IN THE SUPREME

COURT OF ESWATINI

JUDGMENT

Case No. 32/2022

HELD AT MBABANE
In the matter between:

SLOMOES CORPORATION (PTY) LIMITED	**1st Applicant**
LUCKY BANDZI DLAMINI	**2nd Applicant**
And	
ELECTIONS AND BOUNDARIES COMMISSION	**1st Respondent**
THE REGISTRAR OF DEEDS	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral Citation: *Slomoes Corporation (Pty) Limited and Another vs Elections and Boundaries Commission and 2 Others* (32/2022) [2022] *SZSC* 52 (20/10/2022).

Coram: **J.M. CURRIE JA**

Heard: 20 September, 2022.
Delivered: 20 October, 2022.

SUMMARY: *Applications for Condonation by 1st Respondent for late filing of Answering Affidavit, Heads of Argument and Bundle of Authorities – Requirements re-stated – Applications granted – Application for leave to appeal interim order of court a quo – Form and requirements for granting leave to appeal against interim preservation order considered and applied – Interests of justice considered – Application for leave to appeal dismissed.*

JUDGMENT

J.M. CURRIE - JA:

INTRODUCTION

[1] This is an application for leave to appeal against a judgment of the High Court (per Maseko, J) on the 14th April 2022, in terms of which the High Court granted an "asset preservation order" prohibiting the applicants from disposing of and/or dealing with certain immovable property owned by the applicants pending finalisation of action proceedings instituted by the first respondent claiming the sum of E26 000 000 (twenty six million Emalangeni).

[2] In support of the order sought the 1st respondent alleged that the applicants were on the verge of selling and transferring their properties to a certain third party which properties they acquired with funds received by defrauding the

1st respondent. On the other hand applicants allege that the properties were bought through finance obtained from local banks and that the banks hold bonds over the properties and the banks should have been joined as interested parties.

[3] This matter comes before me as a single judge of the Supreme Court. Section 149 of the Constitution provides as follows:

> "**149 (1)** ***Subject to the provisions of Subsections (2) and (3) a single Justice of the Supreme Court may exercise power vested in the Supreme Court not involving the determination of the cause or matter before the Supreme Court.***
>
> *(2)* .....
>
> *(3)* ***In civil matters, any order, direction or decision made by a single Justice may be varied, discharged or reversed by the Supreme Court of three Justices at the instance of either party to that matter."***

[4] The appeals to this court are governed by Section 14 of the Court of Appeal Act which provides:

> ***Right of Appeals in Civil Cases***
>
> ***14 (1) "an appeal shall lie to the Court of Appeal –***
>
> ***(a) From all final judgments of the High Court; and***
>
> ***(b) By leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only."***

[5] Thus, an appeal from a final judgment of the High Court is one as of right whereas an appeal against certain interlocutory orders requires leave of this Court. Sitting as a single judge I am empowered only to deal with the application for leave to appeal and not the merits of the application granted in the court *a quo*.

BACKGROUND

[6] The 1st respondent/plaintiff in the court *a quo* is the Elections and Boundaries Commission, a statutory body based at Lobamba.

[7] The 1st applicant/1st defendant in the court *a quo* is a company registered in the Kingdom of Eswatini. The 2nd applicant/2nd defendant in the court *a quo* is, Lucky Bandzi Dlamini, a director of 1st applicant. Richard Phungwayo is an employee of 1st applicant.

[8] On or about 15 April 2018 1st applicant and the 1st respondent entered into written agreements being the Election Management Rent to Buy Agreement and the Service Level Agreement for Support and Maintenance ("the Agreements").

[9] 1st respondent alleges that 1st applicant breached the Agreements by failing to hand over the Election Management Solution in terms of the Agreements and in November 2021 issued a combined summons against applicants/defendants in the court *a quo* claiming the amount of E 26 000 000 from them jointly and severally which amount was allegedly defrauded by them assisted by Richard Phungwayo, an employee of the 1st applicant/1st defendant.

[10] Applicants/defendants deny that any fraud was committed against the 1st respondent and allege that all payments made to them were as a result of services rendered and goods delivered by them in terms of the Agreements referred to above.

[11] On 1st December 2021 the 1st respondent launched an urgent application in the court *a quo* interdicting the applicants/1st and 2nd defendants from effecting transfer of certain immovable properties pending the outcome of the action proceedings.

[12] The court *a quo* granted the following:

> *"3. An interim interdict being an asset-preservation order which operate* **[sic]** *with immediate and interim effect is hereby granted in respect of prayer 3.1 a, b, c, and d, of the Notice of Motion dated the 1st December 2021.*
>
> *4. The interim order (asset-preservation) referred to in para 2 herein shall operate until completion of the pending civil suit in the main matter."*

[13] Being dissatisfied with the asset preservation order granted applicants/defendants have brought an application for leave to appeal the orders granted by the court *a quo*.

CONDONATION

A. 1st Respondent's Application for Condonation for late filing of Answering Affidavit/Reply to the Application for Leave to Appeal and Applications for Condonation for late filing of its Heads of Argument and Bundle of Authorities.

[14] The application for leave to appeal was filed on 16 May 2022 in the form of a Notice of Motion, Founding Affidavit and draft Notice of Appeal.

[15] The 1st respondent filed an opposing affidavit some months later on the 11 August 2022.

[16] On 16 August 2022 1st respondent filed an application for condonation for the late filing of its answering affidavit/reply to the application for leave to appeal. The affidavit in support of application was deposed to by Mr. Magagula of Magagula Hlophe attorneys.

[17] In his affidavit Mr. Magagula states that his firm was appointed as 1st respondent's attorneys of record on 17 March 2022. Judgment of the court *a quo* in respect of the preservation order was only delivered on 14 April 2022.

[18] Mr. Magagula contends that he had a number of matters in the Supreme Court starting from 1 February 2022 running until the end of the first session of this Court and he listed six matters, which he maintained, all involved constitutional questions. Two of the matters resulted in applications for recusals and subsequent review applications in terms of Section 148 of the Constitution.

[19] On 16 May 2022 an application for leave to execute was served on the office of Magagula Hlophe attorneys by applicants and a notice to oppose was immediately filed by said firm.

[20] Mr. Magagula further states that he was also involved in two major projects being a telecommunications project for one of the major telephone companies and an energy project involving an investor. He was also involved in a matter on behalf of the Energy Regulator to review a decision of the Independent Review Committee established in terms of the Procurement Act.

[21] Matters were compounded by the fact that the Mr. Magagula had to deal with the loss of a colleague under tragic circumstances.

[22] As a result of the aforegoing he was only able to obtain instructions in the third week of July 2022. Thereafter there were delays in finalizing and obtaining signatures of the affidavit by his client as his client was involved in managing the Siphofaneni bye-elections and he only managed to serve and file the answering affidavit on 11 August 2022.

[23] He submits further that he has provided a reasonable and adequate explanation for the delay and further, that 1st respondent has good prospects of success in the application for leave to appeal.

[24] This is a matter of national importance involving the misuse of taxpayers' money. If the preservation order were to be set aside applicants would be free to sell their assets which may leave the 1st respondent without any assets to execute against if it obtains a judgment against applicants in respect of its claim.

[25] 1st respondent was entitled to be granted the preservation order to prevent 1st applicant from dissipating its assets to the prejudice of the 1st respondent. When applicants were requested by 1st respondent to give an undertaking not to dispose of their assets pending the outcome of the action proceedings it failed to do so.

[26] On 2 September 2022 a further application for condonation for the late filing of its heads of argument and bundle of authorities, due on 24 August 2022, was filed by 1st respondent's attorneys.

[27] On 10 August 2022 applicants' heads were received by Magagula Hlophe attorneys but no paginated book of pleadings was provided, nor was a paginated book of pleadings filed with the Registrar of this Court.

[28] In order to prepare for the hearing, on 16 August 2022 a paginated book of pleadings was requested by 1st respondent's attorneys by letter to applicants' attorneys. No paginated book of pleadings was received in response to this letter and on 18 August 2022 a letter was received from applicants' attorneys stating that it "would be premature and unnecessary expense" to their client to prepare and file a book of pleadings.

[29] By letter dated 19 August 2022 respondent's attorneys advised applicants' attorneys that in compliance with the rules they were obliged to prepare a book of pleadings.

[30] It appears that no response was received to this letter, nor was a paginated book of pleadings served on 1st respondent's attorneys, and, at the date of hearing of the matter, one had still not been provided to this Court.

[31] In my view applicants knew by August 2022 that the matters were opposed and they ought to have filed a paginated book of pleadings in compliance with the rules before the hearing of the matter and for the convenience of the Court.

[32] 1st respondent states that as a result of not having a paginated book of pleadings this made it difficult and time consuming to respond to the application and applicants' heads of arguments.

[33] In this application basically the same prospects of success were alleged as in the application for condonation for the late filing of the affidavit.

APPLICANTS' AFFIDAVIT AND ARGUMENTS OPPOSING CONDONATION FOR LATE FILING OF AFFIDAVIT AND HEADS OF ARGUMENTS AND BUNDLE OF AUTHORITIES.

[34] The applicants vigorously opposed both applications.

[35] Applicants contend that 1st respondent has not given an acceptable and/or plausible explanation for the failure to file the answering affidavit to the application for leave to appeal. Furthermore, the deponent to the affidavit has failed to deal adequately with its prospects of success in the main matter. In particular the affidavit does not address the issues raised by the applicants as being the short comings of the impugned judgment nor does it address the averments of the applicants in their founding affidavit to the application for leave to appeal. This Court therefore would not find itself having enough facts to be able to determine if there are indeed any prospects of success.

[36] Applicants state in their affidavit and, further in argument, that the explanation for the delay in filing the answering affidavit is not an acceptable excuse for failure to comply with the rules which dictate that an answering affidavit should be filed within seven days in terms of Rule 9 (4) of the Supreme Court Rules. 1st respondent should have filed by 25 May 2022 and only filed on 11 August 2022, after applicants' heads of argument were served. 1st respondent,

in particular Mr. Magagula, ought not to have accepted instructions from 1st respondent when he was unable to deal with the matter due to other commitments.

[37] Applicants re-stated the points raised *in limine* in the court *a quo* which are not for this Court to deal with in the applications for condonation.

[38] Applicants deny that the application for leave to appeal is fatally defective and does not comply with the Rules.

THE LAW WITH REGARD TO CONDONATION APPLICATIONS

[39] There have been a plethora of cases in this court dealing with the requirements of applications for condonation for non-compliance with the rules and the principles are well established and it is not necessary to refer to all these cases.

[40] An applicant, seeking condonation, in order to succeed, must meet the following requirements that:

(a) as soon as the applicant becomes aware of the issue requiring condonation, the application for condonation must be made;

(b) the applicant must give a full and detailed reasonable explanation for the delay;

(c) the applicant is required to set out sufficient information to enable the Court to assess whether prospects of success exist in substance and merits of the application before court.

[41] The standard of prospects of success in different types of applications such as condonation and leave to appeal is interchangeably described in general case law as *"reasonable", "good"* or *"favourable"* and the following test was formulated in **S v Smith 2012 (1) SACR 567 (SCA) [2011] ZASC 15, para 7:**

> ***"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More***

is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[42] Whilst I am of the view that the 1st respondent only dealt with the prospects of success in a perfunctory manner and the allegations fall short of the benchmark required by this Court to grant condonation I am persuaded that the 1st respondent has, at least an arguable case and that it is in the interests of justice that the merits of the application for leave to appeal should be fully ventilated by both applicants and 1st respondent. If condonation for the late filing of the affidavit opposing leave to appeal and if the application for the late filing 1st respondent's heads of argument and bundle of authorities were to be dismissed this application for leave to appeal would proceed on an unopposed basis.

[43] The matter involves a substantial amount of money involving tax payers' money. It is trite that the noting of any appeal suspends the operation of the

judgment appealed against and that the court of first instance would be *functus officio* save as regards the power, on formal application, to order that the order appealed against be put into operation pending appeal. The Supreme Court, in general, is not possessed of any power to grant *interim* or injunctive or mandatory relief and in particular, any power to order operation of a judgment pending appeal.

[44] If the application for leave to appeal proceeds unopposed and leave is granted, it would mean that the applicants are in a position, if they choose, to dispose of their assets pending the outcome of the action in the court *a quo* and, in the end result, the 1st respondent may be left with a hollow judgment and be unable to find any assets of the applicants as applicants have not disclosed a source of any other income or assets.

[45] Thereafter, the final determination lies with the Court to make a fair and legally sound judgment having heard the merits of the application for leave to appeal.

[46] I accordingly order that the application for the late filing of the affidavit opposing leave to appeal and the application for condonation for the late filing of 1st respondent's heads of argument is hereby condoned. This Court in the case of **R v Ngcamphalala and Others, in Re: R v Valop and Others (20/2005) [2005] SZSC 20 (14 November 2005)** held:

> ***"In its inherent jurisdiction this Court mero motu may excuse any party from strict compliance with any of its rules if there is no prejudice to any other party. (See HERBSTEIN AND VAN WINSEN: The Civil Practice of the Superior Courts in South Africa 3rd Edition page 19-20). That is clearly the position here. Each party knows full well what the other party's case is; each came prepared to meet the other's case and even though each one may have not strictly brought its case in the manner prescribed by the rules; this Court will condone that. The matter must be decided on the merits of the matter and the principles applicable to them and not on some inconsequential technical procedural defect."***

[47] Regarding costs, it is accepted that costs generally follow the event but in certain circumstances costs may be awarded against the successful party. In this case, I have found that the opposition by the applicants was not in any way unreasonable nor obstructive and the 1st respondent, although a plausible explanation has been given, has delayed an inordinate time in filing its affidavit opposing leave to appeal and is heads of argument. Accordingly wasted costs of the two applications for condonation are awarded to the applicants.

APPLICANTS APPLICATION FOR LEAVE TO APPEAL AND ARGUMENTS

[48] The applicants applied on 16 May 2022 by way of notice of motion together with a founding affidavit and attached draft notice of appeal. The applicants sought the following orders in the notice of motion which orders are relevant to this application for leave to appeal:

> *"1. That the applicants are hereby granted leave to appeal the judgment of the High Court of Eswatini, per Maseko J, delivered on the 14th April 2022;*

2. ***Alternatively, that this notice of application and the draft Notice of Appeal, should stand as a formal notice of appeal in the event the present application is not successful.***

3. ***Costs of suit against the 1st Respondent."***

[49] In the founding affidavit the applicants set out the background to the matter and also deal in some detail with the merits of an appeal in order to provide prospects on appeal. In this regard applicants state:

1) In the answering affidavit in the court *a quo* applicants/respondents raised points *in limine* which dealt with the authority of the chairperson of 1st respondent to institute legal proceedings; the use of a private law firm to represent the 1st respondent when 1st respondent was obliged to utilise the services of the Attorney General; that the 1st respondent did not meet the requirements for the granting of an interdict; that the properties were bought with finance obtained from local banks; that the banks which hold bonds over the properties were not joined, yet they are interested parties, and that the 1st respondent

failed to demonstrate that it has prospects of success in its claim in the main action.

2) The attorney General filed a notice to raise points of law which dealt with the use of a private law firm by the 1st respondent and that the Attorney General is the only legal representative of the 1st respondent.

3) The court *a quo* held that the points *in limine* had no merit and dismissed same on the basis and it could not allow technical objections to defeat the interests of justice.

4) The applicants aver that the funds paid by the 1st respondent to applicants were proceeds of lawful contracts entered into in terms of the Agreements. Applicants further state that the 2018 national elections and 2021 bye-elections were conducted using the Election Management system provided by the 1st applicant in terms of the Agreements.

[50] Applicants contend that the court *a quo* was wrong in granting the interdict because the decision was based on the fact that the amount claimed by 1st respondent is a vast amount and the fact that the applicants have expressly stated that, should the need arise, they would dispose of some of 1st applicant's assets in order to fund its business operations.

[51] The court *a quo* did not examine the defences raised and did not sufficiently consider the main requirement for the granting of a preservation order which is that the facts must point to the fact that the respondent is wasting or secreting assets with the intention of defeating the claims of its creditors.

[52] The first respondent/applicant in the court *a quo* had stated that the respondents were in the process of selling their assets to a certain third party. This was unequivocally denied by the respondents and no evidence was provided by the applicant to support its allegations.

[53] The 1st respondent's unsupported claim was based on fraud and theft which was denied by the applicants who stated that the amounts received were as a result of goods supplied and services rendered in terms of the Agreements.

[54] Finally, applicants state that they have good prospects of success on appeal based on what is stated above as the court *a quo* erred in its reasoning and application of the law and the facts as demonstrated in its affidavit in support of the orders sought in the notice of motion to which it is attached. The 1st respondent failed to make out a case for the grant of an interdict but the court *a quo* granted the interdict based on the considerable sum claimed and ignored the fact that the applicants had never created the impression that they would dispose of the assets with the intention of defeating the claims against them.

[55] Applicants counsel argued that the properties bought were financed by local banks and two of them were purchased before the Agreements were concluded. In particular no proof of the alleged fraud was provided either in the Court *a quo* or detailed in the affidavits applying for condonation. For this reason the application for condonation of the late filing of the affidavit ought to be dismissed and the matter should continue unopposed. Furthermore, no proof had been provided that the applicants were in the process of disposing of their properties. Therefore both applications ought to be dismissed with costs and the matter should proceed unopposed.

[56] When this Court suggested that applicants had not brought the application for leave to appeal in terms of Rule 9 applicants' counsel referred the Court to the comments of Maseko J, in his judgment of the court *a quo* where he stated: **"The points *in limine* that were raised have no merit, and I cannot allow form to prevail over substance, and certainly cannot allow technical objections to defeat the interests of justice."** In any event there was no prejudice to the 1st respondent as the affidavit attached to the notice of motion cured any defect in the form of the application.

1ST RESPONDENT'S OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL

[57] 1st respondent contends that applicants' argument was largely confined to the merits of the appeal and not to the procedure adopted by them regarding the application for leave to appeal and the merits of such application. Whilst submitting that 1st respondent has not complied with the rules by filing its answering affidavit and its heads of argument out of time, and that condonation should not be granted and the matter should proceed unopposed, applicants themselves have not complied with the rules.

[58] 1st respondent submits that the application for leave to appeal is fatally defective and ought to be dismissed on this basis alone. Whilst the applicants

have set out the reasons upon which the application is based in the affidavit they have not complied with the rules because the reasons should be set out in the notice of motion. They have not filed a verifying affidavit in terms of the rules nor set out concise grounds upon which leave is sought and as such applicants have not made out a case for leave to appeal.

[59] In this regard Rules 9 (1) & 10 of the Supreme Court Rules provide:

> ***"9.(1) An application for leave to appeal shall be filed within six weeks of the date of the judgment which it is sought to appeal against and shall be made by way of petition in criminal matters or motion in civil matters to the Court of Appeal stating shortly the reasons upon which the application is based.*** (my underlining)
>
> ***10. If the Court of Appeal on a petition or motion for leave to appeal has given an appellant leave to appeal it shall not be necessary for him to file or service a notice of appeal, the petition or motion constituting sufficient notice."***

Civil Form 3 of the rules of this Court is a specimen of an application for leave to appeal which requires that the grounds of appeal be set out in the notice of motion.

[60] 1st respondent contends Rule 9 is peremptory and this rule is supplemented by Rule 10. Amongst other things, Rule 9 requires that "...**the reasons upon which the application is based, and where facts are alleged shall be verified by affidavit.**" Applicants have not filed a verifying affidavit and the affidavit purports to provide reasons upon which leave is sought. This rule is peremptory and failure to comply therewith renders the application invalid. Compliance therewith is essential in order that the opposing party may know the case against it and be in a position to deal with the allegations therein.

[61] Rule 10 provides that if leave to appeal is granted, the notice of motion shall serve as a notice of appeal.

[62] An application for leave to appeal is distinct and has its own formalities prescribed in the rules and should not be confused with an ordinary application brought on notice of motion.

[63] With regard to the merits of the application for leave to appeal an applicant is required to show reasonable prospects of success on appeal. The applicable test is whether there is a reasonable prospect that another court may come to a different conclusion. In *casu* the applicants have no reasonable prospects of success in that:

1) The judgment of the court *a quo* is based on the exercise of a discretion. In order to impugn this judgment the applicant is required to show that the discretion was improperly exercised as a court of appeal would not interfere with the discretion of a lower court unless it was improperly exercised.

2) According to the applicants the court *a quo* based its discretion on the considerable amount involved and the 1st respondent's apprehension that the 1st applicant would dispose of its assets, should the need arise. 1st respondent submits that the court *a quo* was correct in granting the interdict as these are factors to be taken into account when exercising a discretion to grant an anti-dissipatory order. Therefore there is no reasonable prospect that another court would arrive at a different conclusion.

3) The applicants state in their affidavit that the court *a quo* did not consider the defences raised by applicants to 1st respondent's claim namely that the properties sought to be preserved were bought with the proceeds of fraud, whereas the payments received by applicants were in terms of the Agreements.

4) 1st respondent submits that whether or not the applicants had a *bona fide* defence to applicants' claim is irrelevant in the determination whether or not to grant an interdict. The court was not required to evaluate the merits of the applicants' defence to the 1st respondent's claim which is an issue to be determined by the court trying the claim. Accordingly there is no reasonable prospect that another court would come to a different conclusion than the court *a quo* and therefore the applicants have no prospects of success in this regard.

5) Applicants state that a case was not made for the grant of an interdict and the court *a quo* should not have granted an interdict and in particular an anti-dissipatory order.

6) Applicants contend that with regard to the anti-dissipatory interdict the 1st respondent was required to "*show a particular state of mind on the part of the Applicants that they were wasting or secreting the assets with the intention of defeating the claims of creditors.*"

7) 1st respondent states that this contention is clearly wrong and referred, amongst other, to **Herbstein and Van Winsen, the Civil Practice of the Supreme Court,4th Ed, p 1088** where the author states:

> ***"it is not essential to establish an intention on the part of the respondent to frustrate an anticipated judgment against himself if the conduct of the respondent is likely to have that effect."***

Therefore all 1st respondent had to show is that the disposal of the assets would have the effect of defeating 1st respondent's claim against it. *In casu* applicants had confirmed that they would dispose of their assets if the need arose. The disposal of assets would render hollow any judgment 1st respondent may obtain against applicants.

[64] 1st respondent contends that it would not be in the interests of justice to grant the applicants leave to appeal as noting of any appeal suspends the operation of the judgment appealed against. Applicants could then dispose of their assets defeating the very purpose of the preservation order which is only an *interim* order. In this event the harm that could be suffered by 1st respondent and taxpayers far outweighs any harm that would be suffered by the applicants if leave to appeal is granted.

[65] 1st respondent stated that it was not necessary to deal with the points *in limine* raised by applicants as they do not go to the merits of the impunged judgment and were technical objections which do not address the substantive issues in dispute and were dismissed by the Court *a quo*.

[66] In conclusion 1st respondent submitted that applicants have no reasonable prospects of success on appeal and it would not be in the interests of justice if the application for leave to appeal were to be granted.

[67] 1st respondent contends that it was entitled to the grant of the interim preservation order. In an application for interim relief an applicant is only required to establish a *prima facie* right as opposed to a clear right. In the court

a quo the 1st respondent adduced facts to establish a *prima facie* right to the asset preservation order. It is common cause that it seeks to recover monies received by the applicants in that the 1st respondent made payments for goods allegedly not delivered and services allegedly not rendered to it by the applicants.

THE LAW APPLICABLE TO THE ADJUDICATION OF AN APPLICATION FOR LEAVE TO APPEAL

[68] In dealing with this application for leave to appeal this Court should not deal with the factual and legal issues raised as these issues are for determination by the court which hears and determines the appeal, if leave is granted.

[69] The first issue to be considered is the form utilized by applicants in bringing the application for leave to appeal. In this regard it is clear that the incorrect procedure has been brought in filing this application for leave to appeal. In the normal course I would have been persuaded by the submissions advanced on behalf of the 1st respondent and would be inclined to dismiss the application on this point alone but I believe it is imperative to examine the other principles governing leave to appeal.

[70] Secondly, it is necessary to determine whether the judgment or orders of the Court *a quo* are final or interlocutory in terms of Section 14 of the Court of Appeal Act.

[71] If they are final the applicants are entitled to appeal as of right. If they are interlocutory applicants may, in certain instances, seek leave to appeal. This issue has been considered in a number of judgments of this Court. All these judgments appear to have followed the principles set out in **Zweni v Minister of Law and Order 1993 (1) SA 523 (A.D.)** per Harms AJA and recently in summarized in **Teaching Service Commission and Another vs Timothy Tsabedze (61/2019)[2021] SZSC 48 (25/02/2022**

> *"1. For different reasons it was felt down the ages that decisions of a 'preparatory or procedural character' ought not to be appealable (per Schreiner JA in the Pretoria Garrison Institutes case supra at 868). One is that, as a general rule, piecemeal consideration of cases is discouraged. The importance of this factor has somewhat diminished in recent times (SA Eagle Versekeringsmaatskappy Bpk v Harford 1992 (2) SA 786 (A) at 791 B – D). The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and*

cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution (Priday t/a Pride Paving v Rubin 1992 (3) SA 542 (C) at 548H – I).

7. *In determining the nature and effect of a judicial pronouncement, 'not merely the form of the order must be considered but also, and predominantly, its effect' (South African Bank of Athens Ltd 1980 (3) SA 91 (A) at 96H).*

8. *A 'judgment or order' is a decision which, as a general principle, has 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 (Van Streepen & Germs (Pty) Ltd case supra at 586I – 587B; Marsay v Dilley 1992 (3) SA 944 (A) at 962 C – F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992 (4) SA 202 (A) at 214D – G).*

See the decisions of this Court in **Mfanuzile Vusi Hlophe vs The Ministry of Health and Two Others (20/2016) [2016] SZSC 38 (30 June, 2016); The Good Shepherd Mission Hospital vs Sibongile Bhembe (36/2020) [2020] SZSC 32 (22/10/2020).**

In **Dumisani Maxwell Kunene vs Director of Public Prosecutions (03/2019) [2019] SZSC 43 (09 October 2019)** this Court acknowledged that the three attributes enumerated above were not cast in stone, and that at times flexibility and pragmatism was required. This Court quoted with approval a statement made by Lewis JA in **Health Professionals Council v. Emergency Medical Supplies and Training CC t/a EMS 2010 (6) SA 469 (SCA) 473** at paragraph 15, here he said:

(a) ***"But the Court also stated that even if an order does not have all three attributes, it may be appealable if it disposes of any issue or part of an issue. Conversely, however, even if an order does have all three attributes it may not be appealable, because the determination of an issue in isolation from others in dispute may be undesirable and lead to a costly and inefficient proliferation of hearings."***

[72] In applying the above principles to the facts I am of the view that the court *a quo's* judgment to grant the interim dissipatory interdict is not a final judgment. In the first place the interim order is returnable to the Court *a quo* and is capable of alteration or reversal by it once that action proceedings have been concluded in the Court *a quo.* Furthermore, the orders granted do not dispose of at least a substantial portion of the relief claimed in the main proceedings.

[73] In **Guardian National Insurance Co Ltd v Matthew Stephen Charles Searle NO, Case No. 195/97** Howie JA stated as follows:

> ***"There are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable for obvious reasons, that such issues be resolved by the same court and at one and the same time.*** **As the court in *Guardian National Insurance* went on to note, one of the risks of permitting appeals on orders that are not final in effect, is that it could result in two appeals on the same issue**

which would be *'squarely in conflict'* with the need to avoid piecemeal appeals."

And at par 28:

"This approach would at the same time - and to borrow a phrase - also *'prevent the parties from yo-yoing up and down the courts'* and which approach would also prevent, at the same time, the piecemeal-appellate adjudication of issues in the litigation, pending before the lower court, which would also achieve a cost- and time saving effect, which course would also avoid the potential possibility of two appeals, on the same issue."

[74] The orders granted by the court *a quo* were interlocutory orders pending the outcome of the action proceedings instituted in the court *a quo*. These orders did not decide anything about the substance of the main dispute between the parties. Orders of this kind are generally not appealable.

[75] If leave were to be granted and the appeal heard, a review application could be filed whilst the main dispute was being determined in the court *a quo* which could result in a further appeal.

[76] In view of the aforegoing I am of the view that applicants have not satisfied the requirements for granting of leave to appeal and that the application for leave to appeal should be dismissed.

[77] With regard to the issue of costs I am of the view that costs should follow the cause.

[78] Accordingly, the following orders are made:

1. The application for the late filing of the respondent's answering affidavit opposing leave to appeal is granted.
2. The applications for the late filing of the respondent's heads of argument and bundle of authorities are granted.
3. 1st respondent is to pay the wasted costs of the applications in 1 & 2 above.
4. The application for leave to appeal is dismissed.

5. Costs of the application for leave to appeal are awarded to the 1st respondent.

J. M. CURRIE
JUSTICE OF APPEAL

For the Applicants: MR. N. MANZINI, C.J. LITTLER & COMPANY ATTORNEYS

For the Respondent: MR M. MAGAGULA, MAGAGULA HLOPHE ATTORNEYS