

SOUTH AFRICA / JUDGMENT

Olivier v Nieman and Others (Leave to Appeal) (UM228/2022) [2023] ZANWHC 183 (6 April 2023) [2023] ZANWHC 183

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

UM228/2022

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Policy

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG

CASE NUMBER:

UM228/2022

Reportable: YES/NO

Circulate to Judges:

YES/NO

Circulate to Magistrates: YES/NO
Circulate to Regional
Magistrates: YES/NO
In the matter between:-
GERHARD
JACOBUS OLIVIER
Applicant
and
ANNA
MARTHA NIEMAN
1st
Respondent
THE
MASTER OF THE HIGH COURT
2nd
Respondent
ANNAMART
NIEMAN
3rd
Respondent
NELLIE
OOSTHUIZEN
4th
Respondent
JOHANNES
JACOBUS NIEMAN
5th
Respondent
FLORA
PETREA BREYTENBACH
6th
Respondent
JOHANNA
MAGDALENA SMITH
7th
Respondent
In

re: ANNA
MARTHA NIEMAN
Applicant
and
THE
MASTER OF THE HIGH COURT
1st
Respondent
NELLIE
OOSTHUIZEN
2nd
Respondent
JOHANNES

JACOBUS NIEMAN
3rd
Respondent
FLORA
PETREA BREAYTENBACH
4th
Respondent
JOHANNA
MAGDALENA SMITH
5th
Respondent
Estate Late WILLEM
ADRIAAN NIEMAN
ID 4[...]; Masters
Reference 7[...]

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

FMM REID J (FORMERLY SNYMAN):

Introduction

[1] The applicant (Gerhard Jakobus Olivier – Mr Olivier) seeks leave to appeal against the judgment granted by this Court on 28 November on an urgent basis.

[2] The order in the judgment against which leave to appeal is sought is the following:

2.1. That Part A of the matter be heard as urgent in terms of Rule 6(12) of the Uniform Rules of the High Court;

2.2. Part B of the application deals with the issuing of the letter of executorship in the deceased estate and is to determine the identity of the executor of the deceased estate. The order was made on an urgent basis, pending Part B of the application:

2.2.1. That Anna Martha Nieman (the wife of the deceased: Ms Nieman) is authorised and empowered to:

2.2.1.1. Let for any lawful purpose, any immovable property registered in the name of the late Willem Adriaan Nieman (the deceased), or registered in the name of Anna Marta Nieman and the deceased;

2.2.1.2. Sell any farming implements, equipment and livestock falling within the estate that are no longer needed for the purpose of conducting farming operations by the estate;

2.2.1.3. Exercise any power associated with the member's interest registered in the name of the deceased in relation to any of the member's interests held by the deceased as a member in each of the following close corporations:

2.2.1.3.1. WA Nieman Boerdery BK;

2.2.1.3.2. Ademshoop Boerdery BK;

2.2.1.3.3. Geluksdeel Boerdery BK; and

2.2.1.3.4. Niemansland BK.

2.3. The Master is ordered and directed to issue letters of executorship in favour of Ms Nieman in respect of the deceased estate.

2.4. Mr Olivier is ordered to pay the cost of the application which includes the cost of two (2) counsel.

[3] The application for leave to appeal is opposed by Ms Nieman. The parties are represented by the same counsel that represented them in the proceedings resulting in the judgment against which leave to appeal is sought, with Mr Olivier being represented by Adv JHF Pistor SC with Adv MG Hitge and Ms Nieman being represented by Adv JR Peter

SC with Adv HJ Scholtz.

[4] For purposes of clarity, I will refer to the main parties' identity instead of their citations. The dramatis personae is Mr Olivier and Ms Nieman. Mr Olivier was the "family attorney" to the deceased and the family businesses which

business involved all the respondents (save for the 1st and 2nd respondents). Ms Nieman is, in addition to being the wife of the deceased, the mother of the 3rd and 4th respondents as well as the 6th and 7th respondents. The 5th respondent is the son of the deceased. Mr Olivier is the only respondent which opposed the initial application of Ms Nieman. Save for Mr Olivier, no other respondent requests leave to appeal against the judgment delivered on 28 November 2023.

[5] The "family business", at the risk of over-simplifying the term, consists of approximately 63 immovable properties which exceeds an approximate 20,000 hectares of agricultural farms. The

joint estate of Ms Nieman and the deceased is worth over R350,000,000.00 (Three Hundred and Fifty Million Rand) of which the majority operates as agricultural farming.

[6] A comprehensive written judgment has been handed down electronically on 28 November 2022 and I do not intend to repeat the content thereof.

[7] The grounds of appeal for which leave is sought, can be summarised as follows:

7.1. That the founding affidavit was not properly commissioned and the Court erred in accepting such;

7.2. The Court erred in accepting a re-commissioned founding affidavit (no changes were made to the founding affidavit save for the recommissioning) without adhering to the audi alteram partem principle. The Court should have found that the affidavit is void;

7.3. The Court overreached in the doctrine of the separation of powers between the judiciary, executive and legislative functions in directing the Master to issue a letter of executorship. In doing so, the Court acted in conflict with the provisions of Sections 7, 12, and 14 of the Administration of Estates Act 66 of 1965 (the Estates Act) as well as the binding authority in Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others 2012 (3) SA 325 (SCA);

7.4. The Court should have found that the Master could appoint an interim curator in the deceased estate;

7.5. The Court granted final relief which authorised Ms Nieman to sell moveable properties where such relief was not substantiated in the founding affidavit.

[8] After the judgment was delivered on 28 November 2022, Mr Olivier caused a notice of application for leave to appeal to be served on 29 November 2022. This notice had the effect of suspending the

order. On 30 November 2022 the Master of the High Court Mr Kleynsmith (the Master) issued letters of executorship in favour of Ms Nieman.

[9] It is argued by Adv Peter SC that the Master has indeed exercised its discretion independent of the order and not in compliance with the order, as the order was suspended by the application for leave to appeal. The argument is further that an appeal against Part A of the application will have no practical effect because the letters of executorship were not issued in compliance with the court order but by exercising his discretion as the Master.

The applicable law

[10] The test to be applied in applications for leave to appeal has been set out in Section 17 of the Superior Court Act 10 of 2013 and reads as follows:

“17 Leave to appeal:

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[11] The traditional rule is that a ruling which has the nature of an interim order in that it is not final, could not be appealed against as an interim ruling can be altered with the outcome of the pending proceedings. This traditional rule is set out in *Zweni v Minister of Law & Order* 1993 (1) SA 532 (A) at 536A-C as follows:

“In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it) nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.”

[12] This traditional blanket rule that interim orders cannot be appealed against, has changed in the Constitutional dispensation and the fact that an order is temporary does not in itself determine that it is non-appealable. The Constitutional scrutiny of the traditional rule were changed in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at paragraph [22] to place a duty on the Courts to consider the circumstances and decide “whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs.”

[13] The general principle was set out as follows in *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) at

[48] where the Constitutional Court held that:

“It is indeed a general principle of our law that leave to appeal against an interim order would ordinarily be refused unless the applicant is able to demonstrate that irreparable harm would otherwise ensue.”

[14] It was settled by the Constitutional Court in *S v S and Another* 2019 (6) SA (CC) at paragraph [46] that “the interest of justice” is the test to determine whether an interim order should be appealable. In relying on the traditional rule set out in *Zweni*, the Constitutional Court held that:

“Not all litigants have the right to appeal. This court has on more than one occasion stated that it is generally not in the interest of justice for leave to be granted to appeal an interim order. This would defeat the interim nature of the that order. That there is no right to appeal interlocutory orders has been held to be constitutional by the courts on numerous occasions.”

[15] In order to determine whether relief is interim or final in effect, Keightley J succinctly summarised the difference between interim and final relief in *Andulasite Resources (Pty) Ltd v Investec Bank Ltd and Another* 2020 (1) SA 140 (GJ). She held that one should have regard to the outcome of the relief sought: if granting relief would have a final determination on the underlying right between the parties, then the relief sought was final. If granting the

relief would not have a final effect on the underlying right, then the relief is interim of nature.

- [16] The nature of the relief that has been granted as set out in paragraph [2] above is the power and authorisation to proceed with business activities of the family business in “authorising and empowering” Ms Nieman to sell, let, and/or exercise any other power necessary for the purpose of conducting farming operations by the deceased estate. Pending the determination of the identity of the executor of the deceased estate (Part B of the application) the Master was ordered to issue letters of executorship in favour of Ms Nieman to enable her to proceed with commercial transactions as mentioned. At face value, the relief granted in Part A is therefore not final but interim in nature.
- [17] In as far as the judgment was handed down on 28 November 2022, and the application for leave to appeal was served on 29 November 2022, the application for leave to appeal suspended the operation of the judgment in terms of section 18(1) of the Superior Courts Act 59 of 1959. This muddles the waters as to the basis on which the letters of executorship have been issued. The Master of the High Court has issued Letters of Executorship in terms of sections 13 and 14 of the Administration of Estates Act 66 of 1965 in favour of Ms Nieman on 30 November 2022. Without having any statement from the Master, it is impossible to determine whether the letters of executorship were issued in terms of the court order or in terms of the Master’s discretion despite the court order. Irrespective of whether the Master issued the letters of executorship in favour of Ms Nieman in terms of the court order or in the execution of his discretion, the fact of the matter is that the letters of executorship is issued pending the outcome of Part B.
- [18] The test to be applied in an application for leave to appeal, is whether it would be in the interest of justice to grant leave to appeal against the interim order. Should leave to appeal be granted, the litigation proceedings between the parties will be protracted and prolonged. The dispute in relation to who should be favoured with the letters of executorship is to be determined in Part B and the order granted as a result of the urgent application deals with the deceased estate holding commercial integrity pending Part B. The order sought to be appealed against, is an interim order and the norm is that interim orders should not be appealable.
- [19] The only instances where interim orders will be appealable, will be when it is in the interest of justice to do so. In consideration of the interest of justice, the interest of the deceased estate has to be taken into account as well. I take notice of the fact that Ms Nieman is the widow of the deceased and Mr Olivier is the former attorney of the deceased. The funding of the litigation to institute the proceedings, and to oppose the application for leave to appeal, originates from the deceased estate in as far as Ms Nieman is concerned. This is one of the factors that I take into account in finding whether it is in the interest of justice that leave to appeal should be granted.

- [20] The grounds of the appeal set out in paragraph [7] above, are akin, if not identical, to the arguments raised on behalf of Mr Olivier in the urgent application. My findings on these arguments, as well as reasons therefore, is comprehensively set out in the judgment dated 28 November 2022. I am not persuaded that any other Court would come to a different conclusion.
- [21] Having regard to all of the abovementioned factors, I do not find that it is in the interest of justice that leave to appeal be granted. I do not hold the view that another Court will come to a different conclusion than I have in the judgment dated 28 November 2022.
- [22] It follows that the application for leave to appeal should be dismissed.

Costs

- [23] Mr Olivier was cited in his personal capacity in the urgent application and brings this application for leave to appeal in his personal capacity.
- [24] No reasons were advanced why the normal rule should not be followed that the successful party's cost should be paid by the unsuccessful party. I do not find that there is any reason to deviate from the normal rule.
- [25] Both parties used senior and junior counsel for the application for leave to appeal and I agree that the legal principles involved in this application for leave to appeal justifies both senior and junior counsel's attention.
- [26] It follows that the application for leave to appeal should be dismissed with costs, including the costs of two (2) counsel where so employed.

Order:

- [27] In the premise, I make the following order:
- i) The application for leave to appeal is dismissed; and
 - ii) The applicant is to pay the cost of the application for leave to appeal, which costs include the cost of two (2) counsel where so employed.

FMM REID (FORMERLY SNYMAN)

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

APPEARANCES:

DATE OF HEARING: 03 MARCH 2023 DATE OF DELIVERY OF JUDGMENT: 06 APRIL 2023
COUNSEL FOR APPLICANT: ADV PISTOR (SC) WITH ADV HITGE COUNSEL FOR RESPONDENT:
ADV PETER (SC) WITH ADV SCHOLTZ ATTORNEYS FOR APPLICANT: LOUBSER-ELLIS AND
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Prepared on 11 October 2026 · Esheria