

28/4/2011

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLECASE NUMBER 67270/10

(1) REPORTABLE: YES/NO

IN THE MATTER BETWEEN: HMKL 3 INVESTMENTS (PTY) LTD

DATE: 28/04/11

SIGNATURE: [Signature]

Applicant

In the matter between:

HMKL 3 INVESTMENTS (PTY) LTD

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED

1st Respondent

THE MINISTER: DEPARTMENT OF TRANSPORT

2nd Respondent

TRENCON CONSTRUCTION (PTY) LTD

3rd Respondent

JUDGMENT

BAM AJ

- (i) Application for Leave to Appeal by First Respondent;
- (ii) Application by the Applicant in terms of Rule 49 (11) of the Rules of Court.

1. The Applicant in this matter applied on an urgent basis for a temporary interdict restraining the First and Third Respondents from proceeding with the erection of a specific toll gantry on the National Road N1 section S 21 adjacent to Applicant's property, pending an application for the review of a decision of and procedure followed by the First Respondent in that regard. The Application was granted on 2nd December 2010.

2.

2.1 The First Respondent now applies for leave to appeal against the whole of the judgment. The Application is opposed by the Applicant.

2.2 Subject to the Court granting the application for leave to appeal the Applicant conditionally applies, in prayer 4 and 5 of the Application, for an order in terms of Rule 49(11) of the Rules of Court, namely that the order granted on 2 December 2010 *"not be suspended pending the decision of any appeal against such an order."* This application is opposed by the First Respondent. If leave to appeal is refused by this Court, the Application in terms of Rule 49(11) falls away.

2.3 The Second and Third Respondents indicated at the hearing of the main application that they would abide the Court's decision. The Second Respondent, represented by Ms Neukirchner SC, has now again informed this Court that Second Respondent abides the Court's decision in the current applications.

3. It was agreed by counsel appearing for the Applicant and First Respondent, respectively represented by Mr Grobler SC and Mr van der Merwe for the Applicant and Mr Subel SC and Mr Hofmeyer for the First Respondent, that the said two applications should be dealt with at the same time. (Mr Subel, however, initially submitted that the application in terms of Rule 49(11) is premature and should not be accommodated by the Court.)

APPLICATION FOR LEAVE TO APPEAL.

4. The first question which arose is whether a temporary interdict of this nature is appealable. Mr Subel SC, contended that although the order is in form an interim interdict, it is in fact final and therefore appealable. In paragraph 32 of the First Respondent's answering affidavit it is stated that a *"a number of determinations"* made by the Court in the main application are *final in effect*. This contention is opposed by Mr Grobler SC.
5. Section 20(1) of the Supreme Court Act, Act 59 of 1959, reads as follows;
"An appeal from a judgement or order of a court of a provincial or local division in any civil proceedings or against any judgement or order of such a court given on appeal shall be heard by the appellate division or a full court as the case may be."
 What has to be determined is whether the decision to be appealed against is a *judgment or order* as envisaged by the section.

6. In the matter of *Zweni v Minister of Law and Order* 1993 (1) SA 523 AD, which appears to be the *locus classicus* with regard to the issue whether an order of court is appealable in terms of Section 20(1) of the Supreme Court Act, the following was stated at page 532 F ;

"Section 20 (1) of the Act no longer draws a distinction between 'judgements or orders' on the one hand and interlocutory orders on the other. The distinction is now between 'judgements or orders' (which are appealable with leave) and decisions which are not 'judgements or orders'."

And at 532 J to 533 A:

"A 'judgement 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 the 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 relieve claimed in the main proceedings ..."

7. Mr Subel SC submitted that the interests of justice is a further consideration to be taken into account pertaining to the question of appealability. In support of this contention I was referred to *inter alia* the case of *KHUMALO v HOLOMISA and OTHERS* 2002(5) SA 401 CC, *S v WESTERN AREAS LTD and OTHERS* 2005(5) SA 214 SCA and *PHILANI-MA-AFRIKA V MAILULA* 2010(2)SA 573 SCA.
8. It further appears that the effect of the order to be appealed against is of material importance. If the order has an immediate effect which will not be considered in the main application it will generally be final in effect, and therefore an order which is appealable. See *METLIKA TRADING LTD and OTHERS v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICES* 2005(3) SA 1 SCA.
9. It seems to be clear that if the issues for an interim interdict are the matters on which the final relief will be sought in the main application, it will be difficult to find that it would be in the interests of justice to grant leave to appeal against the interim order.

10. Mr Grobler SC, with reference to *CRONSHAW and ANOTHER v FIDELITY GUARDS HOLDINGS (PTY) LTD 1996 (3) SA 686 AD at 689 J to 690 A*, submitted that *"An appeal against an interim interdict is destructive of the main object of an interim interdict namely to maintain the status quo pending the final determination of the main case. It is therefore not in the interests of justice to allow such an appeal."*
I agree with this submission.

11. It was submitted by Mr Subel that the relief sought and obtained in Part A, by the applicant, is generally *"materially distinct"* from the relief sought in in Part B of the application.

To my mind this submission cannot be correct. Part A Prayer 2 and the Order, par 2, are consistent with prayer 6.1 of the main application.

In this regard I am of the opinion that Mr Grobler is correct in submitting that the orders obtained by the applicant go no further than the issues which form the *"lis"* in the main application.

12. It was further specifically contended by Mr Subel that the finding of legality of the signage on the applicant's property is an issue which will not be revisited by the court adjudicating the main application. Therefore, according to Mr Subel, the decision of this Court in that regard is final in effect and thus appealable. Mr Subel further submitted that this issue is of material importance to the First Respondent in that it may affect the situation regarding other billboards and advertisements on other relevant properties adjacent to the N1 National Road in question.

13. The issue of the legality or not of the signage and advertisements on the property of the applicant should to my mind not be considered separately and in isolation. When the issue of the legality of the advertising in question is considered in context I am of the opinion that the Court adjudicating the main case will surely revisit this aspect.

14. At all relevant stages the application for the *interim* interdict was considered by the Court as such, keeping in mind that the relief the applicant sought was of a temporary nature pending

the finalization of the main application. The requirements of an *interim* interdict were proved by the applicant hence the order made by this Court.

15. The relief granted by this Court on 2nd December 2010 was nothing else but an *interim* interdict. I have specifically considered whether the granting of the application for leave to appeal will be in the interests of justice or not. In view of the fact that the order made by this Court is clearly not final and granted pending the review proceedings, I am of the opinion that the interests of justice could not dictate that leave to appeal should be granted.

Order:

1. The First Respondent's application for leave to appeal is dismissed with costs.



AJ BAM

ACTING JUDGE OF THE HIGH COURT

28 APRIL 2011