



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

Case No: 17678/2023

In the matter between:

ROGER BARRY SILBERBERG N.O.

First Applicant

ANTHONY DAVID SILBERBERG N.O.

Second Applicant

In their capacities as the Trustees of the

HELMET KURT SILBERBERG TESTAMENTARY

FAMILY TRUST

No MT 8548/1998

and

JUNE ROSE THERON N.O.

First Respondent

In her capacity as executor of the Estate Late

Hildegard Erika Silberberg,

Master Reference No. 10944/2009

STRAUSS AND COMPANY (PTY) LTD

Second Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email publication and release to SAFLII. The date for hand-down is deemed to be on 15 April 2025.

JUDGMENT (on LEAVE TO APPEAL)

MAPOMA AJ

Introduction

- [1] This is an application for leave to appeal against the judgment and order that I handed down on 19 December 2024 (“the Judgment”). In the judgment, I found that the applicants had failed to meet the requirements of the interdictory relief they sought whereupon I dismissed the application.
- [2] The applicants for leave to appeal are the same applicants for the application for interdict. For this reason, the court retains in this judgment the citation of the parties as it was in the application for interdict.

Summary of the Relevant Background facts

- [3] The summary of the material facts is that the first and second applicant (“the applicants”) are the heirs in their mother’s estate that comprised, *inter alia*, two immovable properties each of which devolved to the applicants respectively. The estate has a cash shortfall that needs to be settled to finalise the winding of the estate. The executrix identified the movable assets of the estate and intends to settle the cash shortfall of the estate by selling some of the movable assets.
- [4] In an endeavour to achieve the above ideal, the executrix sought and obtained the authority of the Master of the High Court in terms of section 47 of the Administration of Estates Act to dispose of the listed movable assets as belonging to the estate with a view to settling the cash shortfall of the estate. It is worth mentioning that the list of the movable assets in question was compiled with the participation and involvement of the applicants.
- [5] The applicants sought interdictory reliefs to retrain the executrix from selling or disposing of the listed immovable assets pending the action proceedings they

intended instituting to claim the ownership of the movable assets. The applicants' contention is that the movable assets in question belong to a family trust and that the estate does not have any movable assets, which is disputed by the executrix.

- [6] The executrix opposed the application, mainly on the basis that the evidence she presented showed *inter alia*, that the applicant's themselves at some stage deposed to affidavits under oath where they stated that the assets in question belonged to the estate of their mother.
- [7] After hearing the parties, I found that on the evidence placed before me the applicants had failed to meet the requirements of the interdict and refused the relief sought.

The test for Leave to Appeal

- [8] Section 17(1)(a) of the Superior Court Act 10 of 2013 ("the Act") provides that:

"(1) Leave to appeal may only be given where the appellant has shown that the charge or charges consent of the opinion that –

- (a) the appeal would have a reasonable prospect of success; or,
- (b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

- [9] The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal would reasonably arrive at a conclusion different from that of the trial court. This principle requires the court to test the grounds on which the appeal is sought against the facts of the case and the applicable legal principles to ascertain whether the appeal court would interfere in the decision against which the appeal is sought.¹

¹ Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 SCA at para [34]

[10] In *Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC)* at para (6) Bertelsman J, said the following:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has since been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion (see *Van Heerden v Cronwright and Others 1985(2) SA 342 (T) at 345*). The use of the word “would” in the new statute indicates a measure of certainty that another court will differ with the court was judgment is sought to be appealed against.”

[11] The use by the legislature of the words “only” in section 17(1) of the Act is a further indication of a more stringent test.² This notwithstanding, it is noteworthy that, while the test is stringent, it does not require the applicant for leave to appeal to show that the appeal will succeed. Rather, the court must establish that there is a reasonable prospect of success based on the grounds advanced.³

[12] The prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough.⁴ A sound rational basis for the conclusion that there are reasonable prospects of success in the appeal must be shown to exist.⁵

Grounds of Appeal

² *Matoto v Free State Gambling and Liquor Authority* (unreported FB Case No 4629/2015 dated 8 June 2017) at para [5]

³ *Mabaso v National Commissioner of Police and Another* [2022] ZACC 13

⁴ *MEC for Health, Eastern Cape v Mkhitha* (Unreported) SCA case number 1221/2015 dated 25 November 2016

⁵ *Ramakatsa v African National Congress and Another* [2021] ZASCA 31

[13] The applicants have advanced various grounds of appeal as the basis on which they seek leave to appeal. While I do not consider that I am called upon to discuss all points raised, it is apposite that I deal with the main grounds that form the bedrock of the application for leave to appeal. The first respondent has also advanced arguments in opposition to the grounds, amongst which is that the order sought to be appealed against is not appealable.

[14] The first issue to determine is whether the refusal of interdictory relief sought to be appealed against is appealable. The applicant argued that the order is appealable in the interest of justice. The first respondent argues that the order is refusal of the interdictory reliefs, and that neither of the refusals was final in effect nor disposed of substantial portion of the relief sought in the intended action.

[15] Prior to the Constitutional Court's pronouncement on the appealability of interim orders in *Tshwane City v Afriforum & Another*,⁶ the Constitutional Court remarked in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,⁷ as follows:

“an authoritative restatement of the jurisprudence was to be found in *Zweni v Minister of Law and Order* which has laid down that the decision must be final in effect and not open to alteration by the court of first instance; that it must be definitive of the rights of the parties; and lastly, that it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. On these general principles the Supreme Court of Appeal has often held that the grant of an interim interdict is not susceptible to an appeal.

[16] In the *Tshwane City v Afriforum & Another* judgment mentioned above, the Constitutional Court held that the common law test of appealability has since been denuded of its somewhat inflexible nature, because common law is subservient to the Constitution that prescribes the interests of justice as the

⁶ 2016 (6) SA 279 (CC)

⁷ [2010] ZACC 6; 2010 (5) BCLR 457 (CC); 2012 (4) SA 618 (CC) paras 49 & 50

only requirement to be met for the grant of leave to appeal.⁸ The determination of interests of justice is a fact-specific exercise. Having considered all the relevant facts in this matter including its history whose genesis is traceable from 2009 and the need for reaching finality, I hold the view that interests of justice do not require that the appeal be entertained, and as such the order is not appealable.

[17] The next issue for consideration is whether, based on the grounds advanced by the applicants, there is a reasonable prospect of success in a court of appeal. According to the applicants, the central feature of the grounds of appeal is the finding of the court that their late mother's estate must, on the probabilities, have acquired ownership of the movable property consisting of artwork, particularly the Maggie Loubser painting. The applicants contend that there is no evidence to the effect that the estate must have acquired ownership of the movables, and on that basis another court would find differently.

[18] During the argument, the court asked counsel for the applicants to direct the court to the part of the judgment where the court made the finding mentioned above. Counsel for the applicants could not identify the finding of the court to that effect. In my view the reason is simply that there is no such finding in the judgment. The court did not make any determination regarding the title of the movable assets. What the court found was that, based on evidence before court, the applicants had failed to meet the requirements of interdictory reliefs sought. On that basis, the application failed.

[19] I have also carefully considered all the other grounds of appeal, the arguments advanced by the parties, and the reasons stated in the judgment. Having done so, I am not persuaded that there are reasonable prospects of success on appeal in this matter.

[20] The last issue the court must determine is whether there is some compelling reason why the appeal should be heard. While the applicant has placed

⁸ Tshwane City v Afriforum & Another 2016 (6) SA 279 (CC) at para 40

exclusive reliance on the first leg of leave to appeal based on section 17(1)(a)(i) of the Superior Court Act 10 of 2013, namely, that the appeal would have reasonable prospects of success, I have also taken liberty to consider whether there is some compelling reason why the appeal should be heard. Having carefully considered this aspect, I do not find compelling reasons that warrant the hearing of the appeal in this matter.

[21] In conclusion, having carefully considered the grounds of appeal advanced by the applicants, it seems to me that the essence of the grounds of appeal is that in refusing the interdictory relief sought, the court incorrectly found that the estate probably acquired transfer of the movable assets. As mentioned above, the thrust of the court's judgment in this matter is whether the applicants met the requirements for interdictory relief.

[22] In the circumstances, I conclude that, based on the reasons advanced in the main judgment and herein, there is no reasonable prospect of a successful appeal. I also conclude there is no other compelling reason why the appeal should be heard. In the circumstances, the application for leave to appeal fails. Further, I find no reason why costs should not follow the results in these proceedings.

Order

[23] I therefore make the following order:

1. The application for leave to appeal is dismissed with costs.
2. Counsel's fees are to be taxed or agreed to on High Court Scale B.

MAPOMA AJ
Acting Judge of the High Court

Appearances

For the First and Second Applicants : **B Hack**
Instructed by : Schuld Incorporated

For the First and Second Respondent : **DW Gess SC**
Instructed by : STBB