CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 182/20

In the matter between:

JUSTICE NHLANHLA LEBEA Applicant

and

SANGO MENYE First Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR PUBLIC WORKS AND INFRASTRUCTURE, FREE STATE Second Respondent

Neutral citation: *Lebea v Menye and Another* [2022] ZACC 40

Coram: Zondo CJ, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers J, Theron J, Tlaletsi AJ, and Tshiqi J

Judgments: Zondo CJ (unanimous):

Heard on: 25 November 2021

Decided on: 29 November 2022

Summary: [adverse credibility findings] — [common law development] — [rule 28(1)] — [Magistrate's Court Rules]

[direct and substantial interest] — [human dignity] — [leave to intervene]

ORDER

On appeal from the High Court of South Africa, Free State Division, Bloemfontein (High Court) hearing an appeal from the Magistrates' Court for the District of Mangaung (Bloemfontein):

1. Leave to appeal is refused with costs.

JUDGMENT

ZONDO CJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers J, Theron J, Tlaletsi AJ, and Tshiqi J concurring):

Introduction

[1] This is an application brought by the applicant, Mr Justice Nhlanhla Lebea, for leave to appeal against a judgment and order of the Free State Division of the High Court, Bloemfontein (High Court) in a matter in which the Supreme Court of Appeal refused leave to appeal. The judgment of the High Court was given by Naidoo J and Murray AJ. It was an appeal by the applicant against a judgment and order of the Magistrates' Court for the District of Mangaung, Bloemfontein (Magistrates' Court), given by Ms Ernest, a Magistrate of that Court, in terms of which she dismissed an application brought by the applicant for leave to intervene in a certain civil matter before that Court. The Magistrates' Court had tried a civil matter between Mr Sango Menye, the first respondent in the present matter, and the Member of the Executive Council for Public Works and Infrastructure, Free State (MEC) who is the second respondent before us in which it had already given judgment in favour of Mr Menye. The MEC did not appeal against that judgment.

The facts

[2] The facts in this matter may be stated briefly. The applicant is an admitted attorney of the High Court of South Africa and practises as such in Bloemfontein under the name and style Lebea and Associates. He was appointed by the Provincial Department of Public Works and Infrastructure (Department) in the Free State to lead evidence on behalf of the Department in a disciplinary inquiry in which Mr Menye was facing certain disciplinary charges of misconduct. Mr Menye was represented by an attorney, Mr Jones, and counsel, Adv Louw, in those proceedings.

[3] The disciplinary hearing was postponed on a number of occasions. One such occasion was on or about 3 October 2014 when it was postponed to 1 and 2 December 2014. On 1 December 2014 the disciplinary hearing was once again postponed. Both these postponements were at the request of the Department. The applicant attended the disciplinary inquiry with one Mr Moletse who was the Director of Legal Services in the Department. On 3 October 2014 Mr Menye had opposed the request for a postponement of the disciplinary hearing but the hearing was postponed to 1 December 2014.

[4] The reason for the employer's request for a postponement of the disciplinary hearing that was scheduled for 1 and 2 December 2014 was that certain witnesses who were supposed to give evidence on its behalf did not arrive. The said witnesses included the Head of the Department.

[5] Mr Menye's lawyers expressed their opposition to the request for a postponement but, ultimately, the disciplinary hearing was postponed. The two sides have different versions of the circumstances under which the hearing was postponed. The applicant's version is that he applied to the Chairperson of the disciplinary hearing for the postponement of the hearing and Mr Menye's legal representatives opposed the application, but the Chairperson decided to postpone the hearing despite that opposition.

[6] The version of Mr Menye's lawyers is in effect that they were not prepared to agree to a postponement of the disciplinary hearing unless the employer agreed to pay Mr Menye's legal costs occasioned by the postponement. They say that after some discussion between themselves, the applicant and Mr Moletse, it was agreed that the matter be stood down to enable the applicant and Mr Moletse to approach the Head of the Department for authority to tender Mr Menye's costs or to give an undertaking that the Department would pay Mr Menye's costs. They say that the matter was indeed stood down and, after a while, the applicant and Mr Moletse returned and told Mr Menye's legal representatives that they had authority to tender Mr Menye's costs or to give an undertaking that Mr Menye's legal costs occasioned by the postponement would be paid.

[7] According to the applicant's version, the only arrangement that both sides agreed upon was that Mr Menye's lawyers would submit their invoice or bill of costs to Mr Moletse who would refer the invoice or bill to the Head of the Department and recommend that the Head of the Department pay the costs if he (that is Mr Moletse) was happy with the amount(s). Mr Menye's legal representatives say in effect that Mr Menye's attorney forwarded the invoice(s) or bill of costs to Mr Moletse because the undertaking to pay Mr Menye's legal costs had already been given.

[8] Later on, the applicant wrote a letter to Mr Menye's attorneys in which he disputed the statement in the letter of Mr Menye's attorneys' that the employer had agreed to pay Mr Menye's legal costs. The employer did not pay Mr Menye's legal costs. This led to Mr Menye instituting an action in the Magistrates' Court in which he claimed payment of his costs by the MEC on the basis that the employer's failure to pay these costs was a breach of an agreement that had been reached between both sides in regard to the postponement of the disciplinary hearing.

[9] In the trial in the Magistrates' Court both Mr Jones and Adv Louw testified for Mr Menye. Their evidence was in line with their version as set out above. The applicant

and Mr Moletse also testified in that trial. Their evidence was also in line with their version as set out above. The Magistrate who presided over the trial was Ms Majokweni.

Magistrates' Court judgment in Menye v MEC for Public Works and Infrastructure

[10] The Magistrate subsequently handed down a judgment in terms of which she found in favour of Mr Menye and accepted the version given by Mr Jones and Adv Louw on the issue of an agreement reached between the two sides in connection with the postponement of the disciplinary hearing and legal costs. The Magistrate made a finding that the applicant had made a misrepresentation to Mr Menye's legal representatives that he and Mr Moletse had been authorised by the Head of the Department to agree that he would pay Mr Menye's legal costs occasioned by the postponement. She made this finding despite the applicant's denial that he and Mr Moletse had told Mr Menye's legal representatives that they were authorised to tender Mr Menye's wasted costs or that they had given an undertaking that Mr Menye's wasted costs would be paid. This meant that the Magistrates' Court made an adverse credibility finding against the applicant, an attorney, that he had not been an honest witness.

[11] After the Magistrates' Court's judgment, the employer satisfied the judgment. In other words, the MEC paid the amount ordered by the Court. The applicant was aggrieved by the adverse credibility finding made against him.

Application for leave to intervene

[12] The applicant then instituted an application in the Magistrates' Court for leave to intervene in the proceedings so that he could appeal against the adverse credibility finding made against him by the Magistrates' Court. The application was made in terms of rule 28(1) of the Magistrates' Court Rules. That rule reads:

> "The court may, on application by a person desiring to intervene in any proceedings and having an interest therein, grant leave to such person to intervene on such terms as it may deem fit."

[13] The Magistrates' Court dismissed the application for leave to intervene on the basis that the applicant had failed to show that he had a direct and substantial interest in the matter in which he sought leave to intervene which the Court said, was a requirement that the applicant had to meet. The Magistrate who gave the judgment was Ms Ernest.

High Court and Supreme Court of Appeal

[14] The applicant then applied for leave to appeal to the High Court. The High Court dismissed the appeal on the basis that the applicant had failed to show that he had a direct and substantial interest in the matter. Thereafter, the applicant applied to the Supreme Court of Appeal for special leave to appeal to that Court against the judgment of the High Court. The Supreme Court of Appeal also dismissed his application.

In this Court

[15] The applicant now applies to this Court for leave to appeal against the decision of the High Court. Mr Menye opposes the application. The application is based on the proposition that the Magistrate's Court made an adverse credibility finding against him that could potentially have far reaching implications for him both personally and professionally, it is contended that it would be grossly unfair if he were not given an opportunity to appeal against the adverse credibility finding made by the Magistrates' Court against him.

Jurisdiction

[16] The first question that this Court has to determine is whether this is a matter in respect of which it has jurisdiction. This Court will have jurisdiction in respect of a

matter where the matter is either a constitutional matter or the matter raises an arguable point of law of general public importance which ought to be considered by this Court.[1]

[17] In this case the applicant seeks access to this Court in order to challenge on appeal a finding made against him by the Magistrates' Court which adversely affects his right to human dignity. This means that this case implicates both the right to human dignity entrenched in section 10 of the Constitution as well as the applicant's right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court"[2] which is entrenched in section 34 of the Constitution. Therefore, the matter raises a constitutional issue. Accordingly, this Court's jurisdiction is engaged.

Leave to appeal

[18] The next question is whether this Court should grant the applicant leave to appeal. This Court grants leave to appeal if it is in the interests of justice to do so. In determining whether it is in the interests of justice to grant leave to appeal in a particular matter, this Court takes into account, amongst other things, the importance of the matter, the applicant's prospects of success, and whether the issues to be decided in the matter concern only the parties or whether they affect many other people.

[19] As already stated, the issue that this matter raises is whether a witness who is not a party to court proceedings in which he or she testifies is entitled to intervene or should be granted leave to intervene in those proceedings for purposes of noting and pursuing

[1] Section 167(3) of the Constitution reads:

"The Constitutional Court—

. . .

(b) may decide—

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[2] Section 34 of the Constitution.

an appeal against an adverse credibility finding made against him by the court in its judgment. That is an important matter. The issue is one that affects all witnesses who find themselves in the position in which the applicant finds himself.

[20] Does the applicant have reasonable prospects of success? That is the question I consider next.

[21] The applicant's application for leave to intervene in the Magistrates' Court was made in terms of rule 28(1) of the Magistrates' Court's Rules.

[22] Counsel for the applicant sought to argue that there was a link between the order made by the Magistrates' Court and the adverse credibility finding made against the applicant which gave him a direct and substantial interest in the order. However, the position is simply that, even if the applicant were to be allowed to intervene, he has nothing to do with the order that the Court made against the second respondent. That order gave him nothing and took nothing from him.

[23] The applicant placed some reliance on a statement made by Addleson J in *Wynne*[3] where the Court said:

> "Where there is an attack on the character of a person who is not a party to the litigation, it is conceivable that there may be a limited right to intervene, provided that it will be essential for the purposes of the judgment, that the correctness of such attack be considered and decided as part of the Court's reasons for determining the issue between the parties."[4]

[24] The applicant's counsel also relied upon *Lehapa*[5] where the Court approved a passage from the judgment in *Wynne*. There the Court said:

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[3] *Wynne v Divisional Commissioner of Police* 1973 (2) SA 770 (E).

[4] Id at 776A.

[5] *SA Commercial Catering and Allied Workers Union v Lehapa N.O. (Mostert N.O. Intervening)* 2005 (6) SA 354 (W).

"In my view the legal position was correctly summarised by Addleson J in *Wynne v Divisional Commissioner of Police and Others* 1973 (2) SA 770 (E) at 774E – H:

> 'Assuming, without deciding, that the above decisions are correct, it seems obvious that in each case the reason for granting leave to intervene was that the damaging allegations against the third party would necessarily be in issue between the parties to the litigation. It would have been impossible for the Court to give judgment in those cases without deciding whether the third party had or had not committed adultery and the effect of the judgment would therefore have been to decide the correctness or otherwise of the attack on the third party's reputation. The same position arose in *Vawda v Budrea* (1908) 29 NL 539, where the defendant alleged fraud and collusion on the part of a third person who was not a party to the action. In principle the Full Court accepted the proposition that, 'a man's character being beyond all price', the third party should be entitled to intervene; but this again was a case where the allegations made against the third party were directly in issue between the litigating parties and would necessarily have to be decided in the course of the judgment on the merits.'"[6]

[25] Counsel for the respondent also referred to *Wynne*, in particular where the Court said:

> "There is, in the present case, no *lis* at all. The issue between the applicant and the first and second respondents was settled before he sought leave to intervene and has fallen away. There is no judgment which the Court could give, save for a formal order recording their agreement. Even if such an order were not made, that agreement would stand and be implemented and the documents would already have been handed back to the applicant. There is therefore no 'right which is [the] subject-matter of the litigation', in the phrase used in Henri Viljoen's case, supra at p169, in which the intervening respondent could have any interest. Moreover, even if such right in the subject-matter were in existence, the intervening respondent's interest therein would

[6] Id at para 6 citing *Wynne* above n 3 at 774E–H.

> be a purely collateral one, not the 'direct and substantial interest' required by the authorities of a party who seeks leave to intervene. See, for example, cases cited by Corbett, J in the *United Watch and Diamond Co* case supra at p415. As in *Brauer v Cape Liquor Licensing Board* 1953 (3) SA 752 (C) at p761, so here, any order which the Court might have made in favour of the applicant might have been 'an unwelcome result' to the intervening respondent but it would not be an order on a matter in which he has any substantial interest. His only interest is in protecting his reputation; and, important as that undoubtedly is to him, it is no way connected with the issue between the applicant and the other respondents."[7]

[26] In *Zuma*[8] one of the issues that the Supreme Court of Appeal had to consider was whether it should grant former President, Mr Thabo Mbeki, leave to intervene in an appeal brought by the National Director of Public Prosecution against a judgment and order of Nicholson J in the High Court of South Africa, KwaZulu-Natal Local Division, Pietermaritzburg in order to appeal against an adverse credibility finding that had been made by Nicholson J against him in the course of his judgment. Mr Mbeki was neither a party nor a witness in the proceedings before Nicholson J. In fact, those proceedings were motion proceedings. Mr Mbeki applied to the Supreme Court of Appeal for leave to intervene in the appeal brought by the National Prosecuting Authority so as to appeal against the adverse credibility finding made against him.

[27] The Supreme Court of Appeal pointed out that Mr Mbeki and other members of Government who also sought leave to intervene had ample grounds to be upset by the reasons in the judgment which cast aspersions on them without regard to their basic rights to be treated fairly. It also said that their "desire to intervene at the appeal stage was understandable".[9] It then went on to say:

> "Nevertheless, to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance

[7] *Wynne* above n 3 at 775 E-H.

[8] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA).

[9] *Zuma* above n 8 at para 84.

> or on appeal. The basic problem with the application is that the applicants have no interest in the order but only in the reasoning. They are in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. Such a person has no ready remedy, especially not by means of intervention. To be able to intervene in an appeal, which by its nature is directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal. The applicants do not have such an interest."[10]

The Court, therefore, dismissed the application for leave to intervene.

[28] In *SA Riding*[11] this Court made the same point, although that was not a case where the party that sought leave to intervene was a witness against whom a court had made an adverse credibility finding or had given reasons for an order that impugned their integrity or character. In *SA Riding* this Court said:

> "It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought."[12]

[29] I do not think that the decision in *Wynne* can assist the applicant in any way. This is more so in the light of the clear position that his interest is really in the adverse credibility finding made against him and not in the order that the Magistrates' Court made. Furthermore, the fact is that there is no *lis* between the parties anymore, just as there was no *lis* between the parties in *Wynne*. In this case, the MEC accepted the judgment and order of the Magistrates' Court and satisfied the judgment. It must also be remembered that there is no appeal against reasons for a judgment and an appeal lies only against an order. This means that even a party to litigation cannot appeal against

[10] Id at para 85.

[11] *SA Riding for the Disabled Association v Regional Land Claims Commissioner* [2017] ZACC 4; 2017 (5) SA 1 (CC); 2017 (8) BCLR 1053 (CC).

[12] Id at para 9.

any adverse credibility finding that the court may have made against him or her if in the end the order that the court made is the order that he or she wanted or he or she has opted not to contest the order. A defendant who succeeds in getting a court to dismiss the plaintiff's claim cannot appeal against one or other adverse credibility finding that the court may have made against him or her in respect of one or other issue in the course of its judgment.

[30] The word "interest" in rule 28(1) has been interpreted to mean a direct and substantial interest which a person is required to have in the subject matter before he or she can be said to have *locus standi* in such a matter or before such a person may be joined or be allowed to be joined in proceedings. Direct and substantial interest is a direct and substantial interest in the order that a court is asked to make in a matter. It is not enough if a person has an interest in a finding or in certain reasons for an order. The interest must be in the order or the outcome of the litigation. The adverse credibility finding against the applicant does not give him a direct and substantial interest. In *Neotel*[13] the Supreme Court of Appeal reaffirmed that an appeal does not lie against the findings of, and, reasons for, a judgment or order.

[31] Counsel for the applicant submitted that, if this Court held that the applicant did not have a direct and substantial interest in the matter in which the applicant sought leave to intervene, this Court should develop the common law so as to extend the concept of direct and substantial interest to include people in the applicant's position.

[32] This Court, just like the Supreme Court of Appeal and the High Courts, derives its power to develop the common law from section 173 of the Constitution. Section 173 reads:

[13] *Neotel (Pty) Ltd v Telkom SA SOC Ltd* [2017] ZASCA 47.

> "The Constitutional Court, Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[33] Another provision of the Constitution that refers to the development of common law is section 39(2). It reads:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[34] There are two ways in which the applicant's submission may be dealt with. The one would be to deal with it along the lines in which this Court decided in *Fourie*.[14] I will deal with the other one later. In *Fourie* the applicants, a same-sex couple, instituted proceedings in the High Court, Pretoria, and asked it to develop the common law definition of "marriage" so as to include a marriage between persons of the same-sex. This would enable the couple to marry. The applicants sought to achieve this by way of the development of the common law definition of "marriage" without challenging the constitutional validity of section 30(1) of the Marriage Act[15] which contemplated a marriage only between a man and a woman. Section 30(1) of the Marriage Act provided:

> "In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

[14] *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

[15] 25 of 1961.

> 'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D here present, and that you call all here present to witness that you take C.D. as your lawful *wife (or husband)*?',
>
> and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:
>
> 'I declare that A.B. and C.D. here present have been lawfully married.'" (Emphasis added).

[35] When the *Fourie* matter was before Roux J in the High Court, he held that an omission to challenge the constitutionality of the provisions of the Marriage Act constituted an obstacle to granting the relief sought. It was for this reason that Roux J dismissed the application. When the parties pursued an appeal in the Supreme Court of Appeal, they did so on the same basis on which they had litigated in the Pretoria High Court, namely, that the common law needed to be developed, without linking this to a challenge to the Marriage Act.[16]

[36] In the Supreme Court of Appeal different judgments were written. The majority one was written by Cameron JA and the other by Farlam JA. In his judgment, Farlam JA said that the formula in section 30(1) of the Marriage Act could be changed by a process of innovative and "updating" statutory interpretation by reading "wife (or husband)" in this provision as "spouse".[17] Cameron JA held that the right of same-sex couples to celebrate a secular marriage would have to await a challenge to the Marriage Act.[18] It follows from this that the Supreme Court of Appeal also took the view that it would not be enough to develop the common law without challenging the constitutionality of section 30(1) of the Marriage Act. Cameron JA held this on the basis that the Marriage Act could not be read in such a way as to include a marriage between same-sex partners.

[16] *Fourie* above n 14 at para 11.

[17] Id at para 30.

[18] Id at para 21.

[37] The *Fourie* matter later came before this Court. Writing for the majority in this Court, Sachs J said:

> "At the hearing two broad and interrelated questions were raised: The first was whether or not the failure by the common law and the Marriage Act to provide the means whereby same-sex couples can marry, constitutes unfair discrimination against them. If the answer was that it does, the second question arose, namely, what the appropriate remedy for the unconstitutionality should be. These are the central issues in this matter…"[19]

[38] Sachs J also said:

> "In essence the enquiry into the common law definition of marriage and the constitutional validity of section 30(1) of the Marriage Act is the same. Are gay and lesbian people unfairly discriminated against because they are prevented from achieving the status and benefits coupled with responsibilities which heterosexual couples acquire from marriage? If they are, both the common law definition as well as section 30(1) must have the effect of limiting the rights contained in section 9 of the Constitution. If not, both will be good. It must be emphasised that it is not possible for one of the two provisions concerning marriage that are under attack in this case to be consistent with the Constitution, and for the other to be constitutionally invalid. In the circumstances, a refusal to consider both together would amount to no more than technical nicety."[20]

[39] It would appear that in *Fourie* this Court took the view that, in order to enable the applicants to marry legally, it was not going to be enough to only develop the common law definition of "marriage" so that it included a marriage between same-sex partners. This Court seems to have taken the view that section 30(1) of the Marriage Act needed to be declared constitutionally invalid to enable the applicants in that matter and other people in the same position to conclude valid marriages.

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[19] Id at para 45.

[20] Id at para 44.

[40] In the present case the applicant did not challenge the constitutional validity of rule 28. Just as this Court seems to have taken the view in *Fourie* that it would not help to develop the common law without declaring section 30(1) of the Marriage Act constitutionally invalid, it may be argued that in the present case, too, it might not help to develop the common law without declaring rule 28(1) constitutionally invalid to the extent that it excludes the type of interest for which the applicant contends. However, in the view I take of the applicant's submission to develop the common law, it is not necessary to decide whether the applicant would need to challenge the constitutional validity of rule 28(1) even if we were to develop the common law. That leads me to the other way in which his submission may be dealt with.

[41] As indicated earlier, the applicant's counsel submitted that, if this Court did not accept his submission that rule 28(1) should be interpreted to include the type of interest for which the applicant contends, we should develop the common law so that it includes that type of interest. The interest referred to in rule 28 has been interpreted to be a direct and substantial interest. In my view, there is no warrant to interpret rule 28(1) so as to include the interest for which the applicant contends. I take the view that we should decline the applicant's invitation that we should develop the common law. My reasons for this position are substantially the same reasons why, in my view, we should not interpret rule 28(1) to broaden the interest required for a party to be granted leave to intervene in proceedings.

[42] For the reasons that follow, I am of the view that it would not be in the interests of justice to develop the common law in this case to accommodate the applicant's type of interest:

(a) If the test is broadened it would not only allow a witness to pursue litigation to overturn adverse credibility findings against them but it would also allow other persons who may be adversely affected by some or other adverse finding of a court to do the same.

(b) If we accommodate the applicant's interest, we will have to also allow a party who is not aggrieved by the order of court but by one or other reason or credibility finding to appeal against such a reason or finding even if they do not appeal against the order.

(c) Although the applicant's application arose from an action, the same problem could arise in motion proceedings as well as in criminal proceedings.

(d) Although in this case we are dealing with one witness who seeks to have an adverse credibility finding made against him overturned, in other cases there could be multiple witnesses who would seek to do the same and this could seriously complicate the adjudication process.

(e) If there are multiple witnesses against whom adverse credibility findings have been made and they are allowed to intervene in a particular matter, they could be entitled to be represented by multiple lawyers.

(f) A refusal of an application for intervention may result in an appeal or appeals.

(g) If an aggrieved witness could intervene at the stage of an appeal, he or she might also then be entitled to intervene before judgment is given and to be represented at the trial of the action or at the hearing of the opposed application, if it appeared that that person's credibility or reputation could be the subject of an adverse credibility finding.

(h) If a litigant or a witness could pursue an appeal against adverse credibility or reputational findings, without having an interest in or seeking to impeach the actual order, an appellate court might need to adjudicate such an appeal without the assistance of anyone other than the aggrieved litigant or witness. This is because the parties with an interest in the actual order might well not wish to incur the costs of participating in an appeal if the trial court's order is not attacked. They might have no interest in whether or not a particular adverse credibility finding stands.

(i) All of these implications have great potential to delay and increase the costs of litigation.

[43] It seems to me that there are too many potential complications that would arise in our court system if we were to broaden the test for intervention as contended for by the applicant. It seems more prudent to leave the issue to Parliament to consider what statutory mechanism, if any, should be created to protect the interests of witnesses who find themselves in the applicant's position.

[44] In the circumstances, I am of the view that the applicant's application has no reasonable prospects of success. Although the absence of reasonable prospects of success is not always a decisive factor in an application for leave to appeal, it is an important factor and, sometimes, it can be a decisive factor. In my view, in this case it is decisive. In the circumstances leave to appeal should be refused. The matter is between two private individuals. Therefore, costs should follow the result.

Order

[45] In the result, the following order is made:

1. Leave to appeal is refused with costs.

For the Applicant:	Adv C Georgiades SC, Adv H Drake and Adv L Mokgoroane instructed by Lebea & Associates Attorneys
For the First Respondent:	Adv M C Louw instructed by Honey Attorneys