REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/8288

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED. YES

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SIGNATURE **DATE: 24 April 2020**

In the matter between:

SAMUEL AGOSTINHO REIS DOS SANTOS	First Applicant
CARLOS MANUEL VARGES PINTO	Second Applicant
MARIO MANUEL VARGES PINTO	Third Applicant
PINCAR AUTO SERVICES (PTY) LTD	Fourth Applicant

and

FRANCOIS JOUBERT	First Respondent
SUSANNA JACOBA JOUBERT	Second Respondent
FRANCOIS JOUBERT N.O.	Third Respondent
SUSANNA JACOBA JOUBERT N.O.	Fourth Respondent
ROELOF PETRUS GERHARDUS LABUSCHAGNE N.O.	Fifth Respondent
INDUSTRIAL STEEL FIBRES CC (IN BUSINESS RESCUE)	Sixth Respondent

SERISO 333 CC	Seventh Respondent
JULIAN EMPEDOCLES	Eighth Respondent
M J SWANEPOEL	Ninth Respondent
A M ERASMUS, THE SHERIFF KRUGERSDORP	Tenth Respondent
M C M VAN DER MERWE, THE SHERIFF RANDFONTEIN	Eleventh Respondent

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JUDGMENT

Weiner J

[1] This case concerns the applicable test to be applied in determining whether it is the interests of justice to suspend the operation of certain orders granted by Senyatsi J on 5 March 2020 (the 'impugned orders').[1] The crisp issue is whether, despite being interim in form, the orders have such irreparable consequences that the interests of justice demand that they be suspended in terms of s 18 of the Superior Courts' Act 10 of 2013 (the 'Act').

[2] The law has evolved over the decades in regard to this vexed question. In the main the authorities have dealt with differentiating between interim and final orders for the purposes of deciding the question of appealability. The determination of whether the impugned orders are in fact appealable falls to be made by the court that granted the interim interdict. That court may also have regard to other features of the order apart from the finality of its effect or substance. This Court, however, has to consider the appealability of the order for the purpose of deciding whether it would be

[1] Although this matter came before this Court as a matter of urgency, the Government's lockdown requirements relating to COVID-19 came into operation soon after the hearing. In light of the lockdown, it appeared that the applicants' business would not be able to operate, and the relief they sought lost the element of urgency. On 14 April 2020, this Court was informed that two entities, Industrial Fibres 2011 and Eco Coal, which they imply are somehow associated with the applicants, had been issued with 'essential services' permits to operate their business. The permits are dated 14 April 2020. The respondents objected to that information being conveyed to the Court, inter alia, because the permits were not issued to the applicants but to other parties not before this Court and that the business of steel wool manufacture and charcoal sales are not essential services. I do not consider it is necessary to make any findings in relation to this issue, as will appear more fully from the reasons and decision set out below.

appropriate to suspend the operation of the impugned orders under s 18.[2] Therefore, one of the issues which this Court must take into consideration in deciding whether the impugned orders should be suspended pending the appeal processes, is whether the orders are purely interlocutory, final in effect and/or final in substance, in terms of s 18 of the Act.

[3] The impugned orders are clearly interim in form, but that does not end the enquiry. As Maya P in *Director-General, Department of Home Affairs v Islam* held:[3]

'*Traditionally, under common law, an interim order was not appealable except where it was shown that it was (a) final in effect as it could not be altered by the court which granted it; (b) definitive of the rights of the parties in that it granted definitive and distinct relief; and (c) was dispositive of at least a substantial portion of the relief claimed in the main proceedings. The test has since evolved. So whilst the traditional requirements are still important considerations, the court may in appropriate circumstances dispense with one or more of those requirements if to do so would be in the interests of, having regard to the court's duty to promote the spirit, purpose and objects of the Constitution eg where the interim order "has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable".*'

Background

[4] For purposes of convenience the first to fifth and seventh respondents will be referred to as the respondents.

[5] The applicants (in various capacities) sought to acquire:-

5.1. a steel wool manufacturing business; together with

5.2. a charcoal manufacturing business;

[2] *Velocity Trade Capital (Pty) Ltd v Quicktrade (Pty) Ltd and Others* (7263/2019; 5717/2019) [2019] ZAWCHC 92 (29 July 2019); [2019] 4 All SA 986 (WCC) para 30.
[3] *Director-General, Department of Home Affairs and Another v Islam and Others (*459/2017) [2018] ZASCA 48 (28 March 2018) para 10 (footnotes omitted).

[6] Such businesses operated under ISF 2011 (Pty) Ltd. (ISF P/L). In respect of these businesses the respondents employed a fairly complicated structure, involving multiple entities:

6.1.1. the steel wool manufacturing business, operated from what is known as the Delporton property, which was registered in the name of the Francois and Ronel family Trust (the 'Trust');

6.1.2. the charcoal manufacturing business operated from what is referred to as the Wheatlands property, which was believed to be registered in the name of Henque 2959 CC, but was actually registered in the name of Industrial Steel Fibres CC (the 'CC').

6.1.3. in respect of machinery and equipment utilised by ISF P/L, such assets were ostensibly registered in the name of Seriso 333 CC ('Seriso').

[7] In order for the applicants to acquire the entire interest and control in the steel wool and charcoal manufacturing businesses, the applicants and certain of the respondents entered into a suite of agreements, listed below:-

7.1.1. An agreement for the sale of shares in ISF P/L;

7.1.2. An agreement for the sale of members' interest in Seriso (the 'Seriso agreement');

7.1.3. An agreement for the sale of the Delporton property by the Trust (the 'Delporton agreement');

7.1.4. An agreement for the sale of the Wheatlands property.

[8] All of the aforementioned agreements were signed and executed in May 2018.

[9] After disputes arose over the applicants' failure to make certain payments, the respondents cancelled the Seriso and Delporton agreements. The applicants disputed the cancellation and that matter is the subject of an action. Whilst such action was pending, the respondents threatened to sell both the Delporton property, as well as

the movable property (the 'Seriso assets'), that formed part of the Seriso agreement. A demand for them to desist therefrom was refused.

The first application

[10] The applicants thus launched the first application, the purpose of which was to interdict the respondents from selling the Delporton property and the Seriso assets found on a property described as the 'Wheatlands property'. The steel wool manufacturing business and the charcoal factory were being conducted and operated from such properties. They thus sought to 'preserve the *status quo*', pending the finalisation of an action instituted under case number 2019/33056, and an action to be instituted by the first to third applicants within thirty days from the granting of Senyatsi J's order.

[11] The first application was confined to the preservation of the applicants' rights in Delporton and the movable assets of Seriso. The applicants contended that instead of only deciding those issues, Senyatsi J granted a much wider order.[4] Such order provided:

1. The forms and service and time periods provided for in the Uniform Rules of Court are dispensed with and this application is urgent;

2. The Francois and Ronel Familie Trust (Registration number: IT483/2008), represented by the trustees for the time being, the Third, Fourth and Fifth Respondents, is interdicted from selling or in any way disposing of or encumbering Erven 29, 32 and 33 Delporton, situated at 1 to 5 Carter Street, Delporton, Krugersdorp ("the property") and held under Title Deed number: T37447/2010, pending the finalisation of an action instituted out of this Court under case number [33056/2019];

3. The Eighth Respondent is ordered to record and register this interdict on the said Title Deed of the property;

4. The First, Second, Third, Fourth, Fifth and Seventh Respondents are interdicted from selling the moveable assets specified in the schedule marked "A" hereto, being the moveable assets which the First, Second and Third Applicants purchased in terms of an agreement of sale of members' interest in Seriso 333 CC dated 8 May 2018, pending

[4] Unreported judgment of *Samuel Agostinho Reis dos Santos & 2 Others v Francois Joubert & 7 Others* (2020/2016) [2020] ZAGPJHC (5 March 2020). The applicants in the matter before Senyatsi J are comprised of the first to third applicants in the current matter.

the finalisation of an action or application which the First, Second and Third Applicants shall institute out of this Court within 30 (thirty) days from the granting of this order, for declaratory and or other relief in respect of the said assets;

5. The Delporton property, including all the moveable assets currently found thereon, is placed in the hands of an independent party to hold legal and factual possession thereof until the finalisation of the pending action under case number 33056/2019;

6. The independent third party for the purpose of [paragraph 5] above is:

   6.1. Erven 29, 32 and 33 Delporton situated at 1 to 5 Carter Street, Delporton, Krugersdorp is Mr M.J. Swanepoel and the Sheriff of the Delporton Area;

   6.2. Plot 65 Wheatlands Randfontein is Mr J.P. Empedocles; and the Sheriff Randfontein;

7. The independent third parties stated in [paragraph 6] above shall compile an inventory of the assets found on both properties and hand the copies thereof to the parties involved in the action under case number 33056/2019 and shall ensure that insurance cover is taken at the cost of the properties against fire and other related risks;

8. The costs of the application shall be the costs in the main case under case number 33056/2019.

The present application

[12] The applicants do not challenge paragraphs 1-4 of the order; that is the relief they sought. However, the applicants joined issue with the mechanisms in which the property and assets were ordered to be preserved as set out in paragraphs 5, 6 and 7 of the order, which comprise the impugned orders.

[13] The applicants thus applied, as a matter of urgency, for relief that the operation and execution of certain portions of the order handed down by Senyatsi J on 5 March 2020, be suspended, pending the finalisation of the applicants' application for leave to appeal, including any petition to the Supreme Court of Appeal and thereafter, if applicable, the finalisation of the applicants' appeal. The relief sought related to the impugned orders.

[14] The applicants contended that Senyatsi J erred in granting the impugned orders, as such orders were not competent given that the respondents ought to have

brought a counter-application in the form of a *rei vindicatio.* The respondents submitted that such an application would have amounted to a decision on the issue of cancellation and therefore such relief would not have been competent. For the purposes of the present application, it is not necessary to deal with this issue.

[15] Upon receipt of the order on 5 March 2020, the respondents were informed of the applicants' intention to launch an application for leave to appeal against the offending portions of the order. Notwithstanding this, the respondents executed on the order in the late afternoon on 5 March 2020.

[16] On 6 March 2020, the applicants filed their application for leave to appeal. On the same day, the applicants' attorney sent a letter calling for a written undertaking to cease execution in respect of the impugned orders. In response thereto, the respondents indicated that according to them, such orders are not appealable. On Monday, 9 March 2020, this application was launched.

[17] It was the applicants' contention that the order by Senyatsi J is final in effect in terms of s 18(1) *alternatively*, there are exceptional circumstances which will result in the applicants suffering irreparable harm if this Court does not grant an order suspending the execution of the impugned orders, pending the leave to appeal, within the meaning subscribed in s 18(2) and (3) of the Act. The respondents, on the other hand, contended that the impugned orders are clearly not final, as Senyatsi J made no finding on the issue of the validity of the respondents' cancellations of the Seriso or Delporton agreements. It is specifically mentioned that those orders will operate 'until the finalisation of the pending action under case number 33056/19'. The respondents submitted further that the impugned orders do not have a final effect, as contemplated in s 18(1) of the Act.

[18] Section 18 of the Act provides, inter alia:

18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

.....

[19] The application before Senyatsi J was one brought by the applicants interdicting certain of the respondents from selling certain properties and assets, the subject matter of the Delporton and Seriso agreements. In granting the applicants the interim relief they sought, the learned judge considered the balance of convenience. In this regard the learned judge stated as follows:

19.1 'The Applicants aver that a total of R8 million has been paid to the Respondents.'[5]

19.2 'The fourth Applicant avers that it has paid, just in respect of the Delporton property alone, the following amount: R3 million deposit as required in the agreement; R900 000.00 balance into the trust account of Heidtmann and Du Preez attorneys in terms of clause 3.2. and 3.3. of the sale agreement. The total of R5.64 million has therefore, so contends counsel for the Applicants, been paid by the fourth Applicant in relation to the Delporton property.'[6]

19.3 'Despite the payment of the amount, the fourth Applicant contends that the Trust insists on cancelling the agreement and retain the sum of R5.64 million.'[7]

19.4 'It has been submitted on behalf of the Applicants...that if the interim relief is not granted, there is a serious potential of irreparable harm. The reason

[5] Ibid para 12.
[6] Ibid para 16.
[7] Ibid para 17.

advanced for this proposition is that the Respondents would be empty shells devoid of all assets.'[8]

19.5 'It cannot be denied that if the Delporton property is sold, the R5.4 million already paid by the Applicants is at risk. There is indeed a pending action which is the subject of a dispute on whether the sale agreement has been concluded or not. The Respondents contend that the agreement been cancelled for non-performance. They raise various reasons such as non-payment of VAT, clearance figure[s] with the municipality and the balance of the purchase price of movable assets.'[9]

[20] Senyatsi J thus found that the applicants had shown that the balance of convenience favoured them in granting the interdicts against the respondents. The respondents did not launch a counter-application. In their answering affidavits they suggested that if the applicants succeeded with their interdict, the properties and assets should be placed in the hands of independent third parties (the eighth and ninth respondents herein).

[21] It appears clear from the judgment of Senyatsi J, that in granting the impugned orders, the balance of convenience in respect of these orders was not considered at all. He dealt with this relief as follows:

'In opposing the submission by [the fifth, sixth and seventh respondents] *…the Applicants contended that such submission was without merit and not in compliance with the Rules of this Court.* [Counsel for the Applicants] *argued that for such an alternative order to be made as contended on behalf of the Respondent, the Respondent ought to have filed a counter-application. I do not agree with the submission by* [the Applicants]*. I say so because* [in its] *opposing affidavit, the Respondent prayed, as an alternative that:*

"In the event of the ... Court finding that an interim interdict ought to be granted, it is prayed for that all the immoveable assets, as listed as per annexure 'AA5', as well as both the Delporton and Wheatlands properties be placed in the hands of an independent

[8] Ibid para 26.
[9] Ibid para 27.

third party, to be identified and elected by the Court, to hold legal and factual possession thereof until the finalisation of all the disputes."

As a consequence, I hold the respectful view that the Applicants have made out a case for the relief sought.'[10]

[22] The applicants submitted that the relief (contained in the impugned orders) amounted to what was in effect an order on a counter-application and that such relief was granted:

22.1. in the absence of averments contained in affidavits justifying such orders;

22.2. involving disputes extraneous to the urgent application;

22.3. in respect of parties who were not cited in the application.

[23] The order of Senyatsi J did not contain provisions which might have been ordered to preserve the *status quo* and prevent both parties from suffering irreparable harm. The respondents did not offer to indemnify the applicants for any damages which they may suffer as a result of the impugned orders if the applicants were ultimately successful, nor was there an order to this effect. There was no suggestion by the respondents, nor was it contained in the order, that the businesses should continue running under the supervision of the eighth and ninth respondents.

[24] The result of the order without these safeguards points to the fact that the balance of convenience was not shown by the respondents to be in their favour, more particularly considering the learned Judge's finding in respect of the balance of convenience being in the applicants' favour in obtaining the interdictory relief which it did.

[25] The applicants contended that the execution of the order has caused *inter alia* the following substantial, irreparable and immediate consequences:

25.1. The businesses have ceased to operate.

[10] Ibid paras 37-38.

25.2. There are approximately eighty-five employees who were working in the businesses operated at the two properties. They are now all without work and, like the applicants, have been ejected from the properties.

25.3. Since the businesses are no longer operating, there are insufficient funds to pay employees their salaries.

25.4. Two of the employees reside in a house and a cottage on the Wheatlands property. They have been entitled to stay there as part of their respective employment packages. The eighth respondent, who by virtue of the court order is in charge of the Wheatlands property, requires that these employees pay rent. Therefore, these employees' residences are now in jeopardy.

25.5. The Sheriffs and the business rescue practitioners did not give the applicants an opportunity to remove the stock from the properties. Therefore, all of the businesses' stock is still on the properties and the applicants have no access thereto, nor any means of protecting the stock.

25.6. The applicants have received numerous enquiries from customers as to whether the businesses have closed down. Furthermore, several customers have indicated that they need stock urgently and that they will have to use an alternative supplier. The businesses' reputations and future prospects have already been severely damaged.

25.7. Within the space of a week or at most a few weeks, it is inevitable that most of the businesses' customers will seek alternative suppliers of steel wool and charcoal.

25.8. The applicants cannot supply its customers and cannot deliver on orders placed.

[26] It does not appear from the judgment of Senyatsi J whether any of these consequences were dealt with by the parties or, if they were, that they were taken into account by the learned Judge in assessing the balance of convenience and granting the impugned orders. It is also not clear whether the impugned orders were based upon what the respondents submitted in answer to the applicants' claims of the dire consequences of the order. In the present application, the respondents contended that

the businesses had already virtually ceased operating, as the applicants were unable to pay their employees or creditors and many staff had already been retrenched.

Are the impugned orders, although interim in form, final in effect for the purposes of s18?

[27] The impugned orders are clearly interim in form. This is, however, not fatal to the application. In order to decide whether it is in the interests of justice to suspend the operation of the impugned orders, in terms of s 18 of the Act, it is necessary to weigh up several considerations. As stated above, this court in assessing whether to suspend the operation of the impugned orders, must deal with the issue of the requirements for an interim order to be considered appealable, Snyders JA in *Government of the Republic of South Africa v von Abo* stated:[11]

'*…It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects C of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.*'

[28] The applicants, in submitting that they are suffering irreparable harm as a result of the impugned orders, referred to *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,[12] which provided a synopsis of the jurisprudence post the test in as set out in *Zweni v Minister of Law and Order.*[13] In *Zweni*, the test for appealability required the following three attributes, namely, that--

'*…the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings….*'[14]

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[11] Government of the Republic of South Africa and Others v von Abo 2011 (5) SA 262 (SCA) (4 April 2011); 2011 (5) SA 262 (SCA) para 17.
[12] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6 (9 March 2010); 2012 (4) SA 618 (CC).
[13] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533A-B.
[14] SCAW (note 12 above) para 49.

[29] This test has evolved over the years. The Constitutional Court in *SCAW* opined:

'After Zweni the Supreme Court of Appeal has recognised that the general rule against piecemeal appeals could conflict with the interests of justice in a particular case. Howie P — writing for a unanimous court in S v Western Areas — was required to decide, in an application for leave to appeal in a criminal matter, whether the dismissal of an objection to an indictment was appealable in terms of s 21(1) of the Supreme Court Act. After surveying its case law on the appealability of a "judgment or order" in civil and criminal cases and after referring to the interests-of- justice test set by this court in Khumalo v Holomisa, he concluded that the general principles enunciated in Zweni are neither exhaustive nor cast in stone. He further held that:

"(I)t would accord with the obligation imposed by s 39(2) of the Constitution to construe the word decision in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the Zweni test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings. The scope which this extended meaning could have in civil proceedings is unnecessary to decide. It need hardly be said that what the interests of justice require depends on the facts of each particular case." …

More recently, in Philani-Ma-Afrika and Others v Mailula and Others, the Supreme Court of Appeal had to decide whether an order of the high court which puts an eviction order into operation pending an appeal was appealable. In a unanimous judgment by Farlam JA, the court held that the execution order was susceptible to appeal. It reasoned that it is clear from cases such as S v Western Areas that "what is of paramount importance in deciding whether a judgment is appealable is the interests of justice". As we have seen, the Supreme Court of Appeal has adapted the general principles on the appealability of interim orders, in my respectful view, correctly so, to accord with the equitable and the more context-sensitive standard of the interests of justice favoured by our Constitution. In any event, the Zweni requirements on when a decision may be appealed against were never without qualification.

…In Machele and Others v Mailula and Others … [the court] *reaffirmed the importance of 'irreparable harm' as a factor in assessing whether to hear an appeal against an interim order, albeit an order of execution:*

"The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is, therefore, whether irreparable harm would result if leave to appeal is not granted."

… The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case.'[15]

[30] The respondents, on the other hand, referred to various authorities, including *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others*,[16] where Gorven AJA (writing for the majority) referred to *Globe and Phoenix Gold Mining Company Ltd v Rhodesian Corporation Ltd*,[17] in which it was held that—

'The order does not irreparably anticipate or preclude in whole or in part the relief sought in the main action or suit. It does not dispose of any issue or any portion of the issue in the main suit, and the execution of the order will not cause irreparable prejudice at the later stage in the sense that it will cause prejudice to the respondent when the final judgment is given. We have not to look to any inconvenience or even expense which an interim order may cause to the person against whom such order operates. We must look to its effect upon the issue or issues in the suit. An interlocutory order may of course cause some degree of prejudice — using this word in its widest sense — to the person required to carry it out, but . . . [this] does not constitute that irreparable prejudice which would give to an interlocutory order the effect of a final judgment.'

[31] In *Cipla*, the majority held:

[15] Ibid paras 51-55 (footnotes omitted).
[16] *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* (972/2016) [2017] ZASCA 134 (29 September 2017); 2018 (6) SA 440 (SCA) para 39.
[17] *Globe and Phoenix Gold Mining Co Ltd v Rhodesian Corporation Ltd* 1932 AD 146 at 155. The respondents also referred to *Andalusite Resources (Pty) Ltd v Investec Bank Limited and Another* (18167/2019) [2019] ZAGPJHC 179 (20 June 2019); 2020 (1) SA 140 (GJ) where Keightley J followed *Cipla*.

'*Here the issue of prejudice was raised. …the only prejudice which may make an order appealable is prejudice which in some way affects the final determination of an issue in the suit or stands in the way of an issue being determined at a later date. This is what the cases have consistently meant when using the words "final in effect".*'[18]

[32] The respondents thus contended that the interdict that was granted is plainly interim, given the manner in which it was formulated (expressly, to operate *pendente lite*) and that it is not final in effect. They submitted that to contend, as the applicants did, that it must be dealt with as final (because of its effect) is to conflate the 'disputed right' and the 'object of that right'.[19] In this case, the 'disputed right' is the cancellation (the validity of which will determined in due course, on trial) and the interdict granted by Senyatsi J does not dispose of any one of the issues that require determination in due course. The 'object of the right', however, is that which must perhaps be returned, depending on the outcome (whether it is a business or the constituent assets that are used to carry on a business).

[33] The respondents also relied upon *Atkin v Botes*,[20] where the SCA, referring to *Phillips and Others v National Director of Public Prosecutions*,[21] stated as follows:

'Howie P said in Phillips…

"And in the case of a common-law interim interdict or attachment pendente lite there is no reason why, for sufficient cause, they would not, generally, be open to variation, if not rescission."

This is just such a case. …Atkin could approach the court a quo for an amelioration or setting-aside of the interdict because of the practical experience of its operation. …. It may well be that Atkin could show that the continued operation of the order would work great hardship on him, his family, and his ex-wife and severely handicapped minor child whom he is obliged to maintain in terms of a court order. If so, he would be entitled to request the court a quo to reconsider the order and that court would be entitled to vary or even rescind it. For that reason, the order made in the interdict proceedings cannot be said to have final effect.'[22]

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[18] *Cipla* (note 16 above) para 40.
[19] As described by Keightley in *Andalusite Resources* (note 17 above).
[20] *Atkin v Botes* (566/10) [2011] ZASCA 125 (9 September 2011); 2011 (6) SA 231 (SCA) para 12.
[21] *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA).
[22] *Atkin* (note 21 above) para 12.

[34] The respondents argued that this is the applicants' remedy. It could raise all the issues it considers to amount to irreparable harm, in order to obtain a variation of the order, "*even if the only new circumstance is the practical rule experience of its operation*".[23] In addition it could seek to vary the order by requiring the court '*to impose reasonable conditions such as an undertaking to be liable in damages if it emerges that the interdict should not have been granted*'.[24]

[35] It is important to bear in mind that as Gorven JA stated in *Cipla,* as the appellant therein relied '*solely on what is meant by 'final in effect' in submitting that the order in question is appealable, the enquiry need only be confined to this'.*[25] Thus the court did not concern itself with the test in relation to the interests of justice. The applicants in the present case specifically rely on that test.

[36] In dealing with the concepts of 'final in effect' and 'final in substance', Binns-Ward J in *Velocity Trade Capital (Pty) Ltd v Quicktrade (Pty) Ltd,* stated as follows:

'*It is perhaps appropriate that I should at this point explain that I consider that there can be a material difference between an order that is final in effect and one that is final in substance. <u>The term "final in effect" in the relevant context is something of a term of art. It bears the connotation that the order in question is not susceptible to alteration by the court that made it. An interim order that is final in substance, on the other hand, is one that, if it were implemented or complied with when it was made, would in a practical way irreversibly anticipate the substantive effect of the remedy in issue in the pending principal case</u>….*'[26] (Emphasis added).

[37] Binns-Ward J in *Velocity* further considered the development in our law in regard to this vexed question of the nature of interim orders. Although they deal, in the main, with the appealability of such orders, these principles are obviously relevant to the issue under consideration in this case. Binns-Ward J stated:

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[23] See *Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (A) at 359I-360B; applied in *Lagoon Beach Hotel v Lehane* (235/2015) [2015] ZASCA 210 (21 December 2015); 2016 (3) SA 143 (SCA) para 10.
[24] *Cipla* (note 16 above) para 46.
[25] *Cipla* (note 16 above) para 37
[26] *Velocity* (note 2 above) para 39. In *Cipla* (note 16 above) para 40, Gorven AJA appears to accept that there is no difference for the purposes of appealability between an ostensibly interim order that is 'final in effect' and one that is final in substance.

'*A consideration of recent judgments of the appeal court and the Constitutional Court makes it apparent that judicial policy in respect of the question has in the constitutional era become notably more nuanced and less inflexible than it was when Cronshaw was decided. Section 173 of the Constitution has been influential in this regard.*

[38] In *Phillips*, the SCA held that a restraint order made in terms of the Prevention of Organised Crime Act 121 of 1998 was appealable notwithstanding that it '…*is only of interim operation and that, like interim interdicts and attachment orders pending trial, it has no definitive or dispositive effect…*'.[27] Howie JA continued—

'*Absent the requirements for variation or rescission laid down in s 26(10)(a) … a restraint order is not capable of being changed. The defendant is stripped of the restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation proceedings he is remediless*.'

[39] The court found '*that unalterable situation*', relative as it was, made the interim order final in the sense required for appealability.[28] Binns Ward noted in *Velocity*—

'*Phillips stands as an illustration of two truths. First, that it is not necessary that all the requirements in Zweni be satisfied for a decision to be appealable. Second, that the insusceptibility of a decision to being altered by the court of first instance does not have to be absolute for the decision to be considered as sufficiently final in effect to render it appealable*.'[29]

[40] Similarly, in *Ntlemeza v The Helen Suzman Foundation*,[30] Navsa JA stated that—

'*There were exceptions to the rule that purely interlocutory orders were not appealable. It is necessary to point out that a number of judgments of this court relaxed this rule on the basis that an appeal may be heard in the exercise of the court's inherent jurisdiction in extraordinary cases where grave injustice was not otherwise preventable.*'

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[27] *Phillips* (note 22 above) para 20.
[28] Ibid.
[29] *Velocity* (note 2 above) para 51.
[30] *Ntlemeza v Helen Suzman Foundation and Another* (402/2017) [2017] ZASCA 93 (9 June 2017); 2017 (5) SA 402 (SCA) para 20.

[41] More recently, the Full Bench of this division in *Old Mutual v Moyo*[31] dealt with this issue as follows:

'*The approach to the appealability of interlocutory orders that has been taken by our appellate courts for years now has been increasingly flexible and pragmatic …. But an order that is in the form of an interim interdict which operates pending the outcome of an action mentioned in the order itself, as in this case, is ordinarily not appealable.*'[32]

…

'*Although it is generally considered not in the interests of justice to permit an appeal against an interim interdict since it will defeat the interim nature of the order and undermine "a necessarily imperfect procedure, which is nevertheless usually best designed to achieve justice", it is now settled <u>that there are limited circumstances where the interests of justice dictate that an interim interdict be appealable.…. In deciding what is in the interests of justice, each case has to be considered in the light of its own facts. In other words, it is a fact-specific enquiry.</u>*'[33] [Emphasis added]

[42] In the present case, the balance of convenience was not weighed up in relation to the impugned orders. The order did not result in the *status quo* being preserved. It resulted in the consequences referred to by the applicants in paragraph [25] above. These consequences are irreversible.

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[31] *Old Mutual Limited and Others v Moyo and Another* (A5041/19) [2020] ZAGPJHC 1 (14 January 2020); [2020] 2 All SA 261 (GJ) para 98.

[32] The Court cited the following cases in this regard: *S v Western Areas* 2005 (5) SA 214 (SCA) paras 25-26; *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) paras 50-51; *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA) para 2; *Government of the RSA v von Abo* 2011 (5) SA 262 (SCA) para 17; *Phillips v Reserve Bank and Others* 2013 (6) SA 450 (SCA) para 28; *Nova Property Group Holdings Ltd and Others v Cobbett* 2016 (4) SA 317 (SCA) paras 8-11; *Celliers NO and Others v Ellis and Another* [2017] ZASCA 13 para 20. It further cited: A*frican Wanderers Football Club (Pty) Ltd Wanderers Football Club* 1977 (2) SA 38 (A); *Cronshaw and another v Fidelity Guards Holdings (Pty) Ltd* 1996 (3) SA 686 (A) at 690B and 690H-691G; *Cipla* (note 16 above) para 37; *S v S and Another* 2019 (6) SA 1 (CC) paras 46-47.

[33] *Old Mutual v Moyo* (note 32 above) para 103. The court relied on the following cases in this regard: *Cipla* (note 16 above) para 37, *Department of Home Affairs and Another v Islam and Others* (459/2017) [2018] ZASCA 48 (28 March 2018) para 10, and *Velocity Trade Capital v Quicktrade* (note 2 above) para 30 et seq. It also referred to Constitutional Court judgments in cases such as *S v S* 2019 (6) SA 1 (CC) paras 46-47, *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) para 40, *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others* 2013 (2) SA 620 (CC) para 16, and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 25, although it noted that it should be borne in mind that the operative standard for determining whether leave to appeal should be granted by the Constitutional Court is the interests of justice.

[43] In my view, the principles upon which the respondents rely are not applicable in the circumstances of this case. As stated in *Moyo*—

'*The fact that* [the order] *is not definitive of the rights about which the parties are contending in the main action and does not dispose of any relief claimed in respect thereof, although a relevant and important consideration, cannot be decisive and the determining factor in this instance. The interim interdict should not have been granted in the first place by reason of a failure to meet the first requirement for the granting of an interim interdict…The interdict, although interim, has an immediate and substantial effect.*'[34]

[44] The interests of justice in the particular circumstances of this case demand that the order should be corrected forthwith before the proceedings have run their full course and before it has any further adverse consequences as the impugned orders have had an immediate and drastic effect on the applicants' businesses, and the lives of their employees. The applicants are accordingly entitled to the relief they seek.

[45] This finding results in it not being necessary for this Court to consider the requirements of s 18(2) and (3) of the Act. In the event that I am wrong, I am of the view that for the same reasons as stated above, the applicants would have succeeded in satisfying the requirements thereof.

[46] The reasons proffered by Binns-Ward J in *Velocity* are apposite in this regard:

[The respondent], *relying on s 18(2) of the Superior Courts Act, submitted however that the order would not be suspended by reason of an application for leave to appeal or any subsequent appeal. As I understood the argument it was premised on the characterisation of the order as (i) interlocutory and (ii) not being final in effect in the technical sense of that term explained earlier. There is no dispute concerning the incidence of the first of those attributes, at least in respect of the form of the order. But it is not clear to me that the second applies. Counsel's argument is predicated on the assumption that the underlined words in the phrase "an interlocutory order not having the effect of a final judgment" in s 18(2) denote "final in effect" in the Zweni sense. I do not accept that is so.*

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[34] *Old Mutual v Moyo* (note 32 above) para 104.

A decision that has the effect of a final judgment is in truth not an interlocutory judgment or order notwithstanding that it might be such in form. That indeed is the import of an established body of jurisprudence, salient components of which were referred to in the majority judgment in Cipla Agrimed. There is no logical basis for distinguishing orders that are dressed up as interlocutory but are in effect final, and therefor actually final, from those to which s 18(3) applies. And I cannot conceive of any sensible object that the legislature could be thought to want to achieve by drawing any such distinction.

In my judgment s 18(2) is directed at regulating the position in those exceptional cases in which an appeal is sought to be prosecuted against a simple interlocutory order… I do not think that an order, such as the one in the current case, that from the moment it is made would be final in substance, falls into that category. In my view the latter type of order is one to which s 18(1) would apply.

But even were I wrong in this regard, the considerations that underpin my characterisation of the order … as one to which s 18(1) applies would in that event provide sufficient reason, if there were a relevant application, for an order in terms of s 18(2) to be made.'[35]

[47] There were concerns raised by the respondents (including the eighth and ninth respondents) that:

47.1. The premises at which the businesses were being conducted were unsafe for the employees and this situation had been reported to the Department of Labour.

47.2. The 'essential services' permits were not issued to the applicants, but to other parties.

47.3. It was doubtful that the businesses conducted by the applicants could be described as 'essential services'.

[48] I intend to deal with these issues in the order which I make hereunder.

[35] *Velocity* (note 2 above) paras 65-68 (original emphasis and references omitted).

Accordingly, the following order is made:

1. The operation and execution of paragraphs 5, 6 and 7 of the order granted by Senyatsi J on 5 March 2020 under the case number 2020/3016 is suspended, pending the finalisation of the applicants' application for leave to appeal, including any petition to the Supreme Court of Appeal, and thereafter, if applicable, the finalisation of the applicants' appeal.

2. The first to fifth respondents, and the eighth to eleventh respondents, are required to do all things necessary to restore the *status quo* prior to the execution of the order under case number 2020/3016, and thereby return factual and legal possession and control of the Delporton and Wheatlands properties and all assets thereon to the applicants, including handing back all keys and remote control units to the applicants' attorneys.

3. The applicants shall not be entitled to commence business activities prior to:

   3.1. Obtaining clearance from the Department of Labour.

   3.2. Obtaining valid essential services permits in the name of the entities that intend to trade.

   3.3. Complying with all Government Directives relating to carrying on business during the period of lockdown and thereafter.[36]

4. The first to fifth, seventh, eighth and ninth respondents shall pay the costs of the application, jointly and severally, the one paying, the others to be absolved.

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

[36] As set out in the following website: https://www.thedti.gov.za/Covid-19.jsp.

Date of hearing:	19-20 March 2020
Date of judgment:	24 April 2020

Appearances:

Counsel for the Applicants:	Adv. J C Viljoen
Instructing Attorneys:	Stupel & Berman Inc
Counsel for the 1st-5th and 7th Respondents:	Adv. A J Daniels SC; Adv. N Smit
Instructing Attorneys:	Kapp Attorneys Inc
Counsel for the 8th and 9th Respondents:	Adv. M Letzler
Instructing Attorneys:	Smith Van Der Watt Inc