IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No.: 18799/2018

In the matter between:

MARC MANNATT First Applicant
LOUSE MANNATT Second Applicant

and

PIERRE DE KOCK First Respondent
Executor of the Estate of E. K. de Kock – 28082/2014 + 025544/2014
and Trustee of the Lady Mcepa Trust – IT3609/2005
and Trustee of the MM de Kock Trust – MT/3871/1987
DECEASED ESTATE OF EMMERENTIA KATHARINA DE KOCK (DE VILLIERS) – 28082/2014 + 025544/2014 Second Respondent
MYTTHYS DE KOCK Third Respondent
Trustee of the Lady Mcepa Trust – IT3609/2005
and Trustee of the MM de Kock Trust – MT/3871/1987
and Director of Dumaresq (Pvt) Ltd Reg. No. 1967/009619/07
CHARL DE KOCK Fourth Respondent
(Also known as RUDOLPHUS DE CHATILLION DE KOCK)
Trustee of the Lady Mcepa Trust – IT3609/2005
and Trustee of the MM de Kock Trust – MT/3871/1987
and Director of Dumaresq (Pvt) Ltd Reg. No. 1967/009619/07
LADY MCEPA TRUST – IT3609/2005 Fifth Respondent
MYTTHYS MICHAEL DE KOCK TRUST – MT/3871/1987 Sixth Respondent
JOHANN FRANCOIS VOS Seventh Respondent
(Curator Bonis of Emmerentia Slabbert senior "the Patient")
and Trustee of the Lady Mcepa Trust - IT3609/2005
ESTATE EMMERENTIA SLABBERT SENIOR Eighth Respondent
CR 171/2017
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Ninth Respondent
MASTER OF THE HIGH COURT CAPE TOWN Tenth Respondent
L. P. LE ROUX (MAGISTRATE, HERMANUS) Eleventh Respondent
NEIL SLABBERT Twelve Respondent
EMMERENTIA SLABBERT JUNIOR Thirteenth Respondent
EMILY VAN DER MERWE Fourteenth Respondent
KEITH MATTHEE Fifteenth Respondent
LUCAS STEYN Sixteenth Respondent

COENRAAD BIERMAN Seventeenth Respondent
DUMARESZ (PTY) LTD – Reg. No. 1967/009619/07 Eighteenth Respondent
LORAINE DE KOCK Nineteenth Respondent
MATTHYS DE KOCK JUNIOR Twentieth Respondent
STEPHANUS DE KOCK Twenty First Respondent
ALDALENE BRAND (Neé DE KOCK) Twenty Second Respondent
TREVOR EDWARD EYDEN Twenty Third Respondent
DECEASED ESTATE OF STANLEY WESLEY EYDEN 13864/2007 Twenty Fourth Respondent
THE SHERIFF OF HERMANUS Twenty Fifth Respondent
THE SHERIFF OF BELLVILLE Twenty Sixth Respondent

JUDGMENT (Application for leave to appeal)

The judgment was delivered by email to the parties and release to SAFLII.

It shall be deemed to have been delivered at 10h00 on 22 June 2020

BINNS-WARD J:

[1] The applicants have applied for leave to appeal against the judgment of this court, delivered on 21 February 2020, in which an order was made striking the principal application from the roll with costs on the attorney-client scale. That order followed upon a finding that a case for the application to be entertained as an urgent application in terms of rule 6(12) had not been made out. A punitive costs order was made because the enlisting of the matter as a purportedly urgent application had not only been misguided, but also, very evidently, an abuse of process. The judgment is listed on SAFLII as *Mannatt and Another v De Kock and Others* [2020] ZAWCHC 10 (21 February 2020). It speaks for itself. The application for leave to appeal is opposed by the second to twenty fourth respondents. The application was delivered a few days after the expiry of the time limit in terms of the rules. It was accompanied by an application for condonation, which was not opposed. An order granting condonation will follow.

[2] Owing to the special measures in place in respect of the conduct of the court's business during the Covid-19 related lockdown, I directed that the application would be determined without an oral hearing on the basis of written argument When inviting the parties to submit written argument, I indicated, through my registrar, that I would like in particular to be addressed on the question of the appealability of the order striking the application from the roll.

[3] Written argument running in length to 89 pages (excluding the lengthy case heading and the several pages at the end of the document particularising the persons to whom it was addressed) was submitted by the applicants. Counsel for the respondents also put in a comprehensive, but thankfully much shorter, set of heads. The application for leave itself was a 131 page document. Most of the application went to the supposed merits of the applicants' principal application and did not engage with the only issues that the judgment of 21 February 2020 decided; viz. (i) that the matter did not warrant hearing as a matter of urgency *because any urgency had been self-created by reason of their failure to apply for leave to appeal from Rogers J,*[1] and (ii) that the applicants should pay the costs occasioned by the enrolment of the application as a matter of urgency on the scale as between attorney and client. Apart from being unduly long, it was in places incoherent.

[4] No point will be served, however, by treating of the supposed substance of the application if the order (probably more correctly termed a 'ruling') that the applicants seek to impugn is not appealable. There are quite a number of appeal court judgments that explain the characteristics of an appealable order. None of them was referred to in the applicants' written argument, which advanced the unqualified, but wholly misconceived, proposition that 'all judgments are appealable'.[2] It suffices for now to mention only those of the applicable authorities that are generally acknowledged to be amongst the more salient.

[5] Although the applicable statutory regimes have evolved through a number of differing iterations over the years, it has consistently been the policy that decisions of a procedural or preparatory character are generally not appealable; see *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 868 (per Schreiner JA). In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A), Harms AJA, writing for the Appellate Division, noted that, in terms of the governing provisions of the Supreme Court Act 59 of

[1] See paragraphs 9 and 10 of the judgment of 21 February 2020.

[2] Paragraph 67 of the applicants' written argument.

1959 then in force, only '*judgments or orders*' were appealable, and decisions that did not qualify as such were not. Without purporting to lay down an absolute rule, the court in *Zweni* defined a '*judgment or order*' as '*in general principle*' having three attributes: '*first, the decision must be final in effect and not susceptible of alteration by the court of first instance; 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*'. The second requirement could be satisfied only if the order concerned went to definitively determining at least some of the substantive relief sought in the proceedings. It would, of course, be unusual for a purely procedural ruling ever to have that effect.

[6] It seems to be established that the word '*decision*' in s 16 of the currently applicable Superior Courts Act 10 of 2013 has exactly the same import as the words 'judgment or order' did in s 20(1) of the repealed Supreme Court Act; see e.g. *Firstrand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169 (24 November 2016), at paras 10-15, and *Neotel (Pty) Ltd v Telkom SA Soc Ltd and others* [2017] ZASCA 47 (31 March 2017), at paras 12-13.

[7] As mentioned, what *Zweni* established was a general principle, not an immutable rule, nor something 'cast in stone'. This much was stressed by Howie P in *S v Western Areas Ltd and Others* [2005] ZASCA 31 (31 March 2005); [2005] 3 All SA 541 (SCA), who said '*it should be observed that this court said in Moch*[3] *that the requirements for appealability laid down in Zweni were not intended to be exhaustive or to cast the relevant principles 'in stone*'. Farlam JA subsequently elaborated on that observation as follows in *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; [2010] 1 All SA 459 (SCA), 2010 (2) SA 573, holding that the belief that the judgment in *Zweni* was all encompassing as to which decisions might be appealable was wrong: '*That belief was erroneous. It is clear from such cases as S v Western Areas … at paras 25 and 26 … that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice. See also Khumalo v Holomisa [2002] ZACC 12; [2002] ZACC 12; 2002 (5) SA 401 (CC) para [8] …* '. And, most recently, in *Director-General, Department of Home Affairs and Another v Islam and Others* [2018] ZASCA 48 (28 March 2018) at para. 10, Maya P observed that 't]*raditionally, under common law, an interim order was not appealable except where it was shown that it was (a) final in effect as it could not be altered by the court which granted it; (b) definitive of*

[3] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A).

the rights of the parties in that it granted definitive and distinct relief; and (c) was dispositive of at least a substantial portion of the relief claimed in the main proceedings. The test has since evolved. So whilst the traditional requirements are still important considerations, the court may in appropriate circumstances dispense with one or more of those requirements if to do so would be in the interests of justice, having regard to the court's duty to promote the spirit, purpose and objects of the Constitution eg where the interim order 'has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable' (footnotes omitted).

[8] The extent to which the defining attributes for appealability identified in *Zweni* still remain decisive in most cases, however, is evident in judgments such as that of the majority in *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* [2017] ZASCA 134; [2017] 4 All SA 605 (SCA); 2018 (6) SA 440.

[9] The decision to strike the principal application in the current matter from the roll for lack of urgency was of a purely procedural character. It did not have any of the three attributes of a '*judgment or order*' identified in *Zweni*. On the basis of the authorities just referred to that counts strongly against it being regarded as appealable. In addition, there are no considerations that would make it susceptible to appeal 'in the interests of justice'. On the contrary, it would be inimical to the interests of justice to permit or encourage the applicants to continue on their misguided path in the current litigation. It is purposeless, and nothing more than an abusive imposition on the court's resources and an unwarranted derogation from the prima facie rights of those of the respondents who are applicant's judgment creditors.

[10] The applicants have been advised in at least one reasoned preceding judgment of this court[4] that their proper recourse lies in seeking leave to appeal against the judgment of Rogers J given nearly two years ago, on 12 September 2018. As far as I can discern they have doggedly resisted accepting that advice, notwithstanding having initially made approaches to the learned judge in September and October 2018 to arrange for the hearing of such an application, and despite having had the effect of the applicable time limits on their right to do so pointed out to them by the judge. In the circumstances, I am in no doubt that that the order striking their principal application in the current matter from the roll is not

[4] The judgment of Bozalek J referred to in paragraph 3 of my judgment of 21 February 2020.

appealable, and that any purported appeal from it would not be entertained by an appellate court even were leave to appeal (misdirectedly) granted.[5]

[11] The very fact that the applicants could in all probability have obtained a date for the hearing of their application on the ordinary (i.e. non urgent) opposed motion roll by now - nothing in the striking order having prevented them from doing so - serves to highlight just how misguided this application for leave to appeal really has been. This illustrates that even were an appeal to be heard, the matter in issue would be of such a nature that the decision sought (i.e. a setting aside of the order striking the matter from the roll for lack of urgency) would have no practical effect or result. That would be reason enough in itself for the appeal to be dismissed, even if the appellate bench might not itself have been inclined, were it sitting at first instance, to strike the matter from the roll for the reasons that I did. See in this regard s 17(2)(a)(i) of the Superior Courts Act.[6]

[12] The incidence of s 17(2)(a)(i) in the particular circumstances means that an appellate court would not get to consider the costs order that was made against the applicants. Section 17(2)(a)(ii) of the Act provides: '*Save under exceptional circumstances, the question whether the decision* [i.e. the decision appealed against] *would have no practical effect or result is to be determined without reference to any consideration of costs*'. There are no 'exceptional circumstances'.

[13] The opposing respondents have asked for the application for leave to appeal to be dismissed with costs on the attorney-client scale. In support of their request for a punitive costs order, they have pointed to the abusive character of the application. I do not intend to review the content of the application and the written argument with any particularity. It is an understatement to say that that the respondents' characterisation of the application as abusive is justified. The applicants have persisted in the unwarranted resort to a range of outrageously insulting, false and defamatory statements about various members of the judiciary (now including me), legal representatives and others that has been remarked on by other judges at previous stages of this litigation.

---

[5] An order granted leaving to appeal does not serve as a warrant that the decision in issue is appealable; see *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A).

[6] Section 17(2)(a)(i) provides: '*When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*'

[14] Even without those grossly objectionable characteristics, the vexatious way in which the application was compiled, with an enormous amount of irrelevant and argumentative material contributing to its ultimately hugely disproportionate volume, would by itself merit a punitive costs order; cf. *Re Alluvial Creek Ltd* 1929 CPD 532 at 535, where Gardiner JP said '*Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear*'.

[15] In the result the following orders are made:

1. The late delivery of the application for leave to appeal is condoned.
2. The application for leave to appeal from the judgment of this court dated 21 February 2020 is refused with costs on the scale as between attorney and client.
3. The applicants' liability for payment of the respondents' costs of suit shall be joint and several.

A.G. BINNS-WARD
Judge of the High Court