

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 845/2005

DATE: 27 FEBRUARY 2008

5 In the matter between:

HERRN SEBASTIAN BAUMANN N.O. 1ST Applicant

SAMUEL SPYCHER 2ND Applicant

JOHANNES SPYCHER 3RD Applicant

RACHEL SPYCHER 4TH Applicant

10 THERESE SPYCHER 5TH Applicant

DAVID SPYCHER 6TH Applicant

And

15 TABEA JACOBS 1ST Respondent

CLIFFORD JACOBS 2ND Respondent

TABEA INVESTMENT HOLDINGS CC 3RD Respondent

J U D G M E N T

20 (Application for Leave to Appeal)

BOZALEK, J.:

[1] On 14 December 2007 I ruled that the plaintiffs in this
 matter could substitute one Swiss executor for another in
 25 this action and join a further plaintiff. Defendants,

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respondents in the opposed application, now wish to appeal my ruling either to the Full Bench of this Court or the Supreme Court of Appeal.

5 [2] Two questions initially arise, namely whether the order is appealable and secondly, the prospects of success of any such appeal. At the risk of putting the cart before the horse I shall deal firstly with the second question.

10 [3] I do not propose to traverse again the merits of the opposing arguments on the issue of whether the substitution is competent or not. Mr Binns-Ward argued that it is not competent, simply put, because the action is one on behalf of a deceased estate and since the first
15 Swiss administrator's appointment was set aside as unlawful, the summons which commenced the action in his name as first plaintiff was a nullity. The effect of substituting the executor or administrator subsequently appointed was, he argues, to purport to cure that nullity, impermissibly so.
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[4] This conclusion depends not only on the facts in this matter but on the relevant case law. The facts in the application, although not always easy to divine, can be interpreted as supporting this conclusion. Secondly,
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there is authority which supports the approach contended for by the respondents, most notably the case of Van Heerden v Du Plessis 1969(3) SA at 298 (O). In my view, there is thus a reasonable prospect of another Court arriving at conclusion different to this Court's conclusion.

[5] As regards the appealability of the judgment, the position is, in my view, somewhat less clear because here we are dealing with an interlocutory application. The question is then is whether the judgment or order made has a final and definitive effect on the main action. Furthermore, the Court must also take into account in this situation that the proper approach is a more flexible one where the Court will have regard to whether an appeal against the interlocutory decision will lead to a more expeditious and cost-effective decision-making process.

[6] I have said that there are reasonable prospects that another Court may find that the summons was a nullity from the outset. Certainly, in the light of my order it is not open to the trial Court to find in the main trial that Baumann is not, for the purposes of the action, the administrator of the estate and thus, probably, that the summons was regular. If, however, the summons is a

nullity it may well spell the end of this particular action, if not the end of the claim itself.

[7] In the circumstances, on balance, I consider that
5 although the issues of the merits of the appeal and the order's appealability are interlinked, this Court's judgment is appealable or at least there are reasonable prospects that another Court will find that it is appealable.

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[8] I am, therefore, inclined to grant leave to appeal. As far
as the forum for the appeal is concerned, Mr Binns-Ward
submits that leave should be granted to the Supreme
Court of Appeal. There is not inconsiderable authority on
15 the general point of the substitution of a plaintiff in similar circumstances but there is, in my view, no authority directly on point. Existing authority appears also to reveal to some extent at least that the conflicting tugs of what can be termed a technical approach as
20 opposed to one which places greater emphasis on substance rather than form.

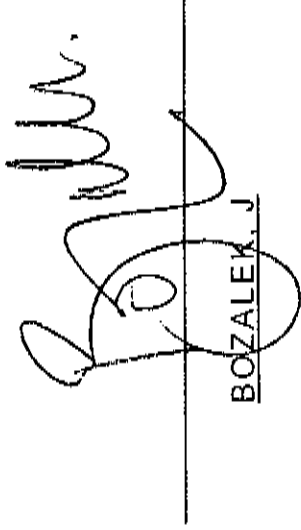
[9] The facts of this case are, moreover, unusual and less
than straightforward. The point at issue has
25 considerable importance for the parties and the future of

the action. The record is also not onerous. In the circumstances I consider that this is a matter which warrants the attention of the Supreme Court of Appeal rather than the Full Bench of this Court.

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[10] In the result, leave to appeal to the Supreme Court of Appeal on the grounds set out in respondents' notice of application for leave to appeal is granted. The costs of this application, including the costs of two counsel, will be costs in the appeal.

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BOZALEK, J

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