THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1074/2022

In the matter between:

SECONA FREIGHT LOGISTICS CC	**APPELLANT**
and	
KOOBENDRAN SAMIE	**FIRST RESPONDENT**
TRUSTEES OF THE CATO MANOR INDIAN CEMETERY AND CREMATORIUM ASSOCIATION	**SECOND RESPONDENT**
ETHEKWINI METROPOLITAN MUNICIPALITY	**THIRD RESPONDENT**
HEAD OF DEPARTMENT: ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS: KWAZULU-NATAL	**FOURTH RESPONDENT**
MEC FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS: KWAZULU-NATAL	**FIFTH RESPONDENT**
CHIEF DIRECTOR: KWAZULU-NATAL DEPARTMENT OF WATER AND SANITATION	**SIXTH RESPONDENT**

MINISTER OF WATER AND SANITATION **SEVENTH RESPONDENT**

AMAFA AKWAZULU-NATALI **EIGHTH RESPONDENT**

SOUTH AFRICAN HERITAGE RESOURCES AGENCY **NINTH RESPONDENT**

Neutral citation: *Secona Freight Logistics CC v Samie and Others* (1074/2022) [2023] ZASCA 183 (22 December 2023)

Coram: MOCUMIE, MOKGOHLOA and GOOSEN JJA and MUSI and MASIPA AJJA

Heard: 6 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 22 December 2023

Summary: Civil procedure – *locus standi* – appealability – whether the issue of *locus standi* determined as a point *in limine* is appealable.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Henriques J, sitting as a court of first instance):

1 The application for condonation for the late filing of the notice of appeal is granted and the appeal is reinstated, with no order as to costs.

2 The appeal is struck off the roll, with no order as to costs.

JUDGMENT

Mocumie JA (Mokgohloa and Goosen JJA and Musi and Masipa AJJA concurring):

[1] This appeal is against an order of the KwaZulu-Natal Division of the High Court, Durban, per Henriques J (the high court), which dismissed a point *in limine* to the effect that the first respondent lacks *locus standi* to institute an application against the appellant and the second to ninth respondents. The appeal is with the leave of the high court.

[2] At the commencement of the hearing in this Court the appellant was directed to address us on the following issue:

'Can it be said that the above order is final in effect or definitive of the rights of the parties or that it disposes of any portion of the relief claimed and is thus appealable?'

[3] The appellant is Secona Freight Logistics CC, a logistics company occupying Erf 329 Cato Manor, in terms of a lease agreement it concluded with the owner of the land, who is the second respondent, the Cato Manor Indian Cemetery and Crematorium Association, represented by its trustees. The first respondent is Mr Koobendran Samie, a resident of Yellowwood Park, bordering on Chatsworth and the south-west of Durban,

KwaZulu-Natal. He identifies himself as a person of Indian origin and a senior environmentalist with the Environmental Planning and Climate Protection Department of the third respondent, the eThekwini Metropolitan Municipality. The second respondent is the Cato Manor Indian Cemetery and Crematorium Association, represented by its trustees, Mr Perumalsamy Chinnsamy Naicker NO, Mr Govindsamy Subramany Pillay NO and Mr Soan Seebran NO. The third to the ninth respondents are cited as interested parties, as part of the relief sought implicates them. All the respondents have filed notices to abide the decision of this Court. The third respondent has filed an answering affidavit only to take issue with the costs order sought against it despite not opposing the application. The eighth respondent, Amafa aKwaZulu-Natali, responsible for the preservation of heritage sites in the province of KwaZulu-Natal, filed an affidavit in the high court to join issue with the appellant and the second respondent in relation to the point *in limine* and opposed the relief sought.

[4] In order to understand the context in which the order was made, it is necessary to briefly summarise the history of the litigation between the parties. The first respondent sought an order interdicting and restraining the appellant and the second to ninth respondents from commencing any new, and continuing any existing activities on Erf 329 Cato Manor (the site), and for the imposition of certain duties and obligations on them to act as mandated in terms of several statutes, including the National Heritage Resources Act 25 of 1999 (Heritage Act), the National Water Act 36 of 1998 (NWA), and the National Environmental Management Act 107 of 1998 (NEMA).

[5] The appellant operates a container depot for the handling, storage and repair of freight containers. It has over 1000 trucks stored on the site. It is common cause between the parties that: (a) prior to the lease agreement, entered into during 2011, and occupation of the site, the site was a cemetery; (b) no tombstones or historic artefacts had been destroyed and the graves were desecrated over the years; and (c) the appellant was not aware that the site was originally a cemetery.

[6] The first respondent states in his founding affidavit that he filed the application in his private capacity and in the public interest. He has known the site in issue from a young age as a cemetery and an important heritage and historical site which reflects the history and culture of the people of Indian origin in South Africa. His grandfather and relatives of other community members were buried on the site. They used to visit the site to pay respect to their loved ones until its gradual deterioration, closure and ultimate demolition without any consultation with the community.

[7] He states further that over a period of time, commencing in 2009, he raised concerns with the third respondent in relation to the manner in which the site was misused and/or neglected. These concerns were not attended to. Sometime in 2017, he started a petition which enjoyed the support of some community members who also had their family members buried on the site. He alerted the South African Human Rights Commission as well as the eighth respondent. When he noticed the site being cleared, he started a Facebook page titled 'Save Cato Manor Indian Cemetery' to raise awareness about what was happening on the site, which attracted many followers with relatives buried on the site. Amongst them, Mr Dharmaraj Roonkan Naidoo filed a supporting affidavit to confirm the family's observation of the gradual deterioration and destruction of the site.

[8] In 2017, when his concerns were not addressed, he instituted a claim against the appellant and the second to ninth respondents for the relief set out in para 4 above.

[9] The matter came before the high court as an opposed application. And on the first day of the hearing, the appellant raised a point *in limine* that the first respondent did not have *locus standi* to institute the application. It contended that, first, the first respondent did not establish a clear right for interdictory relief. Second, he failed to allege that he was acting in anyone's interest. Third, the relief he sought was impermissible and/or incompetent. Fourth, the first respondent, as an individual, has not alluded to, nor demonstrated any personal interest in the matter and has no relationship with, or stake in the second respondent or the site.

[10] To the contrary, the first respondent contended that he has *locus standi* to bring the application in terms of s 38 of the Constitution,[1] which allows him to pursue litigation in the public interest, and also in terms of s 32 of NEMA.[2] He contended further that such legal standing persists, irrespective of the mandate and duties conferred on the third to ninth respondents as organs of state.

[11] The parties agreed to a separation of issues in terms of rule 33(4) of the Uniform Rules of Court to deal with the point *in limine* (in respect of *locus standi* of the first respondent) first. They filed a practice notice to that effect. Although the court did not expressly make an order in this regard, the application nonetheless proceeded on that basis.

[12] The high court considered the point *in limine* first, as it was of the view that the determination thereof may be dispositive of the whole matter. Relying on *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*,[3] the high court concluded, at paras 78 and 79 of its judgment, that s 38 of the Constitution, through the use of the word 'anyone', warrants a wider interpretation of the persons identified in this section. In addition, s 32 of NEMA allows any person or group of persons to approach the court for any breach of

---

[1] Section 38 of the Constitution provides:
'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

[2] Section 32 of NEMA provides:
'(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources—
(a) in that person's or group of person's own interest;
(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
(c) in the interest of or on behalf of a group or class of persons whose interests are affected;
(d) in the public interest; and
(e) in the interest of protecting the environment.'

[3] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC).

a statute concerned with the protection of the environment and the use of natural resources. The high court aligned itself with the reasoning of Davis J in *McCarthy and Others v Constantia Property Owners' Association and Others*,[4] that s 39(2) of the Constitution requires a court, when interpreting legislation, 'to promote the spirit, purport and objects of the Bill of Rights. Accordingly, the high court held that '[a] finding that the applicant has standing in this application provides for a generous approach to access to courts and the protection of the environment'.

[13] Recently, this Court in *Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another*,[5] described *locus standi* as follows:

'*Locus standi in iudicio* is an access mechanism controlled by the court itself. Generally, the requirements for *locus standi* are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant's interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant.'[6]

[14] The issue before this Court is this: is the high court's order on the point *in limine* appealable to this Court? If the answer is in the negative, then the appeal must be struck off the roll and the matter remitted to the high court to proceed as if rule 33(4) was never invoked. I propose to deal with the failure of the appellant to file its notice of appeal and the reinstatement of its appeal first.

[15] The appellant brought an application seeking condonation for the late filing of its notice of appeal and reinstatement of its appeal that had lapsed. It is trite that condonation may be granted if the interests of justice permit. Whether it should be granted depends on the facts and circumstances of each case. The factors to consider when determining

---

[4] *McCarthy and Others v Constantia Property Owners' Association and Others* [1999] 4 All SA 1 (C); 1999 (4) SA 847 (C) at 854J.
[5] *Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another* [2023] ZASCA 107 (SCA).
[6] Ibid para 6.

whether to grant condonation include: the extent of the delay; the explanation for the delay; the effect of the delay on the administration of justice and other litigants; the importance of the issues to be raised in the appeal; the prospects of success; and the nature of the relief sought. The interests of justice must be determined with reference to all relevant factors.[7]

[16] In this regard, the following factors are relevant in this matter. The delay is inordinate. One year and six months before the prosecution of this appeal. The explanation provided by the appellant is that between April 2022 and May 2022 a natural environmental disaster, including extreme flooding, struck the greater Durban area which affected everything including the running of the courts. The courts systems were dysfunctional. All these were *vis major*. The appellant was only provided with a court order sometime towards the end of April 2022. The application for condonation is not opposed. The parties have been referred to this Court by the high court on an issue that in the high court's view deserves this Court's consideration. The prospects of success are evenly balanced. Irrespective of the inordinate delay, it is in the interests of justice that condonation be granted. Consequently, the application for condonation is granted and the appeal is reinstated.

[17] I now revert to the issue before us. Counsel for the appellant submitted that the order of the high court may be regarded as interlocutory, if it is considered that the high court still had to determine other issues which it postponed *sine die*. However, the order was appealable on at least three grounds. First, the appellant was granted leave to appeal to this Court by the high court. Second, even if the high court was of the view that the issue of *locus standi* is not *res judicata*, it would be bound to follow that order regardless of the fact that it may change its mind along the way. He equated the issue of *locus standi*

[7] *Liesching and Others v S and Another* [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC) para 14.

to that of an exception appealed against in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings Pty Ltd and others*[8].

[18] Counsel added a further string to his bow to contend that, in any event, the high court did not express any view on whether it relied upon s 38 *(a)* of the Constitution, that related to acting in the person's own interest, or under s 38*(d)* in the public interest. This issue will remain unclear until clarified by this Court. That on its own makes the order of the high court appealable. Finally, appealability is ultimately decided by recourse to the interests of justice.

[19] In *Cillers NO and Others v Ellis and Another*,[9] with reference to *Zweni*,[10] this Court stated:

'It is trite that, generally speaking, a judgment or order is susceptible to appeal if it has three attributes, namely:

"[T]he 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 it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."'[11]

[20] Furthermore, this Court, citing with approval *FirstRand Bank Limited t/a First National Bank v Makaleng*,[12] stated:

'As emphasised in *Makaleng*, these three attributes [the *Zweni* trinity] are not necessarily exhaustive. Even where a decision does not bear all the attributes of a final order it may nevertheless be appealable if some other worthy considerations are evident, including that the appeal would lead to a just and reasonable prompt solution of the real issues between the parties.

---

[8] *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings Pty Ltd and others*[8] *(273/2022)*[2023] ZASCA 63 (5 May 2023).

[9] *Cillers NO and Others v Ellis and Another* [2017] ZASCA 13 (SCA).
[10] *Zweni v Minister of Law and Order* 1993(1) SA 523 (A) at 532I-533B.
[11] *Cillers* para 15. See also *Jacobs and Others v Baumann NO and Others* [2009] ZASCA 43; 2009 (5) SA 432 (SCA); [2009] 3 All SA 398 (SCA) para 9; *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 49; *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) para 63; and *FirstRand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169 (SCA) para 15.
[12] *FirstRand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169 (SCA).

Furthermore, the interests of justice may be a paramount consideration in deciding whether a judgment is appealable.'[13]

[21] In *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*,[14] the Constitutional Court stated:

'Whether an interim order has final effect or disposes of a substantial portion of the relief sought in a pending review is merely one consideration. Under the common law principle as laid down in *Zweni*, if none of the requirements set out therein were met, it was the end of the matter. But *now the test of appealability is the interests of justice, and no longer the common law test as set out in Zweni.*'[15](Emphasis added.)

[22] On the facts of this matters as set out above, all indications point to one attribute: the order of the high court is interlocutory. It is trite that an interlocutory order (which is a preliminary or procedural order) is not appealable unless it disposes of any issue or any portion of the issue in the main action. If, therefore, an order is made during the progress of litigation which leaves the applicant's claim intact and not decided upon, it is *prima facie* an order which does not have the force of a definitive order. The applicant is not barred from proceeding with their application, as the order is merely incidental to the main dispute.

[23] Applying these trite principles underscored by the authorities referred to earlier, it is clear that the order of the high court does not possess any of the attributes articulated in *Zweni*. Nor is it appealable on any other ground, including the interests of justice. It follows that the matter is not appealable.

[24] The anomaly arose as a result of the high court's decision to separate the issues without considering whether it was appropriate to do so. In that way, it confined itself to the single issue as it did. At para 3 of the order it postponed the application *sine die*. This

---

[13] *Cillers NO and Others v Ellis and Another* [2017] ZASCA 13 (SCA) para 16. See also cases cited therein.
[14] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC).
[15] Ibid para 43.

aspect, amongst others, indicates that the high court perceived that the matter will still proceed on the dispute before it, even if differently constituted.

[25] The implication, which counsel conceded to, is that when the matter is re-enrolled in the high court, it may change its mind on the *locus standi* of the first respondent in respect of some of the respondents and/or the relief sought. This is evident from what it stated in the judgment, where it is said at para 80 that 'whether or not the applicant would ultimately be successful with the relief which he seeks, is not an issue which I am required to decide. I nevertheless suggest that the applicant gives some consideration to amending the relief sought, and to also possibly give consideration to approaching an organisation such as ProBono.org or the Bar Council to appoint a representative to assist him in amending the relief, and pursuing the application'. The above drives home the point that the high court was alive to the fact that what it had decided, namely, the *locus standi* point *in limine*, was not dispositive of the whole matter.

[26] In the result, counsel for the appellant was constrained to concede that this case fell squarely within the *Zweni* trinity and reliance cannot be placed on 'the interest of justice'. And that the appeal was premature. The issue at stake, *locus standi*, can simply not be equated to that raised in *TWK*, the exception, as a matter of principle.

[27] Rule 33(4) if not appropriately applied, without embarking upon an enquiry as postulated in *Theron and Another NNO v Loubser NO and Others*,[16] results in a proliferation of piecemeal appeals; a principle which the high court seems to have overlooked. To entertain an appeal at this stage offends against the jurisprudence of this Court.

[28] There is a further principle which the high court seems to have overlooked; leave to appeal should be granted only when there is a sound and rational basis for the conclusion that there are prospects of success on appeal. In the light that the appellant

[16] *Theron and Another NNO v Loubser NO and Others* [2013] ZASCA 195; [2014] 1 All SA 460 (SCA); 2014 (3) 323 (SCA) at 330-332.

failed to prove that the first respondent did not have *locus standi*, I do not think there was a reasonable prospect of an appeal to this Court succeeding, or that there was another compelling reason to hear an appeal as envisaged in s 17 of the Superior Courts Act 10 of 2013.[17] In the result, the parties were put through the inconvenience and expense of an appeal without any merit.

[29] Lastly, it bears mentioning this Court's disapproval with the disturbing trend of well-resourced litigants, such as the appellant, using apparent 'Stalingrad litigation tactics' to prolong ultimate relief sought in the courts and continue with 'business as usual'. This is clear herein where the matter is kept in abeyance as a result of this litigious toing-and-froing caused by the appeal on a point *in limine*, when the real dispute could have been long since resolved. Courts ought to be more circumspect and alert when parties seek to invoke rule 33(4). The rule is actually for the convenience of the court and to avoid delays in finalising matters expeditiously.

[30] In regard to the issue of costs, all the respondents did not oppose the application for leave to appeal. They filed notices to abide the decision of this Court. Consequently, and as counsel for the appellant acknowledged, it would not be fair to mulct any of them with costs.

[31] In the result, the following order issues:

1 The application for condonation for the late filing of the notice of appeal is granted and the appeal is reinstated, with no order as to costs.

2 The appeal is struck off the roll, with no order as to costs.

---

[17] Section 17 of the Superior Courts Act 10 of 2013 provides in relevant parts:
'(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 C MOCUMIE

JUDGE OF APPEAL

Appearances

For the appellant:	M E Stewart
Instructed by:	Omar & Associates, Durban
	Honey Attorneys, Bloemfontein

All the respondents abide the decision of this Court