IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 16715/2018

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

9 April 2021
DATE

Gavin Rome
SIGNATURE

In the matter between:

SUKOLUHLE THANDO NKALA First Applicant

HERBERT NKALA Second Applicant

and

MOLEFE RUFARO MTHULISI DLODLO Respondent

In re:

MOLEFE RUFARO MTHULISI DLODLO Applicant

and

SUKOLUHLE THANDO NKALA First Respondent

HERBERT NKALA Second Respondent

JUDGMENT

ROME, AJ:

Introduction:

1. This is an application for leave to appeal against my judgment of 19 February 2021. For convenience I refer to the applicants for leave (who were the applicants in the stay application) as “the applicants” and to the respondent in the application for leave to appeal (who was the respondent in the stay application) as “the respondent”.

2. The applicants’ notice for leave to appeal is dated 12 March 2021. The notice of application is succinct and contains two grounds of appeal.

3. The first ground is that the judgment contains an error of fact. The error is stated to be that I mistakenly found that it was common cause that none of the various cost orders which the applicants had obtained as against the respondent had been taxed to finality. In other words, they had not been finally taxed in the sense that the taxing master had not provided his allocatur in respect of any Bill of costs that the applicants had prepared.

4. The second ground of appeal is that the judgment contains an error of law in that it failed to consider or deal with a decision, referred to by the applicants in their heads, in which a stay application arising out of an adverse costs order was granted in circumstances where there had not yet been a taxation of the bill of costs.

5. Before dealing with both grounds of appeal, it is necessary to have regard to basic principles governing applications for leave to appeal and the significance of whether the order appealed against is interlocutory or final in effect.

6. The principles governing the adjudication of whether leave to appeal ought to be granted are both clear and settled. There are several judgments which set out these principles. Before turning to these principles, it is helpful to deal with the issue of whether the order sought to be appealed against is an interlocutory order or of a final nature.

7. The unreported judgment of Sardiwala J in *Public Protector of the Republic of South Africa v Minister of Water and Sanitation and Another (2019) ZAGPPHC 645 (16 October 2019)* is of great assistance on this aspect of the present application. In what follows I refer to certain of the cases cited in that judgment.

8. The *locus classicus* on the issue of whether an order is interim/interlocutory or final in nature is the case of *Cape Corp. Pty Limited v Engineering Management Services Pty Limited 1977 (3) SA 543 (A)*. In that case Corbett J (as he then was) explained the distinction (at 549 G) in the following terms:

   "In a wide and general sense, the term 'interlocutory' refers to all orders by the court, upon matters incidental to the dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final effect on the proceedings; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper' which do not".

9. As stated in *Atkin v Botes 2011 (6) (SA) 231 (SCA) (esp. at 234B-C)* an interim or interlocutory order is appealable if it is final in effect and not susceptible to alteration by the court of first instance.

10. The distinction between final and interlocutory orders remains important notwithstanding that under the Superior Courts Act '*the overarching role of*

interests of justice has relativised in determining the final effect of the order… in determining appealability".[1]

11. As was explained in *International Trade Administration Commission v Scaw South Africa Pty Limited 2012 (4) SA 618 (CC) (at 639F)* there are important policy considerations underlying the traditional distinction between the appealability of final orders and the (non) appealability of interlocutory orders; these considerations are the following:

"*Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes*."

12. The question of whether the order is final in effect in that it disposes of a substantial portion of the dispute between the litigants, remains relevant in the adjudication of an application for leave to appeal. The Supreme Court of Appeal and the Constitutional Court have explained the application of the interests of justice requirement by reference to considerations of whether the order sought to be appealed against has immediate and substantial effect, including whether the harm that flows from the order may be serious immediate, ongoing and irreparable. (See the authorities cited at paragraphs 4 -12 in *Public Protector of the Republic of South Africa v Minister of Water and Sanitation and Another*, s*upra*)

[1] see *Public Protector v Minister of Water, supra, citing Tshwane City v Afriforum (2) SA 279 (CC) at 294B.*

13. The applicants did not advance any substantive argument regarding the question of whether, albeit that the order granted may be of an interlocutory nature, it is nonetheless in the interests of justice, by having regard to the above-mentioned considerations, that leave to appeal should be granted.

14. The notice of application for leave to appeal does not contain any averments as to why (assuming the order is interlocutory in nature), it would be in the interests of justice for leave to appeal to be granted. In argument the applicants' counsel focused his contentions on a submission that because the application for a stay had been dismissed, the judgment is final in effect. The contention was that the dismissal of the stay application was akin to the upholding of an exception and that its effect was final and res judicata. In essence the argument was that the judgment had finally disposed of the applicants' claim for a stay of proceedings as against the respondent based on the adverse costs orders against him. I do not consider that this characterization of the judgment is correct. The order granted does not, in effect or otherwise, finally dispose of any issue in the protracted *lis* between the applicants and the respondent.

15. The order granted falls, in my view, squarely within the category of that type of order which may be subject to reconsideration by a court a quo in the course of the proceedings between the parties. In *Tony Rahme Marketing Agencies Sa (Pty) Ltd and Another v Greater Johannesburg Transitional Metropolitan Council 1997 (4) SA 213* Goldstein J stated (at 215 -216} that:

"The interlocutory decisions of Colleagues, and indeed those of our own, are not binding at later stages of the proceedings and should, and I trust, do yield easily to persuasive arguments indicating error or oversight."

16. I note that in the Tony Rahme matter, the learned judge was dealing with the issue of whether decisions of law adjudicated upon and determined in an urgent interdict application were thereafter final and binding (or *res judicata*) when the matter was later before the trial court. Goldstein J concluded that they are not and will easily yield to persuasive arguments indicating error or insight. While that matter concerned an interim interdict, the same considerations would have application where a simple interlocutory order might be reconsidered at a later stage in the proceedings. To the extent that my judgment is shown by persuasive argument to indicate error or oversight, the order granted would therefore not be binding at later stages of these proceedings, were the issue of the stay to again be considered. The interlocutory nature of my judgment is however not of itself dispositive of whether the interests of justice require that leave be granted.

17. In order to assess whether the interests of justice have application it is necessary briefly to traverse the grounds of appeal. As already indicated, the errors in the judgment (assuming same to be errors) are stated firstly to be an error of fact and secondly an error of law.

18. The error of fact is said to be that the judgment contains a misdirection. The applicants are correct in submitting that annexure SA8 to their founding affidavit does, on a close perusal of its contents, indicate that the document contains what appears to the stamp of the Taxing Master apparently certifying that an allocatur was made on 29 January 2020 by the Taxing Master on the relevant bill of costs. Nonetheless, nowhere in the founding affidavit did the applicants refer to or identify the existence of any allocatur having been provided in regard to any of the costs orders in their favor or of what the amount of the costs, as determined on taxation, was. Instead, what they alleged was that "*one bill of costs has already been served on*

the [respondent] which I attach hereto as annexure SA8. The proof of service is further attached hereto marked as annexure SA9. Due to the Covid 19 restrictions, the remaining bills of costs have not yet been finalized and served, however will be attended to and made available at the hearing hereof."

19. In his answer, the respondent denied the above allegations and stated that the applicants had not acted on the costs order nor "presented the bill of costs she now" complains about.

20. In reply, the applicants did not dispute the respondent's above allegations and instead stated that, "the *court should note that since deposing to the founding affidavit in this application, yet another costs order has been made against (the respondent*). *It is denied that I stated in the founding affidavit that no bill of costs have been presented to the (respondent). I refer to paragraph 12 of the founding affidavit wherein I attached the bill of costs and proof of service thereof*."

21. I note that the service of the bill of costs, predated any taxation thereof. This is because the applicants attorneys' email enclosing the bill of costs (annexure SA9) is dated 25 October 2019, while the Master's stamp on the bill of costs is (*ex facie* SA8) dated 29 January 2020.

22. In addition, the heads of argument for the applicants stated that one bill of costs had been served on the respondent and the rest were being prepared. The case made out in the applicants' affidavits (and in the heads of argument) thus was that a bill of costs (and not the allocatur) was served on the respondent.

23. It is trite that in motion proceedings, the affidavits constitute both the pleadings and evidence. The allegations in the affidavits serve not only to place evidence before

the court but also to define the issues between the parties. An applicant must accordingly raise the issues it intends to rely on in the founding affidavit by both identifying the relevant issues and setting out the evidence pertinent to those issues. It is not open to an applicant merely to annex to its affidavit documentation without identifying the portions thereof of which reliance is placed (Per Joffe J in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of The Republic of South Africa And Others 1999 (2) SA 279 TPD at 323 F – G).*

24. Applicants' counsel submitted that regardless of how the applicants' founding and replying affidavit (had not) dealt with the existence of the Taxing Master's allocatur, the respondent had during oral argument before me conceded that the bill of costs at annexure SA8 had been taxed. I did not have a note of this concession. Instead, and perhaps because of the nature of the allegations in the applicants' affidavits, I had understood the concession to be that the respondent admitted that the bill of costs (not the allocatur) had been served on him. Nonetheless during argument in the leave application, the respondent, to his credit, stated that that he had indeed made this concession.

25. Thus, as a result of the applicants not identifying in their affidavits that a taxation had occurred and an allocatur provided, and because the dispute arising from the affidavits was whether or not the applicants had served the relevant bill of costs on the respondent, I assumed that there had been no determination made by the Master of the taxed costs payable. The assumption, while based on the factual allegations contained in the affidavits, was incorrect. Nevertheless, the question (which I return to below) remains whether given the interlocutory nature of my judgment it is in the interests of justice that leave to appeal be granted.

26. Turning now to the issue of law. The applicants, relying on the judgment in the 1958 decision in *Keshavjee v Ismail 1958 (4) SA 385 (T)* submitted that had I considered ("applied my mind") to that judgment, I would have apprehended that there exists authority for the proposition that a stay of proceedings may be granted in the absence of any taxation of the relevant award of costs.

27. It is correct that the decision in *Keshavjee v Ismail* is authority for the proposition that in circumstances where a bill of costs has not yet been taxed, a court has a discretion to issue a stay of proceedings, but this would be subject to the condition that the applicant submit its bill of costs to the taxing master for taxation by a certain date. In this matter, the applicants had not however proposed that that any order for their requested stay be subject to a condition that their bills of costs be submitted to taxation by the taxing master by a particular date.

28. More importantly, and in any event, this ground of appeal is moot. If the applicants were to have identified and set out the correct facts (namely that an allocatur has been provided and a determined amount was therefore owing and payable by the respondent), no question would have arisen as to whether an order should have been granted to stay the proceedings but such an order then be made subject to the sort of condition provided for in the *Keshavjee v Ismail* judgment. Accordingly, and given the interlocutory nature of my judgment, this ground of appeal does not serve as a basis for establishing why it would be in the interests of justice for leave to appeal to be granted.

29. I now return to the issue of whether the factual error relied upon requires that leave to appeal be granted. Although my judgment is interlocutory in nature and the grounds of appeal do not directly address the requirement of the interests of justice,

I am still obliged to consider whether (assuming the judgment contains the errors or oversight contended for), it is in the interests of justice that leave be granted. I do so by reference to the considerations of whether the judgment has immediate and substantial effect, including whether the harm that might flow from it (if it was indeed wrongly decided) is immediate, serious, ongoing and irreparable.

30. In my view the judgment and the order granted herein does not dispose of any of the main issues in either of the proceedings between the parties. The harm that might flow from the judgment is not of a kind that is likely to be irreparable. There is nothing in the judgment to preclude the applicants from obtaining a reconsideration of an application for a stay. There is likewise nothing in the judgment which precludes them from serving a new founding affidavit in which the relevant facts (that a bill of costs has been subjected to taxation by the Taxing Master and an allocatur provided) might be clearly and properly set out. In contrast, the granting of a stay application for unpaid costs, not its dismissal, would be more likely (much as the dismissal of an exception) to have an effect that is immediate and irreparable. This is because an order staying a party in particular proceedings from taking further steps in those proceedings, until it pays the unpaid taxed costs owed by it, may well have the effect of precluding that litigant from continuing with the litigation.

31. Moreover, the granting of leave to appeal would, given the interlocutory nature of my judgment, likely result in the piecemeal adjudication of the litigation and delay the resolution of both the variation application and the trial of the action in case number: 2017/252717. Accordingly, I do not consider that the granting of leave to appeal would be in the interests of justice.

32. As to costs, the respondent is an unrepresented litigant. He did not indicate that he incurred any legal costs or direct expenses or disbursements in responding to this application. I therefore do not consider it appropriate to make any order in respect of the costs occasioned by this leave application. I accordingly make the following order:

32.1. The application for leave to appeal is dismissed. There is no order as to costs.

9 April 2021 Gavin Rome

GB ROME
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

For the applicants (leave) :	H Viljoen
Instructed by:	Ramsay Webber Inc
For the respondent (leave) :	Represented in person

Date of hearing:	23 March 2021
Date of judgment:	9 April 2021