THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 573/2023

Name of Ship: **MV *'SMART'***

In the matter between:

MINMETALS LOGISTICS ZHEJIANG CO LTD **APPELLANT**

and

THE OWNERS AND UNDERWRITERS OF THE
MV 'SMART' **FIRST RESPONDENT**

THE NATIONAL PORTS AUTHORITY, A DIVISION
OF TRANSNET (SOC) LTD **SECOND RESPONDENT**

Neutral citation: *Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV 'Smart' and Another* (573/2023) [2024] ZASCA 129 (1 October 2024)

Coram: PONNAN, DAMBUZA, MOCUMIE and NICHOLLS JJA and KOEN AJA

Heard: 9 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 1 October 2024.

Summary: Maritime law – s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act) – application to compel litigant to produce documents – documents arising from private arbitration in London between the litigant and a *peregrinus* third party – documents alleged to be confidential – whether third party has a direct and substantial interest in application to compel – whether third party should be joined to application to compel – whether an Admiralty Court has the power in terms of s 5(1) of the Act to join *peregrinus* third party – whether order for joinder of third party granted pursuant to such power appealable.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Lopes J, sitting as a court of first instance exercising admiralty jurisdiction):

1 The appeal is struck from the roll;

2 The appellant is directed to pay the costs of the first and second respondents, such costs to include the costs of two counsel where employed.

JUDGMENT

Koen AJA (Ponnan, Dambuza, Mocumie and Nicholls JJA concurring):

Introduction

[1] On 29 July 2022, the KwaZulu-Natal Division of the High Court, Durban (per Lopes J) (the high court), exercising its admiralty jurisdiction and relying on the provisions of s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act),[1] granted an order joining the appellant, Minmetals Logistics Zhejiang Co Ltd (Minmetals), as a party to an application to compel. The application to compel was brought by the second respondent, the National Ports Authority, a division of Transnet (SOC) Ltd (Transnet), against the first respondent, the Owners and Underwriters of the MV '*Smart*' (the owners), in respect of an action pending between them. Transnet seeks to compel the owners to produce certain documents arising from an arbitration between the owners and Minmetals in London. Minmetals is a *peregrinus*.[2]

[2] The appeal is against the granting of the joinder order, with the leave of the high court. The questions required to be answered in the appeal are whether the high court

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[1] All references to sections hereinafter are to the provisions of the Act, unless stated otherwise.
[2] Minmetals is a Chinese company.

had jurisdiction to grant such an order, and if so, whether its decision to grant the order, is appealable.

Background

[3] On 19 August 2013, the fully laden bulk carrier, the *MV 'Smart'*, time chartered by Minmetals, ran aground in the vicinity of the Richard Bay harbour entrance when departing from the port, causing it to break up and sink. This incident has given rise to various legal proceedings, including: (a) arbitration proceedings by the owners against Minmetals in London, alleging a breach of a safe port warranty; (b) Minmetals, in turn, suing Transnet in delict, based on its control of the Richards Bay harbour, for an indemnification should it be held liable to the owners in the London arbitration; and, (c) the owners suing Transnet in delict in the high court (the action), based on an alleged breach of various legal and statutory duties owed to them, for the value of the lost cargo, hull, bunkers and other losses. The order for the joinder of Minmetals, which is the subject of this appeal, arose in respect of the last-mentioned action by the owners against Transnet.

[4] Underpinning the arbitration and the action, are allegations that Transnet failed to provide a safe port. In its award handed down on 12 June 2020, the London arbitration tribunal however found that although there were some shortcomings in the running of the port, it was the Master's negligent navigation of the vessel, which caused the *'Smart'* to ground, and that such negligence constituted a *novus actus interveniens* which broke the chain of causation, including the alleged lack of safety of the port. On 28 October 2020, Minmetals, in view of these findings, withdrew its indemnity action against Transnet. The owners' action against Transnet continues. It is defended on the basis, *inter alia,* as found in the arbitration, that the loss or damage suffered by the owners was as a result of the negligence of the Master and crew.

[5] In the action between the owners and Transnet, the owners asserted privilege in respect of various discovered documents relating to the arbitration. In addition, on

15 September 2020, Transnet served a notice in terms of rule 35(3) on the owners requesting further documents which had featured in the arbitration. Transnet seeks to compel the disclosure of these documents. The owners have resisted producing the documents, claiming that they are privileged from disclosure, as they were subject to an implied contractual undertaking of confidentiality between it and Minmetals, and that some are irrelevant. That stance notwithstanding, the owners are willing to waive their privilege in respect of the documents, subject to certain timing constraints. They, however, cannot unilaterally waive confidentiality, and any privilege as may attach to the documents, without the concurrence of Minmetals.

[6] Minmetals refuses to agree to the disclosure of the documents: it is of the view that the documents are confidential/private; that it is not obliged to consent to the release of the documents and will not do so; that it did not require nor wish to be joined to any application to compel production; but, that it might consider not objecting to the disclosure if the owners were ordered by a court to produce the documents and the owners produced the documents pursuant to such an order. The owners accordingly accept that they are precluded from making disclosure of the documents in the absence of a court order.

[7] On 4 May 2021, Transnet launched an application against the owners to compel the production of the documents. The issue pertinently raised in the application is whether the documents are confidential and privileged from disclosure. The owners reiterated their willingness to disclose the documents, but that they cannot do so while Minmetals is not prepared to accede to any disclosure, whether qualified or unqualified. That, the owners maintain, would leave them in an invidious position if a South African court were to order disclosure of the documents in the absence of Minmetals as a party to the application to compel, and the documents were found by an English court or tribunal to be privileged and prohibited from disclosure. They will then find themselves subject to two competing, conflicting and inconsistent orders, and that might result in damaging sanctions, because if a South African court should order disclosure, and the order was not complied with because of a conflicting English order, then it could result in the dismissal of their South

African action. They might also face alternative sanctions before the English courts. That would be the result unless Minmetals consents to not pursuing any relief in London in relation to the claim for production of the documents, which it has refused to do.

[8] To avoid such conflicting results, a multiplicity of actions, possible conflicting orders, incompatible outcomes and potential prejudice, the owners settled on seeking the joinder of Minmetals as the only appropriate solution. Minmetals could then elect to take whatever further steps it may deem fit, but it could not resist its joinder to keep open its option to seek relief in England to counter the effect of an order, which might be granted in this country. On 10 June 2021, the owners, relying on the provisions of s 5(1) of the Act, moved for the joinder of Minmetals to the application to compel so Minmetals could assert its position, if so advised, but regardless, be bound by an order of a South African court as to whether the documents should be disclosed.

[9] Transnet did not oppose the joinder application. Its attitude was that there was no need for Minmetals to be joined as the documents sought were in the possession of the owners and should simply be produced. That however would ignore the claims to confidentiality. It participated in the joinder application and also in this appeal simply to dispute Minmetals' allegation that Transnet has no right to the disclosure of the documents because they are privileged or otherwise immune from production.

[10] Minmetals opposed the application for joinder, maintaining its stance that the documents could never be disclosed without its consent. It also did not abandon the possibility of proceeding before the arbitration tribunal, or an English court, for an order restraining the owners from producing the documentation. Indeed, it implicitly reserved the right to do so by maintaining that it was the United Kingdom courts which would have the jurisdiction to rule on the issue of the confidentiality of the documents.

In the high court

[11] On 29 July 2022, the high court, relying on the provisions of s 5(1) joined Minmetals as a party to the application to compel.[3] The high court reasoned that Minmetals would be bound by the findings in the application to compel, whatever those may be, and accordingly, that it would be in the interest of justice for it to be joined, to require it to argue its claim to confidentiality in the application to compel, also as this may be relevant to any further proceedings instituted in an English court or arbitration. The joinder would effectively compel Minmetals to decide whether to waive any right which might prevent the owners from disclosing the documents, or to justify why the documents should not be disclosed.

[12] The high court's order expressly confined Minmetals' joinder to the 'application to compel discovery brought by the Transnet . . .' It further granted Minmetals leave to file answering affidavits, if any, in the application to compel and directed Minmetals to pay the owners' costs of the application, such costs to include the costs consequent upon the employment of two counsel.

[13] The high court concluded that it was not required of the owners to establish a *prima facie* case against Minmetals, because they were not seeking to enforce a claim, but to achieve a procedural remedy, simply to protect themselves against possible claims. It held further, that even if the owners were required to establish any *prima facie* right against Minmetals, that they had done so, as the English law, which Minmetals submitted applies, recognises exceptions to the implied privilege rule, including that disclosure of the documents may be ordered where it would be in the interests of justice. Whether disclosure should indeed be ordered, will however ultimately only be determined by the court hearing the application to compel.[4]

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[3] Paragraph (a) of the order of the high court is in the following express terms:
'(a) Minmetals Logistics Zhejiang Co Ltd, the charterers of the mv 'Smart', are, in terms of s 5(1) of the Admiralty Jurisdiction Regulation Act, 1983, *joined in the main application to compel discovery* brought by Transnet National Ports Authority ('the TNPA'). (Emphasis added.)

[4] *Ali Shipping Corporation v Shipyard Trogir* [1998] 1 Lloyd's Rep 643 at 105, 107 and 129.

The need for joinder

[14] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another,*[5] the Constitutional Court held that:

'Generally, a party must be joined in proceedings if it has a direct and substantial interest in any order the court might make, or when an order cannot be effected without prejudicing it.'

A direct and substantial interest means an interest in the subject-matter of the litigation, not a mere financial or academic interest. If a party has a direct and substantial interest, it is a necessary party[6] and should be joined unless the court is satisfied that it has waived the right to be joined.[7]

[15] On the facts of this matter, whether the documents should be produced is a disputed question, the resolution of which will arise in the application to compel. The application to compel is incidental to the court exercising its jurisdiction in the action. The joinder of Minmetals as a party to the application to compel, is simply a necessary interlocutory procedure to achieve a proper and full ventilation of an issue relating to the action and the application to compel. If the court hearing the application to compel was to order disclosure of the documents, its order will certainly affect the legal rights of Minmetals. Whether disclosure of the documents should be ordered in the pending action would unquestionably be binding on Minmetals.

Giving effect to the need for joinder

[16] Accepting that Minmetals should be joined, the next enquiry is how that could be achieved. In the ordinary course it would not be competent for a South African court to join a foreign entity over which it does not have jurisdiction, to local proceedings.[8] In admiralty matters joinder can be achieved, as in other high court litigation, in terms of the

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[5] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) para 44.

[6] This court said in *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) para 12, that '. . . [J]oinder of a party is only required as a matter of necessity - as opposed to a matter of convenience - if that party has a direct and substantial interest which may be affected prejudicially by the judgement of the court in the proceedings concerned.'

[7] D R Harms Civil Procedure in the Superior Courts (2022) Vol 1, B-103 at B10.2.

[8] Section 21(2) of the Superior Courts Act 10 of 2013.

common law and rule 10, [9] which applies in admiralty matters by virtue of the provisions of Admiralty rule 24, and, in addition, also in terms of s 5(1) of the Act.[10] The high court based its order on s 5(1). Minmetals maintained that s 5(1) did not permit its joinder. The preliminary issue to be addressed is whether the high court had the jurisdiction, in principle, to direct the joinder of a third party, like Minmetals, in terms of s 5(1).

[17] Section 5(1) provides as follows:

'A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in terms of this Act of any person against whom any party to those proceedings has a claim, whether jointly with, or separately from, any party to those proceedings, or from whom any party to those proceedings is entitled to claim a contribution or an indemnification, or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and which should be determined in such a manner as to bind that person, whether or not the claim against the latter is a maritime claim and notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the court, whether by reason of the absence of attachment of his property or otherwise.'

[18] The section provides extended powers, in the interests of justice and convenience, that would otherwise not be available to a high court when not exercising its admiralty jurisdiction, to join peregrine 'not otherwise amenable to the jurisdiction of the court . . .by reason of the absence of attachment of his property[11] or otherwise.'[12] It is however a

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[9] Rule 10 however cannot confer substantive rights. It regulates procedural matters.

[10] The owners relied on rule 10 as well before the high court and this Court. The high court found that it had no application. That finding was correct – see J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) at 136. The owners have again relied on the provisions of rule 10 before this Court. Whether rule 10 could have applied will not be considered further as the high court did not order the joinder of Minmetals based on rule 10, and because this judgment concludes that the joinder of Minmetals was validly achieved based on a proper interpretation of s 5(1).

[11] Following *Simon NO v Air Operations of Europe AB and Others* [1998] ZASCA 79; 1999 (1) SA 217 (SCA); [1998] 4 All SA 573 (A) at 231B-C, no attachment would in any event have been required, as no relief is claimed against Minmetals, and the nature of the relief sought in the application to compel does not sound in money.

[12] In Jamieson v Sabingo [2002] ZASCA 20; [2002] 3 All SA 392 (A) paras 21-22, it was held that ordinarily, in matters other than maritime matters, where the party to be joined is a *peregrinus* against whom relief *ad pecuniam solvendam* (sounding in money) is to be claimed, then an attachment, at least *ad confirmandum jurisdictionem* (to confirm the jurisdiction where the *ratione jurisdictionis* – reason for jurisdiction- for example a delict, occurred within the territorial jurisdiction of the court) or *ad fundandum jurisdictionem* (to found jurisdiction) where it did not.

power which can only be exercised provided the requirements of the provision are satisfied. Whether Minmetals could be made 'amenable to the jurisdiction of the high court' therefore turns on a proper interpretation of s 5(1).

[19] Following *Cool Ideas 1186 CC v Hubbard and Another*[13] and *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[14] the words employed in s 5(1) must be given their ordinary grammatical meaning, unless to do so would result in an absurdity, but interpreted purposively, properly contextualised, and consistent with the Constitution. Statutory interpretation is an objective process. The words in the statute must be given their ordinary general meaning,[15] that will apply to all cases falling within the ambit of the statute,[16] unless to do so would result in an absurdity.

[20] Recently the Constitutional Court reiterated this approach in *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*[17] as follows:

'. . .one must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.'

This injunction means that there must be compelling reasons why, if the legislature used the word 'or', that it should be read as 'and'. The words must be given their ordinary

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[13] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) (*Cool Ideas*): 2014 (8) BCLR 869 (CC) at para 28.
[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 17.
[15] Op cit *Cool Ideas* para 28; Op cit *Endumeni*.'
[16] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) para 78; See also *Endumeni* para 18.
[17] *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.

meaning unless the context shows or furnishes very strong grounds for presuming that the legislature really intended that the word not used is the correct one.[18]

[21] Following the above approach to interpretation, s 5(1) properly construed, contemplates three possible categories, spatially separated by the word 'or' where a joinder may be ordered, namely:

(a) where any party to the proceedings has a claim, whether jointly with, or separately from, any other party to those proceedings, against the party to be joined; or

(b) where any party to the proceedings is entitled to claim a contribution or an indemnification against the party to be joined; or

(c) a person in respect of whom any question or issue in the proceedings is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and should be determined in such a manner as to bind that person.

The high court concluded that the third category conferred the power to join a party in the position of Minmetals.

[22] Clearly, the present is neither an instance where (a) nor (b) finds application. Minmetals argued that (c) did not establish a separate category of persons for joinder, but qualified (a) and (b). It relies on the view of Hofmeyr[19] that the word 'or' in 'or . . . in respect of whom,' immediately preceding (c) above, must be interpreted to read 'and.' This, it is argued, is necessary to give effect to the legislature's intention, and to avoid, as Hofmeyr contends, a situation where in a claim based on carriage, a foreign party could be joined in South African litigation in respect of a completely unrelated non-maritime claim, such as goods sold and delivered. Such an eventuality, Minmetals submits, demonstrates the

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[18] See the interpretation of 'or' as 'and' in *Ngcobo and Others v Salimba CC; Ngcobo and Others v Van Rensburg* [1999] ZASCA 22; [1999] 2 All SA 491 (A); 1999 (2) SA 1057 (SCA) 1068A-C; See also *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) para 143 (minority judgment of Jafta J).

[19] G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) at 212.

absurdity and unreasonableness of interpreting s 5(1) in the manner contended for by the owners, and accepted by the high court.

[23] Hofmeyr's reasoning is not underpinned by any authority. The example of the goods sold and delivered claim, if not involving substantially the same issue or question which has arisen or will arise between the party to the action and the third party to be joined, would not be within the contemplation of the provision in any event. If it does, then the joinder would satisfy, what Hofmeyr[20] himself recognises, as 'considerations of convenience,' so that the same issue, arising between a number of persons, can be decided in one action, rather than in a multiplicity of proceedings. That would be the antithesis of absurdity. But, even if some inconvenience is caused, inconvenience does not equate to absurdity. And further, any such alleged 'absurdity' is expressly contemplated in s 5(1) permitting joinder 'whether or not the claim . . . is a maritime claim and notwithstanding the fact that [the party to be joined] is not otherwise amenable to the jurisdiction of the court.' The alleged 'absurdity' is not only not an absurdity, but a deliberate feature of s 5(1).

[24] There are no compelling reasons to read the provision conjunctively and the second 'or' as meaning 'and', contrary to the plain meaning thereof. The three categories should be read disjunctively. The choice of 'or' was deliberate. As, has been said,[21] '[a]lthough much depends on the context and the subject matter . . . it seems to me that there must be compelling reasons why the words used by the legislature should be replaced; *in casu* why "and" should be read to mean "or", or vice versa. Words are given their ordinary meaning '. . . unless the context shows or furnishes very strong grounds for presuming that the legislature really intended 'that the word not used is the correct one.'

[20] Hofmeyr at 212.
[21] Op cit fn 18 para 11.

[25] It is significant that (c) provides for the joinder of a person in respect of 'whom any question . . . has arisen.' What follows thereafter is fairly broad and almost limitless. It contemplates a joinder in respect of 'any question or issue', 'which has [already] arisen' in the past or 'will arise' in the future. A disjunctive interpretation is also consistent with the purpose of s 5(1) to broaden the scope for joinder in maritime matters, otherwise, there would have been little, or no need to provide for joinder beyond rule 10 and the common law.

[26] The reasoning of the high court was not flawed. On the contrary, it is supported by the ordinary canons of statutory interpretation, and authorities, such as Shaw[22] and Hare.[23] Section 5(1) is a 'powerful measure'[24] and a 'very far-reaching power'.[25] That does not mean that effect should not be given to the clear wording thereof. As was said in *MY Summit One Farocean Marine (Pty) Ltd v Malacca Holdings Ltd and Another*:[26]

'Admittedly, the powers of joinder in terms of the section so construed are far-reaching. But the object of the legislature was clearly to permit all the parties to a dispute to be joined in the action. The absence of such a provision could well result in the undesirable situation of courts in different countries having to adjudicate on the same or substantially the same issues arising out of the same incident or set of facts.'

The avoidance of courts in different countries having to adjudicate on the same or substantially the same issues arising out of the same incident or set of facts, is the very mischief that the owners seek to avoid. The purpose and context of s 5(1) is plainly underpinned by considerations of convenience so that if the same issue arises between a number of persons, that issue should be decided in one action rather than in multiple proceedings.[27] The importance of the section is to avoid a multiplicity of actions, with the real danger of conflicting judgments in different countries.[28]

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[22] D J Shaw *Admiralty Jurisdiction and Practice in South Africa* (1987) at 9 page. Although Shaw considered s 5(1) prior to its amendment, the material portions thereof have not changed.
[23] Hare at 136 described s 5(1) as 'a wide open door' and reinforced the use of a disjunctive 'or.'
[24] Hare at 138.
[25] Shaw at 9.
[26] *MY Summit One Farocean Marine (Pty) Ltd v Malacca Holdings Ltd and Another* [2004] ZASCA 58; [2004] 3 All SA 279 (SCA); 2005 (1) SA 428 (SCA) para 17.
[27] Hofmeyr at 212.
[28] Op cit fn 26 para 17.

[27] Accordingly, (c) applies. Accepting that the high court had the necessary authority to join a third party in the position of Minmetals, the question then becomes whether it should have directed its joinder. However, a consideration of that question need only occupy our attention if the high court's decision to direct the joinder is appealable. It is to that issue that I then turn.

Is the order of the high court appealable?

[28] When the owners opposed the application for leave to appeal before the high court, they had argued that the joinder order was not appealable. The high court however concluded that its order had final effect, in the sense that in joining Minmetals, it rendered it susceptible to the jurisdiction of the court, and that this order was definitive of the rights of Minmetals. It accordingly considered its order to be appealable. In doing so, the high court, with respect, conflated the issues whether it had the jurisdiction and could order the joinder of a *peregrinus* in the position of Minmetals under s 5(1), and whether it should have ordered the joinder of MInmetals. The parties were accordingly requested in advance of the appeal hearing to be prepared to address this Court as to whether the order was appealable.

The test for appealability

[29] *Zweni v Minister of Law and Order of the Republic of South Africa (Zweni)*[29] held that for a court order to be appealable, it had to have three attributes: the order should be final in effect and not susceptible to alteration by the court of first instance; it should be definitive of the rights of the parties, that is, it must grant definitive and distinct relief; and, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. With the passage of time, the test for appealability has become more flexible in accordance with the dictates of what is 'in the interest of justice'. The interest of justice criterion is now paramount in deciding whether orders,[30] including

[29] *Zweni v Minister of Law and Order* [1992] ZASCA 197; [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 532I-533A.

[30] *Philani-Ma-Afrika v Mailula* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA) para 20; See also *S v Western Areas* [2005] ZASCA 31; [2005] 3 All SA 541 (SCA); 2005 (5) SA 214 (SCA);

interlocutory orders[31] are appealable. As to what is in the interest of justice, requires a careful weighing up of all germane circumstances.

[30] These developments in our jurisprudence have been summarised by the Constitutional Court as follows in *Tshwane City v Afriforum*:[32]

'Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interest of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability . . . If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre—Constitution common law impediments might suggest . . .'

[31] The interests of justice test has been explained further by the Constitutional Court, for example in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (UDM)*[33] as follows:

'Whether this Court should grant leave turns on what the interests of justice require. Whether it is in the interests of justice to hear and determine the matter involves a careful balancing and weighing-up of all relevant factors. However, there is no concrete and succinct definition of the phrase "interests of justice" and what it really entails. What is in the interests of justice will depend on a careful evaluation of all the relevant factors in a particular case . . .It would not be in the interests of justice that the issues in this matter are determined in a piecemeal fashion. Moreover, the issues in this matter are of such a nature that the decision sought will have a practical effect if the application for leave to appeal is granted. This matter raises issues that are of a

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2005 (1) SACR 441 (SCA); 2005 (12) BCLR 1269 (SCA) para 25 and 26; *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 para 8.

[31] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at paras 23-25. See also *MEC for Health, KwaZulu Natal v Premier, Kwazulu Natal: In re Minister of Health v Treatment Action Campaign* [2002] ZACC 14; 2002 (5) SA 717 (CC); 2002 (10) BCLR 1028 at para 6; *Cape Metropolitan Council v Minister of Provincial Affairs and Constitutional Development* [1999] ZACC 12 (CC); 1999 (12) BCLR 1353 (CC) at para 12.

[32] *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at para 40 – 41.

[33] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) at para 34 to 37 (footnotes omitted).

constitutional nature and arguable points of law of general public importance . . . The public interest will be best served by their prompt resolution. Such resolution will help to correct the wrong decision before it has further consequences, on the one hand, and to avoid delay and inconvenience resulting from the failure of this Court to hear the appeal . . .'.

[32] The *Zweni* triad of attributes for an order to be an appealable order, is therefore no longer cast in stone,[34] nor exhaustive.[35] But those attributes have also not become irrelevant or supplanted by the development in our jurisprudence.[36] This Court has remarked that, 'the interests of justice should now be approached with the gravitational pull of *Zweni*.'[37] If one of the attributes in Zweni is lacking, an order will probably not be appealable, unless there are circumstances which in the interests of justice, render it appealable. The emphasis has moved from an enquiry focused on the nature of the order, to one more as to the nature and effect of the order, having regard to what is in the interests of justice.[38] What the interests of justice require depends on the facts of a particular case. This standard applies both to appealability and the grant of leave to appeal, no matter what pre-Constitution common law impediments might exist.[39]

[33] As regards the interests of justice, generally:

'[T]he high court should bring finality to the matter before it, in the sense laid down in *Zweni*. Only then should the matter be capable of being appealed to this Court. It allows for the orderly use of the capacity of this Court to hear appeals that warrant its attention. It prevents piecemeal appeals

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[34] *Griekwaland Wes Korporatief Beperk t/a Vaalrivier Diensstasie v Desert Oil (Pty) Ltd* [2024] ZANCHC para 14. The application of the broader 'interests of justice test' might however provide compelling justification for an appeal against an order which otherwise would not be final in effect, whether on a question of law or otherwise.

[35] *Cyril and Another v Commissioner for the South African Revenue Service* [2024] ZASCA 32; 2024 JDR 1335 (SCA) para 7.

[36] *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others (TWK)* [2023] ZASCA 63; 2023 (5) SA 163 (SCA).

[37] Ibid *TWK* para 30.

[38] In *Jacobs and Others v Baumann NO and Others* [2012] JOL 23549 (SCA) at 7 it was said that'[t]herefore, a court determining whether or not an order is final considers not only its form but also, and predominantly, its effect.'

[39] *National Commissioner of Police and Another v Gun Owners of South Africa* [2020] ZASCA 88; [2020] All SA 1 (SCA); 2020 (6) SA 69 (SCA); 2021 (1) SACR 44 para 15.

that are often costly and delay the resolution of matters before the high court. It reinforces the duty of the high court to bring matters to an expeditious, and final, conclusion.'[40]

It is not in the interest of justice to have a piecemeal adjudication of litigation, with unnecessary delays resulting from appeals on issues which would not finally dispose of the litigation. As the Constitutional Court has held, albeit in a different context,[41] it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance, and an appellate court will only interfere in pending proceedings in the lower courts in cases of great rarity – where grave injustice threatens, and, intervention is necessary to attain justice.

Discussion

[34] This Court in *Government of the Republic of South Africa and Others v Von Abo,*[42] held that there is no checklist of requirements to be weighed up to determine whether a decision is appealable. Several considerations need to be weighed up, including: whether the relief granted was final in its effect, whether the relief was definitive of the rights of the parties; whether it disposed of a substantial portion of the relief claimed; whether it is convenient that an appeal be entertained; what delays will be occasioned; considerations of expedience; what prejudice might ensue; whether it will avoid piecemeal appeals; and, whether it will contribute to the attainment of justice.

[35] As regards the triad of attributes listed in *Zweni,* the parties are agreed that it is only the third requirement, that is whether the joinder of Minmetals would have the effect of disposing of a substantial portion of the relief claimed, which is implicated in this appeal. The 'relief claimed' required to be disposed of, is not the relief forming the subject of the application to which it relates, that is the joinder of Minmetals, otherwise every interlocutory application will meet that requirement, and be appealable. The relief is the substantive relief the parties seek to secure in the action, or at the very least, the relief

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[40] Op cit *TWK* para 21.
[41] *Cloete and Another v S; Sekgala v Nedbank Limited* [2019] ZACC 6; 2019 (5) BCLR 544 (CC); 2019 (4) 268 (CC); 2019 (2) SACR 130 (CC) para 57-58.
[42] *Government of the Republic of South Africa and Others v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA) para 17.

claimed in the application to which the joinder order relates, namely the relief claimed in the application to compel. The joinder of Minmetals has not finally disposed of any such relief. The application to compel, may require identifying which system of law will determine whether the documents are to be produced. The joinder order simply facilitates a full and proper ventilation of all the issues material to the determination of the application to compel, but it has not disposed of any part of any of the relief sought. On a strict application of the *Zweni* test, the order of the high court is not appealable.

[36] The question becomes whether there are any further considerations which dictate that the joinder order should nevertheless be appealable in the interests of justice. Minmetals has not pointed to any considerations which persuade me that it is 'in the interests of justice' that the joinder decision should be appealable.

[37] On the contrary, a survey of some of the possible relevant considerations which might apply, point in the opposite direction: allowing an appeal would simply cause further delay in the litigation involving the demise of the '*Smart*', which now occurred some eleven years ago; an appeal will not in any way contribute to achieving finality as soon as possible, in the interests of the parties and the general administration of justice; an appeal against the joinder order will simply fragment the appeal process and further deplete scarce judicial resources; an appeal against the joinder will be largely academic if the application to compel is ultimately dismissed; any appeal in respect of interlocutory applications, specifically where interlocutory (to join) to another interlocutory application (to compel), should generally be discouraged.

[38] The joinder application was an interlocutory application, not disposing of any substantial part of any final relief claimed, but a mere procedural step in relation to another interlocutory application, namely the application to compel, which is interlocutory to the owners' main claim pending in the high court. A court still has to decide, as a matter of law, whether the resistance to disclosure of the documents based on confidentiality,

should prevail, and whether the owners should be compelled to produce the documents.[43] It remains open to Minmetals to oppose the application to compel, or to abide the relief. There are no considerations which make an appeal imperative.

[39] Minmetals' fear that its joinder could expose it to relief sought against it by the owners or Transnet, is misplaced. It was specifically 'joined in the main application to compel discovery brought by the Transnet National Ports Authority . . .'. Transnet is not pursuing any claim against Minmetals. The owners' claim against Minmetals was dismissed in the charterparty arbitration. Neither the owners nor Transnet has given notice of any further claims. Having regard to the time that has elapsed since the grounding of the '*Smart'* on 19 August 2013 any further potential claims would, by now, probably have long prescribed.

Conclusion

[40] Insofar as Minmetals disputed the power of the high court in terms of s 5(1), to order its joinder and thus render it subject to its jurisdiction, its contentions were misplaced and without merit. The high court correctly concluded that s 5(1) confers such a power. Having concluded that the high court could grant such an order, the sole issue was whether it should have granted the order joining Minmetals to the application to compel. An appeal lies against the order of a court, not its reasons. As the relief granted by the high court is not appealable, the appropriate order to be granted is that the appeal is struck from the roll.

[41] As between Minmetals and the owners, the costs should follow the result. As regards the costs of Transnet, the high court found that its submissions were helpful, but that it was in effect a neutral party with regard to the joinder. It made no order for costs

[43] The owners refer to *Transnet v MV Alina II [*2013] ZAWCHC 124; 2013 (6) SA 556 (WCC) para 45 as authority that a South African Court may direct the disclosure of arbitration documents in a foreign arbitration between one litigious party and another third party, but acknowledge that the issue when to override the principle of confidentiality is a vexed one.

with regard to its involvement in the proceedings before the high court. There is no basis to interfere in that order. As regards the interest of Transnet in the appeal, if this court was to have entertained the appeal and concluded that the owners had to establish a *prima facie* case for the documents to be produced, but that no *prima facie* case for the production of the documents had been established, then this could have impacted, as a finding of this Court, on Transnet's application to compel in the high court. I am accordingly of the view that it was reasonable and appropriate for Transnet to have participated in the appeal to protect its rights.

[42] Minmetals is accordingly directed to pay the costs of the owners and Transnet in this Court. All the parties employed two counsel and in asking for the relief they respectively claimed, sought costs, including the costs of two counsel where employed. Such an order is appropriate.

Order

[43] The following order is issued:

1 The appeal is struck from the roll;

2 The appellant is directed to pay the costs of the first and second respondents, such costs to include the costs of two counsel where employed.

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P A KOEN

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	M J Fitzgerald SC and D J Cooke
Instructed by:	Edward Nathan Sonnenbergs Inc, Umhlanga Rocks
	Honey Attorneys, Bloemfontein.
For the first respondent:	S R Mullins SC and P J Wallis SC
Instructed by:	Shepstone & Wylie Attorneys, Umhlanga Rocks
	Matsepes Attorneys, Bloemfontein.
For the second respondent:	M Wragge SC and J D Mackenzie
Instructed by:	Webber Wentzel, Cape Town
	McIntyre Van Der Post, Bloemfontein.