

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 09911/2021

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

04/04/22

.....

Date

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ML TWALA

In the matter between:

SILVANA IDA BARBAGLIA

APPLICANT

And

BERNARD APHANE N.O.

**(In his capacity as the Master of the High,
Johannesburg as defined by the Administration
of Deceased Estate Act, 66 of 1965)**

FIRST RESPONDENT

CHARL EDWARD ANDERSON N.O.

SECOND RESPONDENT

MICHAEL ANTINIO VINCENZO BARBAGLIA THIRD RESPONDENT

PABAR (PROPRIETARY) LIMITED FOURTH RESPONDENT

GREGORY MASSIMO BARBAGLIA FIFTH RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 4th of April 2022

TWALA J

- [1] For the sake of convenience, in this judgment I shall refer to the parties as in convention. Furthermore, this Court directed that this matter be determined on the papers without an oral hearing, as provided for in the Gauteng Division Consolidated Directives; re Court Operations during the National State of Disaster issued by the Judge President of this Division on the 18th of September 2020.
- [2] The first, third and fourth respondents, although for different reasons, brought this application for leave to appeal against the whole of the judgment and order of this Court handed down electronically on the 10th of March 2022 granting the applicant the interim relief as prayed for in the notice of motion.
- [3] It is a trite principle of our law that leave to appeal may only be given where the Judge or Judges concerned are of the opinion that the appeal would have a reasonable prospect of success or where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. (*See section 17 (1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013*).
- [4] The grounds for the leave to appeal are succinctly stated in the notice of application for leave to appeal and I do not intend to restate them in this judgment. Furthermore, I would like to extend my gratitude and appreciation to counsel for the parties for the submissions made in their concise heads of argument.
- [5] It is common cause that the crux of this application for leave to appeal is whether the order granted on the 10th of March 2022 is final or has the effect

of a final order. The test to determine whether a judgment or order is final or has the effect of a final order was set out in *Zweni v Minister of Law and Order 1993 (1) SA 523 (A)* which test was restated with approval by the Supreme Court of Appeal in *Road Accident Fund v S M (1270/2018) [2019] ZASCA 103 (22 August 2019)* in that a judgment or order is a decision which ‘has three attributes: first, the decision must be final in effect and not susceptible to alteration by the court that made it; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings’.

- [6] In *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others 2020 (8) SA 325* the Constitutional Court stated the following:

“Para 47 Turning to the present matter, it should be borne in mind that both applicants seek urgently to appeal an interim interdict, which is purely interlocutory in nature. An interim interdict is a temporary order that aims to protect the rights of an applicant, pending the outcome of a main application or action. It attempts to preserve or restore the status quo until a final decision relating to the rights of the parties can be made by the review court in the main application. As a result, it is not a final determination of the rights of the parties. It bears stressing that the grant of an interim interdict does not, and should not, affect the review court’s decision when making its final decision and should not have an effect on the determination of the rights in the main application. The purpose of an interdict is to provide an applicant with adequate and effective temporary relief.

Para 49 The law concerning the appealability of interim interdicts is settled. Interim interdicts are generally not appealable. This is because

interim interdicts are not final in nature; they are not determinative of the rights of the parties and do not have the effect of disposing of a substantial portion of the relief claimed. However, these reasons are not exhaustive. There are various other sound policy reasons for the general non-appealability of interim interdicts. One of these is that appeals are not entertained in a piecemeal fashion, as that would prolong the litigation, resulting in the wasteful use of judicial resources and incurrence of legal costs”.

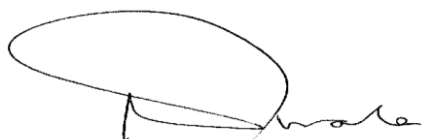
- [7] I hold the view that the judgment and order appealed against is not final and does not have the effect of a final order. The judgment and order is interim pending the final determination of the validity of the Will of the 26th September 2017. Put differently, the order is not final since it is not determinative of the rights of the parties in so far as the will of 26th September 2017 is concerned nor does it disposes of a substantial portion of the relief sought in those action proceedings. The unavoidable conclusion is therefore that the judgment and order is not appealable and the application for leave to appeal falls to be dismissed.
- [8] In as far as judgment and order relates to the conduct of the first respondent in the appointment and removal of the applicant as the executrix in the estate of the deceased, I am satisfied that I have dealt in detail with all the issues raised in the application for leave to appeal in my judgment. For the same reasons as above, the judgment an order is interim and does not determine a substantial part of the issues in the main action. I am therefore of a considered view that there are no prospects that another Court may come to a different conclusion. The unavoidable conclusion is therefore that the application for leave to appeal falls to be dismissed.

- [9] I am persuaded by the applicant's contention that the interest of justice demands that the applicant should, in the interim, proceed to act as an executrix in the estate of the Late Mr Barbaglia for she has a substantial interest in the estate as the surviving spouse of a marriage in community of property. The first, third and fourth respondents have failed to demonstrate that they will suffer any prejudice if the applicant continues to act as the executrix in the interim pending the final determination of the validity of the will of the 26th September 2017 in the action proceedings.
- [10] The first, third and fourth respondents are fully aware that the order of the 10th of March 2022 is interim since the order itself reads thus "pending the final determination of case number 00164/2021" and there was no cogent reason for them to bring this application for leave to appeal the order. These respondents have failed to demonstrate that the interest of justice demands that the order be appealed against. There is absolutely no reason to deal with the appeal in this matter in a piecemeal fashion for the issues in the main action are still to be determined. This, in my view is an abuse of the Court process for it is bound to cause unnecessary delays in the finalisation of the litigation between the parties resulting in incurrence of unnecessary legal costs. It follows therefore that the application for leave to appeal falls to be dismissed.
- [11] It should be recalled that there was no order sought or made against the third and fourth respondents. However, the third respondent unnecessarily dragged the fourth respondent to these appeal proceedings and fully aware that the judgment and order was interim and therefore not appealable. The only inference that can be drawn for this kind of conduct is that the third respondent wants to continue to use the funds of the fourth respondent to cover his legal

fees. This Court will not allow such abuse of its processes to go unpunished. I am of the considered view therefore that the first and third respondent should be liable for the costs of this application for leave to appeal on a punitive scale.

[12] In the circumstances, I make the following order:

1. The application for leave to appeal is dismissed;
2. The first and third respondents are equally liable to pay the costs of this application on the scale as between attorney and client including the costs of two counsel.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of submission of Heads: 22nd March 2022

Date of Judgment: 4th April 2022

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Advocate FR McAdam**

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