



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 33182/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 14 JANUARY 2022

SIGNATURE

In the matter between:

UNIVERSAL COAL DEVELOPMENT (PTY) LTD

Applicant

and

MINERAL RESOURCES DEVELOPMENT (PTY) LTD

Respondent

J U D G M E N T (Leave to appeal)

This matter has been heard virtually and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

- 1.1 On 10 December 2021, this court ordered Mineral Resources Development (Pty) Ltd (MRD) to return a certain coal washing, crushing and screening plant (the plant) to its owner, Universal Coal Development (Pty) Ltd (Universal) within 24 hours from service of the order.
- 1.2 The order was to operate pending the determination and finalization of arbitration proceedings yet to be instituted by Universal.
- 1.3 The order was based on a prima facie finding that the agreement between the parties had run its course once the coal reserves at the Kangala mine had become depleted.
- 1.4 MRD now seeks leave to appeal the judgment and order. The application for leave to appeal was heard on 11 January 2022.
- 1.5 In the meantime, Universal has launched contempt of court proceedings against MRD for failing to return possession of the plant since service of the order. These contempt proceedings are pending on next week's urgent court roll (on 18 January 2022). I interpose to state that the main application had also initially been launched on an urgent basis.
- 1.6 In addition, MRD had applied for the introduction of further evidence at the hearing of the application for leave to appeal. This consists of six documents relating to the exchange of correspondence between the parties' attorneys regarding the implementation of the order of 10 December 2021. Universal has not opposed this application and the annexures sought to be introduced, bar one, all form part of the contempt application in any event.
- 1.7 As the issue regarding leave to appeal may play a role in the contempt proceedings and in order to provide the parties with certainty and not prejudice or delay those proceedings, this judgment is rendered within the

few days left of the week preceding the contempt application. The consequential brevity of this judgment is accordingly occasioned thereby.

[2] The further evidence

2.1 On 15 December 2021, Universal's attorneys wrote to MRD's attorneys, demanding implementation of the order of 10 December 2021.

2.2 In the letter, the following is, inter alia, stated:

“3 In handing over possession, operation and control of the plant to our client, your client is reminded that it must inter alia necessarily furnish our client with:

3.1 the passwords for the PLC (scada) system required for the plant to operate

3.5 all keys to all the relevant rooms at the plant i.e MCC, Control Room etc

4. We trust your client will comply with the order when it is served.

5. Separately, we are instructed that your client in effect abandoned the plant and has not returned to it since 18 August 2021 to restart it or to maintain any aspect thereof

7. As a result, with each passing day, the condition of the plant has deteriorated significantly and our client's hands have been tied as a result of the position taken by your client.

8. *In light hereof, we hereby notify your client of our client's intention to seek damages against your client- for any damages suffered by our client as a result of the position taken by your client in relation to maintenance of the plant, which damages rest at your client's feet.*
9. *At this juncture, and in light of the order of Davis, J your client is invited to attend a joint inspection of the plant as envisaged in the governing contract, simultaneously with the handover of the plant ...".*

2.3 MRD's attorneys responded to the above demand on 16 December 2021. They left the allegations of abandonment of the plant by their client undisturbed but, after referring to the lodging of the application for leave to appeal, stated the following:

- “7. *It is however worth noting that your demands seek to give final effect to the order granted by Davis J. What is unclear is whether your client relies on a contractual entitlement to make such demands, since on its own version, the contract has come to an end.*
8. *The judgment makes no provision for the handover of the plant in accordance with the terms of the contract. In fact, the 24 hour handover period practically precludes any contractually agreed inspection and handover process. Your client, having relieved our client of its obligations under the contract and then tendered the indemnity referred to in paragraph 4.5 and 9 of the judgment, has only itself to blame for the impracticality which does arise.*

9. *Your threats of a damages claim further confirms both the prejudice which our client will suffer if it is forced to hand over the plant at this stage as well as the final effect of the order*

11. *Your demand that our client attends a joint inspection of the plant **as envisaged in the governing contract** contradicts your client's prior submissions, allegations and indeed the order".*

2.4 The principles governing the acceptance of further evidence on appeal are trite. They are:

- the applicant applying for the admission of such evidence must provide a reasonable explanation why the evidence was not available previously.
- the evidence must be of substantial importance in the case.
- the evidence must be of such nature that it might change the course of the matter.

See: *Staatspresident en 'n ander v Lefuo* 1990 (2) SA 679 (AD) (dealing with the predecessor to section 19 of the Superior Courts Act 10 of 2013) and *De Aguiar v Real People Housing* 2011 (1) SA 16 (SCA).

2.5 The additional evidence was not in existence at the time the order was granted and in addition does not constitute evidence which might have changed the course of the matter. The "evidence" on which MDR seeks to rely, is merely a perpetuation of its interpretation of the contract and

arguments based thereon. The evidence should therefore not be admitted on this basis.

- 2.6 However, the evidence also forms part of papers already submitted to this court (in the contempt application). Adv Schafer, who appeared yet again for MRD argued that at least, on this basis, the court should have regard thereto. Insofar as the “evidence” may assist the court to adjudicate whether it would be in the interest of justice to grant leave to appeal and, on the basis that Universal has not objected thereto, I shall have regard to the “evidence”, but only in this limited regard. I shall return to this aspect later.

[3] Is the order appealable?

- 3.1 Insofar as section 16 of the Superior Courts Act provide that an appeal can be made against “any decision”, these words have been interpreted to mean a “judgment or order” as contemplated in the section’s predecessor, section 20 of the Supreme Court Act, 59 of 1959. See: *S v Van Wyk and Another* 2015(1) SACR 584 (SCA) as confirmed in *Cipla Agrimed (Pty) Ltd Merck Sharp Dohme Corporation and Others* 2018 (6) SA 440 (SCA) at paragraph 37.
- 3.2 The words ‘judgment or order’ have in turn been interpreted in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J – 533A as follows:

“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 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 relief claimed in the main proceedings”.

- 3.3 In the present instance, the order granted by the court is not susceptible to alteration by itself, but it was clearly (as was stated in the judgment) only a prima facie determination of the interpretation of the contract between the parties (as their counsel had confirmed it should be) and the “final determination” would be by way of arbitration. The judgment and order were therefore also not definitive of the contractual rights of the parties relating to the duration of the contract. It therefore did not dispose of the claims which the parties may have against each other in terms of the contract. None of the requirements for appealability set out in *Zweni* have therefore been satisfied.
- 3.4 However, that might not be the end of the matter. The Supreme Court of Appeal has held that the three requirements set out in *Zweni* “do not constitute a closed list. This was made plain by the use of the words ‘as a general principle’. In addition, the interests of justice are of paramount importance”. See *Cipla* at para 37.
- 3.5 This approach has found favour in *Cloete and Another v S; Sekgale v Nedbank Ltd* 2019 (4) SA 268 (CC) at para 39 where the Constitutional Court has held that only final decisions or decisions that have final effect are appealable unless the interests of justice require otherwise.
- 3.6 I have therefore considered whether, despite not satisfying the requirements of *Zweni*, the order granted has a “final effect” as contemplated by the Constitutional Court and whether the temporary order “has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable” as stated by

that Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 25.

- 3.7 The example of an interim interdict being final in effect referred to in *Cipla*, is that of *JR 209 Investments (Pty) Ltd and Another v Pine Villa Country Estate (Pty) Ltd* 2009 (4) SA 302 (SCA). There, an interim interdict was granted in respect of the transfer of a single lot in a township development pending the final determination of the dispute between the seller and the purchaser thereof. The effect of the order, however, prevented the developer of the township from dealing with the whole township pending outcome of the action.
- 3.8 In the present instance, the effect of the order is simply this: MRD must return Universal's Plant to it pending and until such time as an arbitrator has finally determined whether the contract between the parties has terminated upon the depletion of the coal reserves at the Kangala mine or whether, despite such depletion, the contract period (and consequently MRD's possession and operation of the plant) was 96 months, a period which will only expire in the future. Should the arbitrator find in favour of Universal, well, *caedit quaestio* and possession of the plant then remains where it would be in terms of the interim order. Should the arbitrator find in favour of MRD, well then the plant would have to be returned to MRD until the termination of the contract through the effluxion of time and Universal would be liable to MRD in whatever amount(s) the arbitrator may determine in respect of the agreed or fixed monthly operating costs. Issues such as the costs of maintenance (or lack thereof) would then also be part of the equation.
- 3.9 In my view, this exactly what Universal had contemplated would happen on arbitration if regard is had to paragraph 11 of the founding affidavit and

paragraph 55 of the replying affidavit, expounding thereon. MRD's counter-application can then also be addressed as contemplated in paragraph 8.4 of the judgment. The interim return of the plant does not finally dispose of any of these disputes nor can it be "final in effect" as contemplated in the above decisions. The order is therefore also on this alternate ground not appealable

3.10 This brings me to the last issue, namely whether the interests of justice require that leave to appeal should be granted. On a practical level, would it be in the interests of justice that MRD, who has to all intents and purposes abandoned the plant since August 2021 (if regard is had to the uncontroverted "evidence" which MRD had brought before this court as referred to in paragraph 2 above), remain in possession of the plant pending the finalization of arbitration proceedings? Is there any "ongoing" or "irreparable" harm occasioned thereby as contemplated by the Constitutional Court? I think not. Having regard to the "evidence" introduced by MRD, the interests of justice favour Universal.

[4] On a different level, MRD argued that it would be in the interests of justice that leave to appeal be granted as contemplated in section 17(1)(a)(ii) of the Superior Courts Act. This section provides that leave should be granted where there is "some ... compelling reason" such as conflicting judgments which need to be reconciled. The two judgments relied on by MRD are *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) and *Radio Islam v Chairperson, Council of the Independent Broadcasting Authority and Another* 1999 (3) SA 897(W). These cases deal with the question as to whether an interim interdict can "always" be said to be final in the limited sense that "time run cannot be recalled". In similar fashion as in *Cipla* (as discussed in both the majority and minority judgments), I find that the present case is not one where the differences between the

approaches taken in the two cases (and those that followed them) should be reconciled. Firstly, the facts in the present case are completely to be distinguished from those in *Radio Islam* and from those in *BHT*. The principles in *BHT*, namely that the substance and not the form of an order should be determinative, have been considered in line with *Cipla*. In the application now before me, similarly as in *Cipla*, the mere existence of the different approaches in *BHT* and *Radio Islam* was raised and the following statement by Rogers AJA is apposite: “*since the correctness of the competing lines of authority was likewise not canvassed in argument before us, I shall assume, without so deciding, that the BHT approach is sound in principle*”. In addition, the same reasons given in paragraph 3.10 above why it would not be in the interests of justice to grant leave to appeal in this case, negate a finding that there is “compelling” reason that conflicting judgments on unrelated facts should be reconciled.

- [5] Lastly, the argument that, when Universal invited MRD to be present for a joint inspection at the hand-over of the plant, but mentioned that such an inspection should be “in accordance with the contract”, this resulted in Universal attempting to claim final relief, is a red-herring. It becomes more of a red herring when MRD seeks to rely on the timing and notice periods for such inspections as provided for in the contract and further claims that compliance therewith is an impossibility. I need not interpret the parties’ conduct and whether a reference to the contract was made only in respect of the mode of inspection and not the timing or whether the reference to the contract was inadvertently done or necessary. I need only determine whether this aspect creates grounds on which leave to appeal should be granted or not. Clearly it does not. It has nothing to do with the judgment itself or the correctness thereof. The order was simply that possession of the plant should be returned to Universal. In my view, it follows that such “return” encompasses issues such as those raised in paragraph 3 of the letter

quoted in paragraph 2.2 above. Whether the failure or refusal to do so (with or without an inspection or whether the invitation for an inspection, couched in the terms that it had, created a reasonable excuse for not complying with the court order), amounts to contempt of court or not, is not for this court to decide in this application.

[6] Conclusion

I find that the order granted on 10 December 2021 is not appealable and that there are neither compelling reasons nor grounds on which it would be in the interests of justice that leave to appeal should be granted. I further find that there are no reasons why the customary rule that costs should follow the event, should be departed from.

[7] Order

Leave to appeal is refused with costs, including the costs consequent on the employment of two counsel.



✓ N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 11 January 2022

Judgment delivered: 14 January 2022

APPEARANCES:

For the Applicant:

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