



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: 1770/2020

In the matter between:

**EAST LONDON JEWISH HELPING HAND
AND BURIAL SOCIETY (ALSO KNOWN AS
THE EAST LONDON CHEVRA KADISHA)**

Applicant

and

CHANOCH GALPERIN

First respondent

**THE JEWISH ECCLESIASTICAL COURT (ALSO
KNOWN AS THE BETH DIN OF JOHANNESBURG)**

Second respondent

GIDEON FOX N.O.

Fifth respondent

YOEL SMITH N.O.

Sixth respondent

THE MASTER OF THE HIGH COURT, GRAHAMSTOWN

Seventh respondent

JUDGMENT

LAING J

[1] This is an application for leave to appeal against the whole of the judgment of this court, handed down on 2 December 2021.

[2] The matter has a complicated history. For immediate purposes, it is necessary to indicate that the judgment pertained to an application to amend and a joinder application that were previously brought by the applicant ('the Society') in relation to an earlier application that was brought by the first respondent ('Rabbi Galperin'). The earlier application ('the main application') was for the findings of the second respondent ('the Beth Din') to be made an order of court.

[3] At the time that the Society opposed the main application, it brought a 'conditional counter-application' that it would pursue only in the event that its opposition to the main application was unsuccessful. As it turned out, Rabbi Galperin subsequently withdrew the main application. The parties, however, became embroiled in separate action proceedings which ultimately prompted the Society to pursue its counter-application, but not before bringing the present application to amend, as well as the joinder application.

[4] The grounds for the application for leave to appeal include, *inter alia*, the following: the court ought to have found that Rabbi Galperin was confined to the grounds set out in his notice of objection and that his contention to the effect that the averments made in the counter-application were inextricably linked to the main application did not appear in either the above notice or his opposing affidavit; the court erred in relying upon such contention; the court ought to have found that paragraph 16 of the founding affidavit to the counter-application, read with paragraphs 8 to 102 of the answering affidavit, only pertained to the facts applicable to the counter-application and did not pertain to either the allegations made by Rabbi Galperin in his founding affidavit in the main application or to the pleadings in the separate action proceedings; the court erred in finding that the paragraphs could not be incorporated by reference, without qualification, into the founding affidavit; the decision in *Pearson and Hutton, NNO v Hitzeroth and others* [1967] 4 All SA 67 (E) was distinguishable from the present matter; the court erred in finding that the counter-application would become unmanageable in the event that the application to amend and the joinder application were granted; the court failed to apply the relevant

legal principles, as enunciated in decided cases and the matter of *Whittaker v Roos and another*; *Morant v Roos and another* 1911 TPD 1092; the court erred in finding that the granting of the applications in question would lead to the over-complication of the matter to the prejudice of Rabbi Galperin and the second, third and fourth respondents; the court erred in relying upon the principle of whether it was in the interests of justice to grant the application to amend, rather than whether same was *bona fide* and whether it would cause prejudice or an injustice; and the court failed to exercise its discretion judicially,¹ having had regard to the relevant principles and facts of the matter.

[5] The provisions of section 17(1)(a) of the Superior Courts Act 10 of 2013 provide that leave to appeal may only be given where, *inter alia*, the court is of the opinion that the appeal would have a reasonable prospect of success. Consequent to the repeal of the Supreme Court Act 59 of 1959, it is generally accepted that a stricter test applies. See *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen* (unreported, LCC case no. LCC 14R/2014, 3 November 2014), which was cited with approval in *The Acting National Director of Public Prosecution v Democratic Alliance* (unreported, GP case no. 19577/09, 24 June 2016).² The court must decide whether the appeal *would* have a reasonable prospect of success and there must be a sound, rational basis for any conclusion to that effect. See *Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA)*, at 463F.

[6] Turning directly to the Society's grounds of appeal, the Society's notice of intention to amend was limited to the deletion of the word, 'conditional', wherever it appeared 'in the heading and body' of the counter-application. Its subsequent application to amend was more expansive in nature, seeking leave also to deliver a supplementary founding affidavit. Accordingly, it would be patently unfair to restrict Rabbi Galperin to the grounds set out in his notice of objection which merely addressed the society's terse notice of intention to amend. Furthermore, Rabbi Galperin raises, squarely, the argument in relation to the closeness of the connection between the counter-application and the main application in his heads of argument,

¹ The Society used the term 'judiciously' in its grounds of appeal, which appears to have been a misnomer when consideration is given to discussion of the principle in the relevant case law.

² See, too, *Notshokovu v S* (unreported, SCA case no. 157/15, 7 September 2016).

which was foreshadowed in both the notice of objection and his opposing affidavit inasmuch as he indicated that one of the reasons for his objection to the proposed amendment was that the Society sought to transform a conditional counter-application (filed in relation to an application which was later withdrawn) into a 'substantive stand-alone application'.³

[7] The contents of paragraph 16 of the founding affidavit to the counter-application, read with paragraphs 8 to 102 of the answering affidavit, set out in great detail the history of the dispute between the parties. The averments are substantiated by numerous annexures. It cannot be said, as the Society argues, that they had nothing to do with the allegations made by Rabbi Galperin in his founding affidavit in the main application and pertained only to the subject of the counter-application. They represent the basis upon which the Society opposed the main application; they are the 'relevant facts' for such purposes⁴. This court found that their incorporation by reference into an affidavit intended for other purposes was problematic for the reasons set out in the judgment.

[8] The general principles expressed in *Pearson and Hutton, NNO v Hitzeroth and others* are undoubtedly relevant and it is difficult to see how the above authority, in that regard, is distinguishable from the present matter. The granting of the applications would risk the 'highly cumbersome and undesirable course' to which Addleson J referred, as well as the 'considerable perusal and cross-checking of the evidence and documents already filed', thereby incurring additional costs.⁵ If the action is taken into account, too, then the prospect of overlapping proceedings between the same parties becomes unavoidable and the dispute as a whole becomes unmanageable.⁶ The prejudice to the respondents is self-evident.

[9] The wide ambit of discretion that the court enjoys was stated unequivocally in *Whittaker v Roos and another; Morant v Roos and another*. Moreover, Wessels J

³ See paragraph 5.2 of Rabbi Galperin's notice of objection, as well as paragraph 15 of Brin Brody's answering affidavit.

⁴ The expression is used as the heading that precedes paragraphs 8 to 102 of the answering affidavit.

⁵ At 70.

⁶ The problem of deciding 'clearly linked' issues side by side, in separate proceedings between the same parties, was raised by Lowe J within the context of an application for the postponement of the action. See [62] of this court's earlier judgment, n 18.

made it clear that the purpose of granting an amendment was to ensure that the court obtained 'a true account of what actually took place', such that a decision was not made on the 'wrong facts'.⁷ Here, the application for amendment is not so much for purposes of placing the correct facts before the court, to allow for the proper ventilation of the dispute or for the real issues between the parties to be decided, as for the Society to pursue a counter-application as a safeguard against the failure of its defences in relation to Rabbi Galperin's special plea.⁸ The trial, however, remains the most appropriate forum in which to test the relevant facts. It is far from satisfactory to permit the same or similar issues to be determined under a parallel process and it remains unclear as to why the dispute cannot be decided under a single, consolidated set of proceedings. At the least, to grant the application for amendment and the joinder application would hamper the efficient conduct and adjudication of the issues.

[10] In *GMF Kontrakteurs (Edms) Bpk and another v Pretoria City Council* [1978] 2 All SA 407 (T), Franklin J emphasised, at 411, that:

'The granting or refusal of an application for the amendment of pleadings is a matter for the discretion of the Court, to be exercised judicially in the light of all the facts and circumstances of the case before it.'

[11] This court, in reaching its decision, considered the effect of granting the applications and decided, ultimately, that the counter-application would become unmanageable. Moreover, the prejudice (to all parties) of overlapping proceedings cannot be ignored. Consequently, the court stands by the findings and order previously made.

[12] The granting or refusal of the applications involves the court's discretion. For an appeal to succeed, the Society would need to demonstrate that the exercise of such discretion was improper. See *Ciba-Geigy (Edms) Bpk v Lushof Plase (Edms)*

⁷ At 1102.

⁸ An application for amendment is usually granted when it is necessary for deciding the real issues between parties or for allowing the proper ventilation of the dispute, provided that any injustice caused can be remedied by an appropriate costs order. See DR Harms, 'Civil procedure: Superior Courts', in *LAWSA* (Vol 4, 3ed, 2016), at 379.

Bpk en 'n ander [2002] 2 All SA 525 (A), at 526. This court is not of the view that the Society has demonstrated same successfully or established a sound, rational basis upon which to persuade the court that an appeal would have a reasonable prospect of success.

[13] Finally, senior counsel for Rabbi Galperin sought an order to include the costs of two counsel in the event that the Society's applications were unsuccessful. Whereas the nature of the dispute and ensuing litigation is convoluted and far from straight-forward, the court is nevertheless satisfied that such an order would not be justified.

[14] In the circumstances, the application for leave to appeal is dismissed with costs.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE:

For the applicant: Adv S Pincus SC, instructed by Whitesides Attorneys, Grahamstown.

For the first respondent: Adv IJ Smuts SC with Adv Miller, instructed by Wheeldon Rushmere and Cole Inc., Grahamstown.

Date of hearing: 29 July 2022.

Date of delivery of judgment: 02 August 2022.