REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 3218/12

In the matter between:

CRAIG MACLEAN HATHORN N.O.	**First Plaintiff**
CHRISTOPHER PETER VAN ZYL N.O.	**Second Plaintiff**
DUDLEY BERNARD DAVIDS N.O.	**Third Plaintiff**

and

MICHAEL ALEXANDER COWAN	**Defendant**

JUDGMENT: LEAVE TO APPEAL

DELIVERED: 18 FEBRUARY 2013

SAVAGE AJ:

[1] Leave to appeal to the Supreme Court of Appeal is sought by the defendant against the orders of this Court handed down on 12 December 2012 in terms of which the defendant's application in terms of rule 30 was dismissed with costs and the plaintiffs' application for leave to amend the summons and particulars of claim was granted with costs.

[2] The application for leave to appeal was filed by the defendant on 18 December 2012 and argument was heard on 25 January 2013. Subsequent to argument having been presented, I requested the parties to file additional heads of argument by 4 February 2013 concerning the appealability of the orders. These heads were filed by agreement on 8 February 2013.

[3] A judgment or order that is appealable must be final in effect and not susceptible to alteration by the Court of first instance; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533 A. In *Ngqula v SAA* 2013 (1) SA 155 (SCA) at 158I-J Heher JA, with reference to *Zweni supra* stated that the first emphasis is on whether an appeal will lead 'to a more expeditious and cost effective determination of the main dispute between the parties, and, as such will contribute to its final solution ' (at 531 I-532B). The second emphasis in *Ngqula* was that consideration must be had to the effect rather than the form of the order (at 159B).

[4] If a judgment or order does not dispose of all the issues between the parties, the balance of convenience must, in addition, favour a piecemeal consideration of the case. *Zweni* supra at 531 D-E (with reference to *Swartzberg v Barclays National Bank Ltd* 1975 (3) SA 515 (W) at 518 B). Where the decision of the court is determinative of a self-standing issue which has been finalised and in respect of which the trial court is bound, such ruling may be appealable. In *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A) reference was made to the matter of *Labuschagne v Labuschagne* 1967 (2) SA 575 (A) at 415F as follows –

'Die uitspraak waarteen hoër beroep is, is dus, wat betref die Hof wat die uitspraak gegee het, 'n finale en onherstelbare afhandeling van die selfstandige en afgedoende verweer wat eerste verweerder geopper het....'

[5] An order which is purely interlocutory in effect is one which if reversed on appeal would remain purely interlocutory in its effect. *Friday t/a Pride Paving v Rubin* 1992 (3) SA 542 (C) at 547H. The fact that a decision is for convenience called a ruling is not in itself determinative of the effect of the order which arises from such ruling.

[6] The orders made by this Court and in respect of which leave to appeal is sought are determinative of the defendant's application in terms of rule 30, as well as the plaintiff's application to amend the summons and particulars of claim. I am satisfied that the effect of the orders are final in their conclusions

and effect. Both orders are not susceptible to alteration by the court of first instance, are therefore definitive of the rights of the parties in respect of the two applications made and therefore the future conduct of the matter. Although the effect of the orders made is not to dispose of a substantial portion of the relief claimed in the main proceedings, I am satisfied that having been granted they are finally determinative of matters of substance, as opposed to matters of form or procedure. For these reasons, I find that the orders made are appealable.

[7] With regards to prospects of success, I am of the view that there exists a reasonable prospect that another court may come to a different conclusion as to the interpretation of sections 32(1)(b) and section 157 of the Insolvency Act 24 of 1936 and the conclusion that the summons issued by the plaintiffs is not a nullity. I accept that the order granting the amendment to the summons and particulars of claim is inextricably linked to the question of whether the summons is a nullity and that the effect of the order granting the amendment of the summons and particulars of claim is not interlocutory but is determinative. I am therefore persuaded that both orders are appealable and that there exists a reasonable prospect that another court may come to a different conclusion regarding these orders.

[8] Given that the appeal concerns primarily an interpretation of sections 32(1)(b) and 157 of the Insolvency Act and therefore questions of law and of fact, in my mind, the matter requires the attention of the appellate division as contemplated by section 20(2)(a) of the Supreme Court Act 59 of 1959.

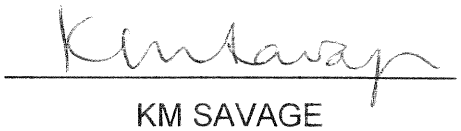
[9] I am further of the view that were leave to appeal be granted to a full bench of this Court, a reasonable prospect exists that the questions of law and fact raised in the appeal would not be finally determined between the parties but may be subject to further appeal with the result that there would be caused a further delay in the finalisation of the matter.

[10] In the result, I make the following orders:

1. The application for leave to appeal against the orders of this Court made on 12 December 2012 succeeds.

2. Leave to appeal is granted to the Supreme Court of Appeal.

3. The costs of this application are to form part of the costs of the appeal.



KM SAVAGE
ACTING JUDGE OF THE HIGH COURT