune to comply with rules and principles on pleadings when a suit is based on State Liability Act is misguided. In this regard, para 26 of the heads of argument state that "*[I]t is trite that in a claim of this nature there is a duty on the applicants to allege and proof locus standi the basis of law and in fact, on which they seek to hold the respondent liable for the alleged claim, also known as cause of action.*"<sup>18</sup> Further that the appellants have failed in this regard.

[27] The appellants' counsel in reply contended that the judgment of the court a quo finally interfered with the appellants' procedural rights and to that extent the judgment and order is final and appealable. Further that though it is correct that other parties are referred to as being negligent the appellants made a choice to only cite the respondent.

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<sup>18</sup> See also para 23 of the respondent's heads of argument where it is stated that "it is trite that the onus to allege and prove any cause of action in this regard lies with the applicants as the parties that are suing in these matters," and para 24 where it is stated that "[A]lso, there is nothing in the allegations contained in the applicants' particulars of claim including in paragraphs 13 to 16 which indicates in any specific manner or basis as to how and why it is alleged that the respondent is responsible or liable for the alleged "failure and /or negligence of the parties referred to therein."

***Cross appeal – Non-joinder and Misjoinder***

[28] The appellants' counsel contended that the respondent has not applied for leave to cross-appeal the decision of the court a quo to dismiss the special plea of non-joinder of the Mafikeng Justice Centre, Office of the Chief Justice and or secretary General and the special plea misjoinder. As such the cross-appeal brought by the respondent is incompetent and should be struck out with costs. To this end, the counsel referred to the SCA judgment in *MEC for Department of Cooperative Government and Traditional Affairs v Maphanga 2021 (4) SA 131*, which held that a party wishing to cross appeal should first apply for leave to cross-appeal.

[29] The counsel for the respondent contended that section 171 of the Constitution, read with sections 16 and 17 of the Superior Court Act, make no reference to the requirement that a party seeking to cross-appeal should first apply for leave to cross-appeal. To this end, it is clear that the judgment of the SCA has been incorrectly decided and should not be relied upon. Regard must be had to the provision of the Uniform Rules of Courts which also makes no such a requirement. It will also lead to absurdity to interpret it to the contrary as the appellants' appeal may be hamstrung by the respondent's leave to cross appeal the decision of the court a quo because if leave to cross-appeal is dismissed the respondent may thereafter petition the SCA and ultimately the Constitutional court. This will frustrate the principle of finality of disputes.

[30] Based on the foregoing, so went the argument, the court should dismiss the appellants' contention and adjudicate over both the non-joinder and the mis-joinder cross-appeal. The appellants' particulars of claim identified parties who allegedly were, inter

alia, negligent, and no direct link is made to the respondent and thus the respondent is non-suited, and the mis-joinder special plea has merits.

[31] In retort, the appellants' counsel contended that the argument by the respondent is misplaced since the claim against the respondent is not based on the negligence of the employees or any other party but on state liability as was clearly held in the *Alves* judgment. The respondent is responsible for the employees in his department and also for the action of those subcontracted to execute the respondent's duties. The court *a quo*'s finding that the transcription companies should be joined is therefore assailable.

#### *Costs*

[32] The counsel for the appellants contended that there are two aspects relating to costs that need to be addressed by this court. Firstly, the costs associated with the appeal and secondly, the costs which were reserved by the court *a quo* in an interlocutory application and were to be argued before the appeal court. Both parties contended that the costs of the appeal should follow the successful party. This court could not entertain arguments in respect of the costs associated with the interlocutory application as the records relating to the said application were not part of the record before this court.

#### *Legal analysis.*

##### *Special plea of non-joinder*

[33] Joinder of parties is regulated by Rule 10 of the Uniform Rules of Court. Rule 10(3) dealing with joinder of defendants provides that:

"Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever a question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action." (Underlining added)

[34] The rule enjoins a party to sue the defendants together whenever the determination of a question of law or fact would be the same. On a closer consideration of the appellants' particulars of claim one could glean that the appellants' alleged breach of the constitutional duties and at the same time alleged, inter alia, negligence on the state's functionaries, Leeuw J, Registrar of the High Court, Justice Centre and the transcribers. The legal issue for determination is the liability of persons identified. If the court ultimately accepts that such persons were negligent then the court may have to order such parties to compensate the appellants to the degree of their respective negligence or contribution to the delay.

[35] The test to be applied as set out in the *Amalgamated Engineering Union* case is that the court should only consider joinder if its order may affect the interest of the third party. Once the court had determined liability of parties based on the allegations made and proved by the appellants as against those parties it would be appropriate for the court to order which party should compensate the appellants and the extent of such compensation. If all person identified in the appellants' particulars of claim are found to have contributed in the delay it would not be appropriate for the court to conclude that only party to be liable should be the respondent. The order which the court would then make would affect the parties who have not been summoned and or cited in these papers, then such parties have a direct and substantial interest in the outcome of the *lis*.

[36] The authorities cited by the appellants that the party is entitled to choose his defendant against several wrongdoers cannot be faulted. Regrettably such authorities do not countenance the appellants' case as the appellants have referred in their papers several wrongdoers who were allegedly negligent. It appears that the appellants intended only to allege wrong doing on the part of the respondent or its functionaries as they failed to lay the basis of negligence on the part of other alleged wrong doers, more particularly Leeuw J. and Justice Centre, the latter having been unable to assist due to lack of funding.

[37] The transcribers are contracted to the respondent and execute the duties of the respondent, inter alia, to transcribe hearing records. The contention by the appellants that the respondent cannot outsource its obligations has a sound legal basis. The record is requested from the registrar and the latter would communicate with a relevant company contracted by the state to avail the record. The court a quo did refer to section 316 of CPA to confirm that the records are housed within the office of the registrar. The appellants would ordinarily not be privy to the contract between the respondent and the transcribers. It is correct that transcribers have separate legal personality and have obligations and rights. The rights and obligations would be between the transcribers in relation to the respondent and such obligations have no bearing on the respondent's obligation to provide records through its functionaries. The relationship between the respondent and transcribers *qua* respondent's subcontractors may be construed as *res inter alios acta* in relation to the appellants. To this end the order of the court a quo to join the transcribers cannot be upheld.

[38] Subject to this court's decision below with regard to the cross appeal, the contentions by the respondent in relation to the reference to Leeuw J and Justice Centre would have some legal basis. They are both not within the jurisdiction envisaged by the

State Liability Act as invoked against the respondent. The appellants' particulars of claim are replete with paucity of facts and specificity to substantiate the basis for alleging negligence against these persons and one is constrained to fathom the basis underlying allegations of negligence, failure or refusal to act. This is however a matter for the trial court to consider. That being said sight should not be lost of the jurisdictional requirements to be met before a party can sue a sitting judge.

[39] Also subject to this court's decision on cross-appeal as set out below the argument by the appellants that the respondent is an executive authority to the Registrar of the high court<sup>19</sup> would have been meritorious and the respondent's resistance thereto would be unsustainable. Whilst the respondent argued that reliance should not be based on section 316 of the CPA as it relates to appeals and not leave to appeal it does not appear that in respect of leave to appeal the registrar would be exempted to provide records. The respondent did not also provide an indication as to where else should the appellants request record in relation to leave to appeal. The allegation that the registrar has made a concession, whilst it would be interrogated by the trial court, suggest that the allegations of negligence against the Registrar may be sustained.

[40] The contention by the respondent that the order of the court a quo is not appealable has to be tested against the decisions of the following judgments which guides the general principle to determine the appealability of interlocutory orders. The SCA in *Atkin v Botes* 2011 (6) SA 231 SCA at 234 B considered the question of appealability of interim or interlocutory orders and quoted with approval judgment in *Metlika Trading and Others v*

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<sup>19</sup> The respondent's Notice of Cross-Appeal did not make reference to the non-joinder of the Registrar of the High Court.

*Commissioner, South Africa Revenue Service* 2005 (3) SA 1 (SCA)<sup>20</sup> where it was stated that “...interim interdict is appealable if it is final in effect and not susceptible to alteration by the court of first instance.”

[41] The constitutional court in *City of Tshwane Metropolitan Municipality v Afroforum and Another* 2016 (2) SA 279 (CC) added another leg that the interest of justice considerations should be taken into account to determine the question of appealability. Having regard to the foregoing judgments it is apparent that the submission by the respondent is not congruent with the fact that the order of the court a quo to join other transcription company is not susceptible to reconsideration by the same court when a final relief is determined. This means that a court a quo cannot reconsider this issue. It therefore follows that the order is appealable and the respondent’s contention in this regard is not sustainable.

#### *Cross appeal*

[42] In contrast to the appellants’ contention that the respondent’s cross appeal should not be entertained as it was not preceded by application for leave to cross-appeal the respondent’s counsel submitted that this court should not follow judgments of the Supreme Court of Appeal which held that a party intending to cross appeal must apply for leave to cross appeal. The respondent’s submission that decision of the SCA should not be followed is at odds with the fundamental common law doctrine of *stare decisis*. It was held in *Patmar Explorations (Pty) Ltd and Others v The Limpopo Development Tribunal and Others* (1250/2016) [2018] ZASCA 19 (16 March 2018) (*Patmar Explorations case*)

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<sup>20</sup> Also quoted with approval by the Constitutional Court in *International Trade Administrative Commission v Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (CC).

that the object of *stare decisis* "... to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. It serves to lend certainty to the law".<sup>21</sup> The fulcrum of the principle of *stare decisis* is certainly to engender certainty, predictability and confidence in the judgments without which there would be chaos in the judicial system. Deviation should therefore only be permissible under extremely circumscribed circumstances. (the question of *stare decisis* will be dealt with below)

[43] The history of judgments which held that a party intending to appeal should first apply for leave to cross-appeal and further that cross-appeal is nothing other than appeal tacked as cross-appeal were traced by LTC Harms<sup>22</sup> (*Harms*) who stated that

*"[I]n general, the rules applicable to appeals apply to cross-appeals. The fact that the appellant has obtained leave to appeal does not dispense with the respondent's obligation to obtain leave to cross-appeal according to the rules applicable to appeals".*

[44] Harms referred to the following judgments, *firstly*, *Goodrich v Botha* 1954 2 SA 540 (A) (*Goodrich's* case). In this case, the respondent sought to bring a cross-appeal, having failed to first apply for leave to cross-appeal. This process at that time was regulated by section 3(b) of The Appellate Division Further Jurisdiction Act 1 of 1911, which provided that "[N]o judgment or order made by consent, or as to costs only which by law are left to the discretion of the Court, and no Interlocutory order, shall be subject

<sup>21</sup> It was stated in *Ratepayers and Residents Association and Another v Harrison and Another* (CCT18/10) [2010] ZACC 19 at para 28 that "[C]onsiderations underlying the doctrine were formulated extensively by Hahlo and Kahn. What boils down to, according to the authors, is: certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*."

<sup>22</sup> LTC Harms "*Civil Procedure in the Superior Courts*" Lexis Nexis. 2002, at para B49-5.

to appeal save by leave of the Court or Judge making the order.” (see Schreiner at 544B-C). The court held at 544F-H that *[N]either the South Africa Act nor Act 1 of 1911 differentiates between appeals and cross-appeals. A cross-appeal is, for the present purpose, simply an appeal which is conveniently tacked on to another appeal*. The counsel for the respondent in that case retorted further that appeals and cross-appeals are dealt with separately and distinctly in Rule 6(4) and Rule 6(6) respectively, to which the court held that “*[B]ut, even if any inference could thus be drawn as to the intention of the regulating authority, this could not modify the clear meaning of the Act.*” (Underlining added).

[45] The second case referred to by Harms is *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A), where the court held, at 608A, that the judgment in “*Goodrich case applied generally to all cross-appeals...that leave to cross-appeal is required by sec 21 of the Supreme Court Act.*”<sup>23</sup> The same conclusion was arrived at in the *National Union of Metalworkers of SA v Henred Fruehauf Trailers* 1995 (4) SA 456 (A) (NUMSA case). This was an appeal from the Labour Appeal Court to the Appellate Division<sup>24</sup> where it was confirmed that no mention is specifically made of cross-appeal in the Labour Relations Act, and as it was stated in the *Goodrich* case, cross-appeal “*is simply an appeal which is tacked on to another appeal.*”

[46] Consistent with previous legislative provisions referred to in the judgments above sections 16 and 17 of the Superior Court Act 10 of 2013 makes no reference to cross-

<sup>23</sup> The court further held at para. E the “[W]here the necessary leave to appeal is lacking this Court may in appropriate circumstances, defer the hearing or determination of the appeal to obtain such leave.” The applicable statute at the time was the Supreme Court Act 59 of 1959.

<sup>24</sup> This was the position before the 17<sup>th</sup> Constitutional Amendment in terms of which the Labour Appeal Court was then pronounced to be court on the same footing with the Supreme Court of Appeal and its appeals lies with the constitutional court.

appeal. The Uniform Rules, which are intended to give effect to, *inter alia*, the above sections do not state specifically that the application for leave should precede notice to cross-appeal. Reference to cross-appeal in the Uniform Rules of Court is in terms of Rule 49(3), which provides in peremptory terms that notice of cross-appeal shall be delivered within ten days after delivery of the notice of appeal.

[47] The question is, at what stage should the party intending to cross-appeal be expected to apply for leave to cross-appeal. Previous authorities and the regulations have not provided guidance on how this will be implemented. The applicable rule would be rule 49(1) which provides that the applicant must apply for leave to appeal within 15 days of the judgment or after receiving reasons or full reasons of the judgment. Since the rules are supposed to apply *mutatis mutandis* to both appeals and cross-appeal both parties need to apply for leave to appeal within the time prescribed. I surmise that the party who bring the application first would ultimately become the appellant and the party who bring his application second would be the cross appellant, and the latter would in compliance with rule 49(3) deliver the notice of cross appeal within 10 days after the delivery of notice of appeal

[48] Counsel for the respondent raised alarm of possible chaos and stifling of court processes if the application for the leave to cross appeal is dismissed as such a party may appeal the refusal to grant leave up to the constitutional court. Counsel further contended that since the Act and the rules makes no reference to leave to cross-appeal then one should assume that there is no requirement for a party to apply for leave to cross-appeal, (emphasis added) The submission fails to acknowledge what previous courts have said that cross appeal is just an appeal in itself. There is therefore no basis to contend that leave to appeal should be viewed as being *sui generis* and be treated as something else (which

the statutes allegedly failed to identify) besides the fact that it is just an appeal delivered in response to the appeal by the other party.

[49] There are judgments which shares the sentiments of the respondent that maybe cross appeal is an appeal of a different kind. The Labour Appeal Court, now being on the same footing with the Supreme Court of Appeal, expressed some reservations *in obiter* on the correctness of the SCA's NUMSA judgment that leave to cross appeal is required. It was also stated in *Mkhonto v Ford N.O.* Case no JA61/99 (9 March 2000) (*Mkhonto's* case) by Conradie JA (Zondo AJD and Willis JA concurring) that "[T]he rules for the conduct of proceedings in the labour appeal court provide in rule 4 for a petition for leave to appeal. Nothing is said about a cross-appeal. It is interesting to observe that rule 48 of the Uniform Rules of the high court provides for the granting of leave of appeal." (sic). It then says that after the grant of leave, a notice of cross-appeal is to be delivered within ten days of delivery of the notice to appeal. Leave to cross-appeal is evidently not required in that forum." (underlining added). The court proceeded and observed that that Labour Relations Act 28 of 1956 does not refer to the request for leave to cross-appeal. The court concluded at para 8 that this point could not be decided upon as the appellant conceded that "...the judge a quo, in virtually suggesting a cross-appeal can be said to have impliedly granted leave to cross-appeal." In view of the concession the court did not have an opportunity to make a final determination of the question of leave to cross appeal. This interpretation resonates with what was held in *KNS Construction Pty Ltd v The Genesis Partnership* (Case no 9861/2016) Gauteng Local Division (9 September 2016), where it was held at para 7 that "A right to cross-appeal, accordingly, exists by inference and is based on the construction of similar statutory provisions relating to appeals by the court in the past." This judgment did not specifically state that the judgments of the SCA are upset.

[50] The SCA has still reaffirmed its position that cross appeal should be preceded by an application for leave to appeal and this was held in *Monyepao v Ledwaba and Others* (Case No 1368/18) [2020] ZASCA 54 (27 May 2020) at para 6 that “[W]hatever the subject matter of the cross appeal, leave to appeal is necessary because the rules relating to appeals apply mutatis mutandis to cross appeals”. This issue appears not to have as received the attention of the constitutional court yet though leave to cross-appeal was granted in *Mphephu-Ramabulana and Another v Mphephu and Others* [2021] ZACC 43. In this case, the constitutional court was not invited to determine whether leave should precede cross-appeal.

[51] It is laudable that Superior Court Act introduced in 2013 a stringent test for leave to appeal so as to regulate and ensure that meritorious appeals are accorded audience of the higher courts. As such allowing cross-appeal without being preceded by leave will defeat the rational of sifting appeal matters and according audience only to those which are meritorious.

[52] Apropos the submission by counsel for the respondent that previous judgments of the SCA should not be followed the Constitutional Court expressed itself explicitly in *In Re S v Walters and Another* 2002 (4) SA 613 (CC) at para 60 that “High Courts are obliged to follow legal representations of the Supreme Court of Appeal whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the Supreme Court of Appeal itself decides otherwise or this court does so in respect of a constitutional issue.” The Constitutional Court in *Camps Bay Ratepayers Association AO v Harrison AO* CCT 18/10[2010]ZA 19 quoted with approval *Walters’* case and further held that *[S]tare decisis is not simply a matter of respect for courts of higher authority. It*

*is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."* Notwithstanding the foregoing, the constitutional court acknowledged at para 30 that the judges who view that deviation is warranted should first be "...invariably convinced that they are doing the right thing...the way to go about it is to formulate those reasons and urge court of higher authority to effect change."

[53] There is no authority submitted by the respondent to substantiate the argument that cross-appeal should enjoy automatic audience of the higher court without its merits being subjected to a scrutiny whether it deserves to heard by a higher court during the application for leave to cross appeal. To this end the respondent has not succeeded in mounting a strong case to persuade this court that the time has come to upset the long-standing authorities which stated that cross-appeal should be treated like appeals.

[54] In view of the conclusion below any other arguments raised by the parties deserves no further attention.

[55] It is trite that the appeal court should be slow to interfere with the judgment of the lower court except in instances where it appears that there was misdirection on the part of the court a quo. From what is set out above interference is warranted.

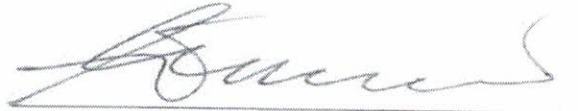
#### *Costs.*

[56] There appears to be no reason why the costs should follow the cause.

#### *Conclusion*

In the premises the appeal is upheld, and order of the court a quo is substituted as follows:

1. *"The special plea of non-joinder of Sneller Verbatim Pty Ltd or Rencey Smit t/a L & C Typing Services is dismissed with costs,*
2. The cross-appeal is struck out with costs.



**NOKO AJ**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**PRETORIA**

Delivered: This judgment was prepared and authored by the Acting Judge, whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 25 January 2022.

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DATE OF THE HEARING: 20 OCTOBER 2021

DATE OF JUDGMENT: 25 JANUARY 2022.