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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG DIVISION, PRETORIA)

CASE NO.: 19357/2010

DATE: 05/11/2010

In die application of

L, A M

Applicant

and

L, A

Respondent

In re:

L, A

Plaintiff

and

L, A M

Defendant

CORAM: EBERSOHN AJ. HEARD ON 29th October 2010

JUDGMENT HANDED DOWN ON 5th November 2010

**JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL AGAINST THE
ORDER MADE IN TERMS OF UNIFORM RULE 49(11)**

EBERSOHN AJ.

[1] In this judgment the parties will be referred to as in the main matter.

[2] The plaintiff was successful in the main matter. After the defendant brought an application for leave to appeal against the whole of the divorce order, including the maintenance order, the plaintiff brought an application in terms of Uniform Rule 49(11) to have the portion of the divorce order with regard to the maintenance put into operation pending the finalisation of the application for leave to appeal and if granted the finalisation of the appeal. Whilst the divorce was pending there was an order in terms of Uniform Rule 43 in terms of which the defendant paid maintenance pendente lite to the plaintiff.

[3] In the application for the Uniform Rule 49(11) order the plaintiff made out a case to the effect that she was in desperate need of maintenance. The defendant did not file an answering affidavit to the Uniform Rule 49(11) application and after having heard the application and argument, an order was made in terms of Uniform Rule 49(11).

[4] An application for leave to appeal against the Uniform Rule 49(11) order made by the court, was then filed by the defendant.

[5] This court caused a directive to be issued and forwarded by the Registrar to the attorneys of the parties on the 26th October 2010, which directive reads as follows:

"Please take notice that His Lordship, Mr. Acting Justice Ebersohn, directed that both parties are to file heads of argument, not in excess of 10 pages, by 14:30 on Thursday the 28th October 2010 at his Chambers wherein counsel deal specifically with the legal issue of whether a Rule 49(11) is appealable or not."

[6] The plaintiffs counsel filed heads but the counsel of the defendant did not and Mr. Smith, who appeared at the hearing on behalf of the defendant, apologised for not having done so and stated that the notice was a bit short and that he was finalising heads of argument in another matter which is before the Supreme Court of Appeal.

[7] The issue which must, firstly, be decided is whether the order made by the court in terms of Uniform Rule 49(11) was appealable or not and if so, whether the defendant made out a case for leave to appeal. If it was not appealable, the notice of application for leave to appeal against the order was a nullity and did not suspend the operation of the order granted. See *South African Druggists Limited v Beecham Group pic* 1987 (4) SA 876 (T) at 880G; *Van Leggelo v Transvaal Cellocrete (Pty) Limited and Another* 1953 (2) SA 287 (T) at 289C - D.

[8] To date, the question of whether an order made in terms of Uniform Rule 49(11) (i.e. that the operation and execution of the order sought to be appealed against shall not be suspended pending the decision of the appeal) is appealable has been determined by the application of common law principles. See *South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Limited* 1977 (3) SA 534 (A) at 551H -552A; *South African Druggists Limited v Beecham Group pic supra*. These principles were reconsidered comprehensively in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) because of the amendment of section 20 of Act 59 of 1959 which provides for appeals against "judgments or orders" of the High Court. The court pointed out that only "judgments or orders" are appealable and proceeded to state the attributes of a judgment or order. At 532F - 533F the court said that in determining the nature and effect of a judicial pronouncement "not merely the form of the order must be considered but also, predominantly, its effect." The court said that a "judgment or order" is a

decision which, as a general principle, has three attributes: first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. The court also said that the second attribute is the same as the oft stated requirement that a decision in order to qualify as a "judgment or order" must grant definite and distinct relief.

[9] The requirements for a "judgment or order" set out in Zweni's case have continued to be applied by the courts to determine whether a particular decision or order is appealable. See *Jones v Krok* 1995 (1) SA 677 (A) at 683H; *Avtjoglou v First National Bank of Southern Africa Limited* 2004 (2) SA 453 (SCA) at 457G -H; *Smit v Scania South Africa (Pty) Limited* 2004 (3) SA 628 (SCA) at 629F - H and *Scott-King (Pty) Limited v Cohen* 1999 (1) SA 806 (W) at 824D - G.

[10] Mr. Smith raised certain aspects regarding interpretation and effects of the Uniform Rule 49(11) order:

a) The plaintiffs Uniform Rule 49(11) application was understood to the effect that relief was only sought in the event of the court granting the defendant leave to appeal and as no judgment regarding the application for leave to appeal was handed down (yet) and, so went the argument, the order granted in terms of Uniform Rule 49(11) was granted prematurely and constituted a misdirection. I disagree. There was a proper application before the court.

b) The effect of the Uniform Rule 49(11) order was that the maintenance was in fact due and payable, retrospectively, as from the date of the granting of the order namely the 23rd December 2009. The court, not wanting further arguments and splitting of hairs on

the part of the defendant, however, and for the sake of clarity ordered that it was due and payable with retrospective effect from the 23rd December 2009. Mr. Smith argued, however, that no such relief was asked for in the application and that "the court accordingly erred in granting such order." There is absolutely no substance in such argument.

c) Mr. Smith also argued that the court erred by ordering that the arrears maintenance be payable forthwith, within 7 days, with mora interest. Mr. Smith did not appreciate that when the Uniform Rule 49(11) order was made all the arrears maintenance and the interest thereon, owing as from 23rd December 2009 in any case became due and owing ex lege with mora interest. The granting of a seven day period of grace was in fact an act of kindness on the part of the court towards the defendant.

d) Mr. Smith also, speculatively, because no answering affidavit was filed by the defendant in opposition to the plaintiffs founding affidavit wherein she detailed the dire financial straits she was in, argued that there was a potential of irreparable harm and prejudice to the defendant in the event of the appeal succeeding and the possibility of recovering from the plaintiff any monies paid by way of maintenance. These arguments were, at best, speculative with no substance at all.

e) Mr. Smith also made mention of some or other order made by the Maintenance Court which, according to him, in effect reduced the maintenance payable by the defendant to the plaintiff. It was common cause that the defendant did not file an answering affidavit and did not put anything, no papers, no nothing at all, before this court in connection with the Uniform Rule 49(11) application and there were thus no particulars of such alleged proceedings in the Maintenance Court before this court and particulars of such an alleged order before this court yet Mr. Smith blatantly, openly and in abusive language accused the court of acting to the detriment of the defendant in direct conflict with the order of the Maintenance Court. Perchance it is time for the legal

representatives of the defendant to get their act together and putting papers before the court before slurring the court openly.

[11] Before the court gave judgment in the Uniform Rule 49(11) application the court, although it was hampered by the defendant not filing an answering affidavit, considered, with the facts at its disposal:

- a) the potentiality of irreparable harm or prejudice in the most unlikely event of an appeal succeeding (See South Cape Corporation (Pty) Ltd. v Engineering Management Services (Pty) Ltd supra at 545E; Burlington Hosiery Mills (SA) Ltd. v Arwa (Pty) Ltd. 1977 (4) SA 150 (W) at 153C; N v Government of the Republic of South Africa (No. 3) 2006 (6) SA 575 (D) at 5791-J);
- b) the prospects of success on appeal, including more particularly the question as to whether the appeal was frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg to gain time or to harass the plaintiff (See Leask v French 1949 (4) SA 877 (C) at 893; Ismail v Keshavjee 1957 (1) SA 684 (T) at 688; Lubambo v Presbyterian Church of South Africa 1994 (3) SA 150 (W) at 153E; Burlington Hosiery Mills (SA) Ltd. v Arwa (Pty) Ltd. supra at 153C; N v Government of the Republic of South Africa (No. 3)); 2006 (6) SA 575 (D) at 5791-J);
- c) whether there is a potentiality of irreparable harm or prejudice to both plaintiff and defendant, the balance of hardship or convenience, as the case may be. (See Thirtwell v Johannesburg Building Society 1961 (4) SA 665 (D); Lewis v Culwivic 1966 (3) SA 52 (D) at 58; South Cape Corporation (Pty) Ltd. v Engineering Management Services (Pty) Ltd supra at 545E; Burlington Hosiery Mills (SA) Ltd. v Arwa (Pty) Ltd. supra at 153C; N v Government of the Republic of South Africa (No. 3) 2006 (6) SA 575 (D) at 5791-J).

[12] The court considered and weighed up all the factors and in the end had to find in favour of the plaintiff regarding the hardship she was suffering and that she desperately required maintenance. The court also considered that any maintenance order this court would make may on good cause be shown, later varied by the Maintenance Court, and was not final.

[13] Insofar as the judgment in *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) may be recognised as an exception to the general rule that in order to be a "judgment or order" (and therefore appealable) the order sought to be appealed against must have the three attributes referred to in *Zweni's* case, the case is not analogous to the present case. In *Phillips* the court was dealing with the appealability of a restraint order issued in terms of section 25 of the Prevention of Organised Crime Act, 121 of 1998 and considered the effect of such order in the context of the statutory framework provided by the act. In paragraph 23 the court found that a restraint order is intended to be appealable because it is final (in the sense in which was used in *Zweni's* case) notwithstanding that it is not definitive or dispositive of any of the issues that will arise in the main proceedings. In the present case the order in terms of Uniform Rule 49(11) was not made in terms of any statutory provisions which have the effect that the order is final in effect and was simply a interlocutory order putting the payment of maintenance in operation and did not have a final and definite effect on the main action. In *South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Limited* supra at 551G - H the court stated:

"It does not dispose of any issue or any portion of the issue in the main suit, nor does it irreparably anticipate or preclude any of the relief which might be given at the hearing (taking the 'hearing' in such a case to be the hearing of the appeal). It leaves the Court of appeal free to make whatever decision it deems fit in the main action."

[9] The respondents' second contention raises the question whether the court in *Minister of Health and Others v Treatment Action Campaign and Others* (No. 1) 2002 (5) SA 703 (CC) purported to replace the above principles governing the issue of appealability with a new principle i.e. whether it is in the interests of justice that the decision or order be appealed against. This question must be answered unequivocally in the negative. The court drew a clear distinction between the non-appealability of an interim execution order at common law and in terms of the Supreme Court Act, 59 of 1959 and the appealability of such an order where a decision on a constitutional matter is concerned, this appears from paragraphs 5 and 6 where the court said the following:

'[5] The first question that arises is whether the interim execution order is appealable at all. In terms of both the common law and the Supreme Court Act 59 of 1959, an order granting leave to execute pending an appeal is considered to be purely interlocutory and not appealable. There are important reasons of policy why this is so. In particular, the effect of granting leave to appeal against an order of interim execution will defeat the very purpose of that order. The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a Court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be the subject of an appeal, that, in turn, would suspend the order.

[6] Of course, the question whether a matter is appealable to this Court is governed by the Constitution itself. Section 167(6) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that:

'National legislation or the Rules of the Rules of the Constitutional Court must allow a person, when it is in the interest of justice and with leave of the Constitutional Court -

(a); or

(b) To appeal directly to the Constitutional Court from any other court.'

The relevant Rule is Constitutional Court Rule 18(1), which prescribes the procedure

'in an application for leave to appeal directly to the Constitutional Court where a decision on a constitutional matter, other than an order of constitutional invalidity under s 172(2)(a) of the Constitution, has been given by any Court other than the Supreme Court of Appeal Once it is clear that an application for leave to appeal concerns a 'decision on a constitutional matter', the criterion by which the Court then determines whether it shall grant leave to appeal or not, is prescribed by s 167(6) of the Constitution, namely whether it is in the interests of justice to do so. The first question then is whether the interim execution order is a decision on a constitutional matter as contemplated by Rule 18."

[14] In the present case the decision in the main application is not a decision on a constitutional matter. This was not even argued by Mr. Smith. In *N and Others v Government of the Republic of South Africa and Others* (No. 3) 2006 (6) SA 575 (D & CLD) the court simply applied the reasoning of the Constitutional Court in a case involving a decision on a constitutional matter. The court did not purport to establish new rules or principles applicable to the question of applicability of an interim execution order.

[15] It is significant that the Constitutional Court unambiguously stated that in terms of

the common law and the Supreme Court Act an order granting leave to execute pending an appeal is considered to be purely interlocutory and not appealable and refers to the leading cases in support of the statement.

[16] Mr. Smith argued ultimately that no costs order should have been made with regard to the Uniform Rule 49(11) application and that the costs should have been ordered to be costs in the appeal, with the rider that if there was no appeal that the costs then should be payable by the defendant. This court carefully considered the question of costs before making the order. This case is of such a nature that it called for an order of costs in terms of authorities such as Burlington Hosiery Mills (SA) Ltd. v Arwa (Pty) Ltd. supra; SA Breweries v Solomon 1924 OPD 76; Graham v Venter 1924 OPD 46, Coetzee v Etheridge 1924 OPD 47; Frankel v Pirie 1936 EDL 107; Sorec Properties Hillbrow (Pty) Ltd. v Van Rooyen 1981 (3) SA 650 (W) and Erasmus at p. BI-371. In any case costs is in the discretion of the court.

[17] It is clear that the application for leave to appeal cannot be sustained and the following order is made:

"The application for leave to appeal is dismissed with costs."

P.Z EBERSOHN

ACTING JUDGE OF THE HIGH COURT

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