



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 20421/2024

In the matter between:

STONEHILL PROPERTY FUND PROPRIETARY LIMITED

Applicant

and

ANDILE SHONGWE

First Respondent

KRAVITOUCH (PTY) LTD

Second Respondent

**APPLICATION FOR LEAVE TO APPEAL
JUDGMENT DELIVERED ELECTRONICALLY
FRIDAY, 6 DECEMBER 2024**

NZIWENI, J

- [1] This is an application under section 17 of the *Superior Courts Act*, Act 10 of 2013 ("the Act") for leave to appeal against the whole judgment and orders that I handed down on 16 October 2024. The applicant now seeks leave to appeal

to the Supreme Court of Appeal (“SCA”) alternatively to the full bench of this division. The respondents oppose the application.

- [2] The grounds upon which the application is predicated are fully listed in the notice for leave to appeal.
- [3] During the course of the applicant’s oral submissions, the applicant raised various grounds as to why it asserted that this Court was wrong to come to the decision it did in relations to the joinder, the order it made and the costs order. In effect for these and other reasons developed during this application, it was submitted that I should not have found that there was a non-joinder.
- [4] Among the points raised by the applicant was that the matter raises important constitutional issues and that the interest of justice is in favour of leave to appeal. For the reasons set out below, the applicant is of the opinion that there are reasonable prospects of success and compelling reasons to grant the leave to appeal to the Supreme Court of Appeal.

Grounds of appeal

Wrong test applied

- [5] The applicant argues that this Court erred in finding that the political parties are necessary parties to the interdict proceedings. On that premise, the applicant contends that I incorrectly articulated the test for assessing joinder by necessity. According to the applicant’s counsel, I found that it is sufficient that a party has

an interest in matter and that its rights are indirectly implicated by the subject matter of the litigation.

- [6] In relations to the test applicable, the applicant further asserts that I applied a test that says one must look at the facts and circumstances of each case and make a determination whether there is an impact. So, the argument continues; it can be deduced from this that I applied a broader test. Yet, the jurisprudence on joinder applies a narrow test than I did. According to the applicant, a party is necessary if it affected by the order sought or its participation is required to bring the order into effect.
- [7] Further, the applicant contends that only the parties that are alleged to have engaged in the unlawful conduct can be interdicted and must be joined. According to this argument, it is wrong and inappropriate to present an undue chilling effect on strike action to join parties who are not implicated in the unlawful conduct.
- [8] According to the applicant, because there is no relief sought against the political parties; they can never be necessary parties.

The Oak Valley case

- [9] It was strenuously asserted on behalf of the applicant that it is only competent to order a joinder of necessity if the order implicates the party at issue. As this ground of appeal was developed in this Court, the proposition came to be that

the correct legal position as was stated in the case of *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* 2022 (5) SA 18 (CC) (1 March 2022), is that, only the parties who are alleged to have engaged in the unlawful conduct can be interdicted and must be joined. Thus, it is not sufficient to look at the subject matter of litigation as done by this Court.

- [10] So far as the relief sought in the main application was concerned, Ms Goodman SC further submitted that in the main application, the applicant only sought to interdict the respondents from continued participation in those strikes.
- [11] For all the foregoing reasons, the applicant submits that this Court, in its main judgment went against the precedent established in the *Oak Valley* case.
- [12] Accordingly, it was argued on behalf of the applicant that it is a very narrow point that it seeks to take on appeal; the finding that the applicant is required to join parties that are not implicated in the unlawful conduct. In relations to the contempt issue, it is submitted that the applicant takes issue with whether the contempt concern that this Court identified in its judgment, as sufficient to warrant joinder.
- [13] It was further argued that the interdictory relief sought by the applicant is forward-looking. It is only concerned with future conduct, consequently the political parties that have participated in the past protest are not implicated by the order that is sought.

Wrong interpretation of the averments in the founding affidavit

- [14] The applicant also seeks leave to appeal on the ground that this Court's decision is based upon an erroneous finding of fact without regard for the material before it. It is further argued that this Court's finding that the founding affidavit denotes that political parties who had arranged marches had acted in cahoots with the respondents in arranging marches. It is submitted that this finding was based on my reading of that evidence and what it meant by implication. It is thus submitted that another court may interpret that evidence differently.
- [15] According to the applicant, my interpretation of the averments is wrong because the founding papers were at pains to state that on evidence available, the political parties were not acting unlawfully or in breach of their constitutional rights. According to the applicant, the papers drew a very stark distinction between the respondents, on the one hand, who they claimed were abusing their rights; and the political parties and the strike participants on the other hand, who were said to be acting in a legitimate exercise of their constitutional right. Thus, according to the applicant's counsel, they were not in cahoots or pursuing a common goal, but in fact their positions were starkly divergent. It is argued by applicant's counsel that this Court implied common purpose and yet the papers do not make that out.

The test applicable

- [16] It is the applicant's assertion that there are two grounds on which an applicant can seek leave to appeal under section 17. One is that there is a reasonable prospect that another court might differ. The applicant further asserts that in other words, another court might say this joinder point was wrong, and it ought to have been dismissed.

The order striking the matter from the roll

- [17] The third ground of appeal is that another court may take issue with the order of striking the matter from the roll. According to the applicant, this Court acted contrary to precedent as stated in the *Peacock v Marley* 1934 AD,1 matter. The applicant also seeks to appeal on ground that this Court failed to identify the parties who were required to be joined despite this Court being handed a draft order to that effect.

Cost order

- [18] Finally, the applicant seeks leave to appeal on ground that this Court should not have granted a costs order against it as the applicant brought the main proceedings in order to vindicate its constitutional right and to ventilate constitutional issues. Thus, it is entitled to the protection of the *Biowatch* principle.

Evaluation

The test

- [19] Section 17 identifies the criteria for granting leave to appeal. In terms of section 17 of the Act, leave may be given if the court is of the view that the appeal would have reasonable prospects of success or there is some compelling reason why the appeal should be heard.
- [20] It should, however, be emphasised that in so far as the decision to grant or refuse leave to appeal is concerned, the court is required to apply the test as set out in section 17 of the Act. Thus, the 'correct test' must always be applied in such applications.
- [21] The case law is clear that one factor that is considered in all cases is whether the appeal is *prima facie* meritorious or there are compelling reasons why the appeal should be heard. This means that the critical factor in obtaining leave to appeal is measured by this test. And the test is more stringent than articulated by Ms Goodman SC.

The joinder

- [22] It is worth noting that, overall, the case presented by the applicant was predicated on the basis that the respondents have corralled political parties to the respondents' cause to lead marches and protests that caused harm to the applicant and that a further march was planned. Indeed, it was in this vein that, as I have previously observed in the main judgment, that the applicant asserts

that the conduct of the respondents and the various political parties are inextricably intertwined. In essence, the applicant implicates the political parties to the impugned conduct attributed to the respondents.

[23] It then follows from that that in this case, this is an important and distinct feature, particularly in the context of whether the political parties ought to have been joined or not.

[24] Therefore, in the main judgment the express and deliberate mention that the various political parties are inextricably entangled in the assertions made by the applicant against the respondents and the organisation of the protests does not implicitly preclude or ignore the principle that is enunciated in the *Oak Valley* case.

[25] It is also a striking feature that at the outset of her submission in this application, Ms Goodman SC, stated that the underlying fact of this matter concerns rolling protests on the Pullman Hotel which the applicant alleges are instigated by respondents. On this assertion alone, there is an insinuation that the respondents are urging the political parties to engage in the rolling protest targeted at Pullman Hotel.

[26] Similarly, the applicant's papers identify the respondents as inciting the political parties to engage in the protests. The applicant further submits that harmful allegations made by the respondents have misled hundreds into marching. It is

common cause in this matter that it is the identified [in the founding affidavit] political parties that are engaged in the protests.

- [27] On top of that, the applicant further alleges that the respondents threatened the owners of the applicant with political action and to organise protests. I stress again that, in this context, it is significant to note that the applicant then alleges that the respondents are politically connected and corralled to their cause several political parties who have since led marches and protests. If this does not expose a suggested link between the respondents and the political parties, nothing else does.
- [28] Clearly, the applicant suggests that the respondents are the force behind the protests and that there is some sort of joint work between the respondents and the political parties to cause harm to the applicant. This can only be construed to mean that there are conspiracies between the respondents and the political parties to cause harm to the applicant. According to the applicant, the political parties participated in a plan [hashed by the respondents] to cause the applicant harm through protests. The assertions contained in the founding affidavit equivocally alleges that the protests by the political parties are actuated by the respondents' desires and objectives.
- [29] That being so, it follows that the political parties harboured the same unlawful intentions harboured by the respondents [to use protests as a tool to harm the applicant]. According to the founding affidavit, on that they are at one.

[30] Reading of the founding affidavit closely, it is easy to form a conclusion that there is a link between the respondents and the political parties.

[31] It is pertinent to note that the applicant also states the following in the founding affidavit that:

“That is with respect, is not permissible use of right of peaceful assembly. It is abuse of rights and should be stopped by way of interdictory relief.”

[32] It is clear to me, therefore, that the applicant says, albeit not in so many words, that the political parties are part of the tactics employed by the respondents to use protests as a tool to harm a business of a rival. The applicant further plainly characterises the actions of the respondents as unlawful. In such circumstances, it is difficult to draw the line between the respondents and the political parties.

[33] The Constitutional Court in *Oak Valley, supra*, further stated that:

“[26] The cases make it clear that one of the *inquiries* undertaken by a court asked to grant a final interdict is a careful assessment of whether the injury committed or apprehended can be attributed to the conduct of the respondent. In *Hotz SCA*, the University of Cape Town contended that the evidence established that the student respondents “had all been active participants in the protests and had not disavowed any of the conduct of the protestors”. In reaching its decision to grant a final interdict against the students, the Supreme Court of Appeal considered the factual allegations made against each student and the grounds advanced for why the University was entitled to an interdict against them. It concluded that the evidence in respect of each

student disclosed that they were engaged in or parties to unlawful conduct that included the destruction of university property. By implication, it rejected the contention that mere participation in protest action, in which there is unlawful conduct, is sufficient to expose a person to interdictory relief.

[27] Likewise, in *Rhodes University*, the High Court engaged in a painstaking analysis of each student's involvement in the unlawful conduct in order to determine what relief, if any, could be granted against them.

[28] Is the position any different in cases where an interdict is sought against workers engaged in strike action? A conspectus of jurisprudence from the High Court and Labour Court reveals that courts have held steadfast to the requirement of a sufficient link between the respondent sought to be placed under interdict and the alleged unlawful conduct committed or apprehended, even within the context of strike action."
Footnotes excluded and emphasis added.

[34] It bears commenting that in so far as *Oak Valley* is concerned, I am unable to accept the proposition made on behalf of the applicant that *Oak Valley* supports the applicant's contentions. Counsel on behalf of the applicant suggests that *Oak Valley* is the authority for the proposition that the non-joinder finding by this Court is a wrong finding in the context of the present case.

[35] To the contrary, I consider that the principles laid out in *Oak Valley* case, stands four square with this matter in support of this Court's finding. Thus, the decision of this Court accords with *Oak Valley*. Unsurprisingly, had this Court found that the political parties are not necessary parties in this application, such a finding would be contrary to the precedent set by *Oak Valley*. Yet, ironically the

applicant *inter alia*, relies for the reversal of the main judgment on this proposition.

[36] If the applicant's proposition is to be accepted, that would involve reading into the [Oak Valley] decision, conclusions both of substance and in the findings that are simply not present.

[37] I stress again that in the founding affidavit the applicant has corralled together the respondents and the various political parties. So far as the allegations made by the applicant are concerned, it seems to me inherent and self-evident that the applicant suggests that the respondents and the political parties acted jointly or in concert. The factual assertions made in the founding affidavit, establishes a link between the respondents and the political parties. Thus, in the context of this case, if there is no wrongful conduct imputed against the political parties, there can never be wrongful conduct ascribed to the respondents.

[38] There can be no doubt, therefore, that the upshot of the matter is that the conclusion thus far is that because of the applicant's assertion, the applicant has inevitably drawn the political parties into the main application. In consequence, I then found that on the applicant's own version it is suggested that the political parties are implicated in what the applicant accuses the respondents of doing and that the political parties are aware of the respondents' intentions and acted together with the applicant. It is to be observed therefore that the acts complained of against the respondents [the impugned conduct]

were the conduct of the political parties, who were the persons organising the protests.

- [39] It follows from all these considerations that these findings are clearly justified by the evidence presented by the applicant. Thus, the order to join was *inter alia* clearly motivated by the terminology and assertion [factual allegations] used by the applicant in the founding affidavit.
- [40] Over and above, it is not the applicant's assertion that the political parties were organising the protests independent from the respondents. Instead, the assertion is that they were being corralled by respondents into protests, to perpetuate the respondents' unlawful conduct.
- [41] What I would add by way of postscript is this; as I have indicated at the outset in trying to deal with the 'corralled' issue; the applicant's evidence strongly suggests that there is close association in the organisation of the protests between the respondents, and the political parties. I pause to note one further point: that this is not this Court's interpretation, but the applicant's own version. Thus, the findings which I arrived at, are manifestly warranted by evidence in this application.

[42] And indeed, it is for this reason that this ground of appeal is a non-starter.

Joinder of parties that are not to be affected by the order

[43] The second issue under this head, therefore, is whether the party that needs to be joined is the party that is affected by the order. In *Oak Valley*, the following was stated:

“[23] In addition, it is not far-fetched to conclude that the prospect of being implicated in a contempt application – whether or not such application is likely to succeed – will have a chilling effect on the exercise of the constitutional rights to strike and protest. If mere participation in a strike or protest carries the risk of being placed under an interdict, this might well serve to deter lawful strike and protest action. Moreover, if a participant in a strike or protest is placed under an interdict, despite having conducted herself lawfully, she might well refrain from further strike action out of the justifiable fear of being swept up in contempt proceedings in the event that other persons in the crowd act in breach of the interdict.

[24] In *Mlungwana*, this Court held that the criminalisation of the assembly of more than 15 persons without notice had a “calamitous effect” on those caught within its net” and that the “deleterious consequences of criminalisation severely discourage – and thus limit – the exercise of [the right to protest]”. Notably, this Court also acknowledged that the chilling effect of criminal sanction “extends beyond those who convene assemblies without notice” and that “people may be deterred from convening a gathering and prospective attendees might be dissuaded lest they too be deemed to have convened the gathering without notice. In short, even those who intend to strike in a lawful manner might be discouraged from so doing out of fear of being deemed to

have acted unlawfully if interdictory relief is granted too readily." Footnotes omitted

- [44] I fully agree that a party should not be required to be joined simply because accusations about that party are made where no relief is being sought against that party. In the context of this matter, the relief claimed against the respondents is capable of affecting the legal interests of such a party. I found in the main judgment that it seems to me that a judgment in these proceedings has a real potential to have an effect on the political parties. The question which arises is as to whether it would, therefore, be appropriate to make any such order without giving political parties an opportunity to be heard. In my view it would not.
- [45] It seems to me that any consequences of such a finding which could affect the interests of the political parties cannot be made without giving them an opportunity to be heard.
- [46] It certainly cannot be ruled out that a finding in favour of applicant in this case could affect the entitlements of various political parties. As far as this ground is concerned, I get the distinct impression that the applicant's submissions are no more than statements disagreeing with the outcome of the main application and expressing the continued belief that this Court is wrong as far as the contempt aspect is concerned.

Striking the matter from the roll

[47] The effect of striking the matter from the roll was to give the applicant an opportunity to remedy the defect. Surely, the applicant cannot say that in the context of this case this Court did not exercise its discretion judicially.

[48] As far as the order that I granted, I still maintain that an analogy cannot be drawn between *Peacock* and the present case. Plainly, it is not in the province of the appellate court to tell the courts of first instance as to which order to grant in the exercise of discretion. The *Peacock* judgment does not seek to prescribe what a court should do in the exercise of discretion. To accept the assertions made by the applicant would involve reading into the decision conclusions that are not present.

Failure to identify the non-joined parties

[49] The political parties that ought to be joined in this matter were identified by the applicant in its papers. It then stands to reason that the applicant is aware as to who the political parties are. Hence, there is no reason that this Court should furnish to the applicant information that is known to it. There is absolutely no merit to this ground.

Main application costs

[50] In relations to costs, the essentials of the applicant's arguments as set out in the heads of argument in the main application were as follows:

"This case concerns competing constitutional rights and so ordinarily there should be no order in respect of costs. However, since this litigation between private parties, and the applicant's cause of action entails proving that the respondents are abusing their constitutional rights, the Biowatch principle should not apply here. The respondent should be directed to pay the costs of these proceedings. . ." I accept that concession as rightly made. In the circumstances of this case, the cost order that I granted in the main application is amply justified.

Conclusion

[51] I am totally in agreement with Mr Ka-Siboto that the submissions that have been put before this Court are no different from what had been put in the main application. The applicant's assertions were no more than statements disagreeing with the decisions I made in the main judgment. The applicant, in my view, seeks the leave to appeal so that the appellate court can reweigh the evidence. This case turns on the application of law to the facts. There is no question of public importance or such a nature or significance to warrant a decision by the SCA.

[52] For all the foregoing reasons I am not persuaded, that an appeal would have reasonable prospects of success.

In the result, I make the following order:

ORDER

Leave to appeal is dismissed with costs.

A handwritten signature in blue ink, which appears to be 'Nziweni, J.', is written over a solid black rectangular redaction box.

NZIWENI, J

JUDGE OF THE HIGH COURT