



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: **NO**  
(2) OF INTEREST TO OTHER JUDGES: **NO**  
(3) REVISED:

**Date:** 21/02/2023

**Sign:** 

**Case No. 2022/7504**

In the matter between:

**AFRICA'S BEST FOODS (PTY) LTD**

Applicant

and

**CISA SPECIALITA ALIMENTARI S.R.L.**

Respondent

In re:

**Case No: 2021/26828**

In the matter between:

**CISA SPECIALITA ALIMENTARI S.R.L.**

Applicant

and

**AFRICA'S BEST FOODS (PTY) LTD**

Respondent

and in re:

**Case No: 2021/39683**

In the matter between

**AFRICA'S BEST FOODS (PTY) LTD**

Applicant

and

**CISA SPECIALITA ALIMENTARI S.R.L.**

Respondent

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**JUDGMENT – LEAVE TO APPEAL**

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**MAHOMED, AJ**

1. In my judgment of 30 November 2022 I refused an application for consolidation of matters. The respondent in this application is an Italian company and I found that the court did not have jurisdiction in the matter. I found that the respondent had not submitted to this court's jurisdiction and the facts did not satisfy the other common law grounds of jurisdiction.
2. Advocate van der Walt, appeared for the applicant, and informed the court that he would focus on the issue of appealability, jurisdiction and service of process on the respondent and what this court should have done in the circumstances of this case.

3. The application is opposed, Ms Niewoudt appeared for the respondent and argued that on the very point of appealability the court must dismiss the application, no final judgment was made and therefore no appeal lies in this interlocutory application. She referred the court to the judgments in Zweni and Phillips in this regard.

### **APPEALABILITY**

4. Mr van der Walt submitted that the finding in my judgment is final on the issue of jurisdiction that binds the respondent and this court. He submitted that it closes the doors of the court to the applicant proceeding in this court.
5. Counsel submitted that the judgment must be read in the context of the respondent's legal points taken in terms of Rule 6(5) (g) (iii) and attacks my finding at paragraph 79-80 of my judgment.
6. Counsel submitted that my finding had the effect of dissuading a finding of jurisdiction based on convenience to the court. He submitted that my finding is based on an error of fact and law as set out in the stated paragraphs, I was incorrect to state that the court has no jurisdiction over a peregrinus. He submitted that his main arguments at the hearing

of the application was to highlight the various ways in which a court can have jurisdiction over a peregrinus.

7. Mr van der Merwe referred me to the writer Forsythe, 5<sup>th</sup> ed, 2012 on Public International Law, who stated that the approach now is to adopt a wider application or reach by courts in respect of jurisdiction over foreign litigants.
8. It was argued that another court would therefor arrive at a different finding and the applicant has reasonable prospects of success, therefor the applicant meets the threshold set in s17 of the Superior Courts Act 10 of 2013.
9. Counsel submitted that my judgment effectively sanctions that a foreign peregrinus, as the respondent, may appoint an address for service in South Africa for the purposes of service in respect of its claim only but not for a claim by an incola against it.
10. It was argued that my finding can be held up against his client if it were to proceed with its action where an opposing party could raise the defence of *functus officio* and *res judicata* / issue estoppel.

Jurisdiction and Service

11. Counsel referred to the judgment in **HAY MANAGEMENT CONSULTANTS PTY LTD** <sup>1</sup>, where the facts were similar, the agreement did not include any express submission to the court's jurisdiction but merely an address for service and the law which will apply. He argued that the SCA considered those points and concluded that the parties submitted to the jurisdiction of the court in South Africa. The court in that case found that on the probabilities the parties' intention was to submit to the court's jurisdiction in all disputes that related to their agreement
12. Mr van der Walt argued that the parties were business persons and they could never have intended that any related issues that arise from the agreement would be treated differently.
13. Counsel submitted therefor that on this basis the appeal court would arrive at a different judgment.
14. Counsel submitted the same approach, a consideration of the probabilities, must be adopted to determine the intention of the parties in respect of the address for service. He submitted that the parties could

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<sup>1</sup> 2005 (2) SA 522 SCA

never have intended that the address is good for claims made by the respondent on the applicant but not vice versa.

15. Mr van der Walt submitted further that the respondent has brought a claim in the South African courts against his client, which is extant, that should demonstrate submission to this court's jurisdiction.

- 15.1. It was further submitted that the respondent must be open to submitting to the jurisdiction as it moved first when it launched an application. Given that a counterapplication is not open to the respondent, on account of its illiquid claim, its only recourse would be by way of an action, which it now seeks to consolidate.

- 15.2. Mr van der Walt submitted that this can be the only "just course" for the parties to follow.

- 15.3. Counsel referred the court to the provisions of Rule 6(5) (g) (iii), in referring a dispute in motions to oral evidence or trial, the court must do so to ensure a just and expeditious resolution of the matter.

16. He submitted that the dispute in casu is a case in point and therefor the appeal court would arrive at a different finding.

17. Counsel submitted that the judgment in **ZWENI v MINISTER OF LAW AND ORDER [In 4]** does not apply in that in my judgment I made a factual finding against the applicant in casu, that is final in effect.
18. Ms Niewoudt argued that applicant's counsel limits the purport and effect of the decisions in Zweni, Phillips and the Gun Owner's cases, and that in fact the overarching consideration must be the "interest of justice."
19. Counsel argued that there are two questions of jurisdiction to be determined, it was submitted that this court had to determine if it has jurisdiction in the application for consolidation.
20. Counsel submitted that this court is empowered to determine only that point and not whether a trial court has jurisdiction over a peregrines in the "action."
21. Counsel argued that the applicant simply seeks to obtain an order in its favour to pre-empt the decision of that trial court.
  - 21.1. It was argued further that the applicant attempts to obtain an order on service of its process, which is not before this court.

- 21.2. Furthermore, it was argued, that the issue of service must be fully ventilated, and her client must be afforded an opportunity to make its submissions. An order for consolidation will assist the applicant in circumventing this important point, as well as the issue of jurisdiction. She submitted that this is not in the interest of justice as contemplated in the judgment in Zweni.
- 21.3. Counsel argued that this courts focus must remain on its jurisdiction on consolidation of matters and reminded the court that the substantive issues in the matters to be consolidated, are not before this court and therefore have not been ventilated.
22. Ms Niewoudt submitted the appeal court will not be open to hearing those issues, when all it has before it is an application for consolidation and the pertinent points in dispute between the parties are still to be argued before a court.
23. Counsel submitted, a consolidation in the absence of a full ventilation of critical issues between the parties cannot be in the interest of justice.
24. Ms Niewoudt proffered that the only effect in casu is to delay the hearing of the application, which is ripe for hearing, only the applicant's heads of argument remain outstanding.



25. The applicant has failed to do anything to prosecute its claim, it has had several opportunities to address its legal challenges in the action.
26. Counsel referred the court to the judgment in **HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA and ANOTHER v EMERGENCY MEDICAL SUPPLIES AND TRAINING CC t/a EMS**<sup>2</sup>, where judges are cautioned on the granting of leave in matters where issues are still to be determined.
27. Ms Niewoudt submitted that the applicant has failed to demonstrate that the court had exercised its discretion, injudiciously. She submitted there are no grounds for an appeal and the application must be dismissed.
28. In reply, Mr van der Walt argued that it matters not whether the finding on jurisdiction in made by this court or another court, in effect it is a final pronouncement on the court's jurisdiction over the respondent.
29. There has been no progress in the action only because the respondent refuses to accept service of the documents. This is a peregrines which failed to file answering papers and raised only legal points, thereby refusing to take the court into its confidence. It was submitted that it

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<sup>2</sup> 2010 (6) SA 469 SCA

seeks to short circuit the process, by arguing that this court does not have jurisdiction.

30. Mr van der Walt proffered that justice will not be done if both parties matters are not fairly considered.

31. Mr van der Walt referred the court to **PREFIX PROPERTIES PTY LTD & OTHERS v GOLDEN EMPIRE TRADING 49 CC & OTHERS**<sup>3</sup>, where the court stated it could not order the restitution before the damages claim is heard in circumstances where a party will not have a fair chance to recoup its damages.

## JUDGMENT

32. It is trite that an application for consolidation is an interlocutory application and that a court has a wide discretion in the granting of the order.

33. The discretion has to be applied judiciously, so as to avoid any prejudice to the parties nor any inconvenience to the court.

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<sup>3</sup> 2011 (2) SA 334 KZP

34. The various judgments of the Supreme Court of Appeals<sup>4</sup> set out the test for granting of leave to appeal.

35. In **ZWENI v MINISTER OF LAW AND ORDER**<sup>5</sup>, the court stated:

*“a non-appealable decision (ruling) is a decision which is not final, nor definitive of the rights of the parties, nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Such a decision is accordingly not an ‘judgement or order’ as intended in s20(1) of the Supreme Court Act 59 of 1959.”*

36. In my judgment at paragraphs 52, 58 to 60, 92 and 95, I considered facts submitted and applied my mind to the possible outcome, more particularly in relation to the convenience to the court.

37. I noted submissions made in this application for leave and considered the prejudice to the parties.

38. Counsels agreed that the overarching consideration in granting leave to appeal is the consideration of the interest of justice.

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<sup>4</sup> Zweni v Minister of Law and Order 1993(1) SA 523 (A) 536 B-C, 2010 (6) SA 469 (SCA) para 14-19,

<sup>5</sup> See footnote above

39. In **HEALTH PROFESSIONS COUNCIL OF SA and ANOTHER v EMERGENCY MEDICAL SUPPLIES AND TRAINING CC t/a EMS<sup>6</sup>**, was stated'

*“a court when requested to grant leave to appeal against order or judgments made during the course of proceedings, should be careful not to grant leave where the issue is one that will be dealt with isolation, and where the balance of the issues in the matter have yet to be determined, of course where a litigant may suffer prejudice or even injustice if an order or judgment is left to stand- ..., then the position will be different.”*

40. Mr van der Walt argued that my judgment closes the door on his client in the action proceedings. I disagree.
41. I am of the view that the court in the action proceedings will have to consider the issue of jurisdiction and will have the benefit of more evidence and a wider context to exercise its discretion.
42. My judgment is not the real impediment, but rather other factors in law and procedure which the applicant has still to address.
43. In my view the applicant is not without a remedy.

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<sup>6</sup> 2010 (6) SA 469 SCA at para 25

44. An appeal court would not on the record arrive at a different decision on the issue of consolidation. The applicant seeks to consolidate two wholly different processes.
45. Our Rules of court do not provide for such consolidation, unless ordered by the court in the action upon consideration of all the evidence in the matter before it.
46. My judgment is not definitive of the rights of the parties, nor does it dispose of a substantial portion of the relief claimed in the main proceedings.
47. I am of the view that there are no grounds of appeal that satisfy the requirements set out in s17 of the Superior Courts Act 10 of 2013, another court would not arrive at a different finding on the issue of consolidation.
48. Accordingly, the application must fail.

I make the following order:

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the respondents costs in the application.

A handwritten signature in black ink, consisting of stylized, overlapping loops and a vertical line on the right side.

**MAHOMED AJ**

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 21 February 2023.

Date of hearing: 9 February 2023

Date of Judgment: 21 February 2023

## **Appearances**

For Applicant: Advocate N van der Walt

Advocate A Pillay

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For Respondent: Advocate M Niewoudt

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