

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 56029/18

1.	REPORTABLE: NO
2.	OF INTEREST TO OTHER JUDGES: No
3.	REVISED YES
21 Feb 2020	
DATE	SIGNATURE

In the matter between:

VIRGIL HUMPHREY RABIE

APPLICANT

And

ERNST & YOUNG ADVISORY SERVICES (PTY) LTD

RESPONDENT

JUDGMENT APPLICATION FOR LEAVE TO APPEAL

COLLIS J:

1. In the present application, the applicant is seeking leave to appeal the order¹ of this court, granting an interim interdict against the Public Protector, pending the final determination of a rescission application issued by the first respondent.

¹ Judgment Collis J delivered 24 October 2019

2. In the same order, this court directed the applicant to pay the costs of the urgent application as he was the only party who opposed the application, and he was unsuccessful in such opposition.
3. The application for leave to appeal is premised on the grounds that the court erred by finding that the matter is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court. Secondly the applicant alleges that the court erred in fact by finding that the first respondent had a clear right, whereas having regard to moral considerations this court should have revoked the first respondents' clear right. Thirdly, the applicant contends that the interim interdict granted by this court fell outside of the jurisdiction of this court and such order granted is against the constitutional mandate empowered and bestowed upon the Public Protector. Lastly, it is contended that the order granted by this court failed to take into account that the complaint made to the office of the Public Protector originated from an anonymous whistle-blower and such complaint was made in terms of the Protected Disclosures Act, which should have protected the identity of the "whistle-blower" whereas his identity was exposed. During argument the applicant also challenged the costs order awarded against him as the unsuccessful party.

THE LAW

4. Section 17 of the Superior Court's Act provides as follows:²

² Act 10 of 2013

"17 Leave to Appeal

1. Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
 - (a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
 - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."
2. At the commencement of the proceedings the court directed the parties to address the court on the appealability of the court's decision and in this regard the court specifically requested the parties to address it with reference to the criteria set out in the decision of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

NON-APPEALABILITY

3. The standard test whether a particular decision is appealable was stated in *Zweni* as follows:

"Generally speaking, a non-appealable decision (*ruling*) is a decision which is not final (because the court of first instance is entitled to alter it), not definite of the rights of the parties nor has the effect of disposing

of at least a substantial portion of the relief claimed in the main proceedings."

This court has held that those requirements do not constitute a closed list. This was made plain by the use of the words "as a general principle".

In addition, the interest of justice are of paramount importance.

4. The approach to the appealability of interlocutory orders that has been taken by our appellate courts for years, is now increasingly flexible and pragmatic. See in this regard Celliers NO and Others v Ellis and Another [2017] ZASCA 13 para 20.
5. The ratio for the general rule against the appealability of interim interdicts was concisely stated by Goven AJA in Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and others 2018 (6) SA 440 (SCA) to be the following:

'[45] The need to develop a policy arises from the nature of interim interdicts. They are temporary measures designed to protect rights before a final determination can be made. Since most of these are granted by way of application, it is not ordinarily possible to resolve the competing contentions. Thus 'a necessary imperfect procedure' developed. This requires the establishment of a prima facie right, although open to some doubt, as opposed to a clear right. It also attempts to factor in the likely resultant prejudice in assessing the balance of convenience. The stronger the prospects of ultimate success,

the less the balance of convenience counts. It allows for the consideration of the interdict if circumstances warrant it. As soon as the court makes a final determination, the interim interdict is discharged. This is also why a fresh application for an interim interdict pending an appeal can ordinarily be brought. In *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] (4) SA 348 (A) EM Grasskopf JA referred to the practical difficulty raised in *Cronshaw* that an appeal against the grant of an interim interdict would often be inconsistent with the very purpose of the remedy.'

6. The three attributes on a non-appealable decision as set out in *Zweni* need not all be present at the same time. The presence of any one of these attributes may render a decision non-appealable. In the order of this court all these attributes are to be found and I proceed to deal with same below.

Is the court's decision final?

7. The interim order granted by this court is not final in effect. The order granted by this court merely interdicted and restrained the Public Protector from conducting any investigation, pursuant to paragraph 2 of the order of his Lordship Mr Acting Justice Millar handed down on 22 January 2019, pending the final determination of the application for rescission which was issued by the first respondent on 12 July 2019.

Is the decision definite of the rights of the parties?

8. During argument it was submitted on behalf of the first respondent that the rescission application will be heard on 28 February 2020 as directed by Davis J, the appointed case manager in the matter. The date for the hearing of the rescission application was conceded by Mr Rabie. Therefore, at best a mere two weeks away the first respondent together with the applicant would have an outcome as to whether the order dated 22 January 2019, obtained by the applicant, falls to be rescinded. In addition to this, the relief sought on appeal will clearly fall within the ambit of section 16(2)(a) of the Act, which provides as follows:

Section 16(2)(a) (i): "when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

9. It is on this basis, that I cannot but conclude the decision of the court is not definite of the rights of the parties.

Does the decision dispose of at least a substantial portion of the relief claimed?

10. The third question to be answered is whether the decision of the court disposes of a substantial portion of the relief claimed. In this regard the relief claimed is for the first respondent to be permitted to rescind the order of Millar J, dated 22 January 2019 and if successful with such rescission, to proceed with a review application. The interim order granted by this court has no effect on the relief sought in either of these applications.

11. The court's order made no pronouncements regarding the success or otherwise of the merits of the pending rescission application to be adjudicated upon. Another court is still to decide in this application on the 28 February 2020.
12. In addition to what has been alluded to above, the applicant further challenges the decision by this court for determining that the matter should be enrolled and heard by the urgent court. In the judgment of this court and more specifically paragraphs 11 to 18 thereof, an exposition as to the facts postulated in the respective affidavits is set out which supported the determination by this court in concluding and finding that the matter should be heard on an urgent basis. This court could find no support for the assertion that the urgency of the application was self-created as contended for by the applicant.
13. As to the costs order granted against the applicant, Mr Rabie conceded during argument that being the unsuccessful party in the proceedings and applying the principle that costs follow the result, no successful challenge on appeal could be mounted against the costs order made against him.
14. Furthermore, as mentioned in the judgment of the court, no challenge was mounted by the Public Office of the Protector against the relief sought, instead a Notice to Abide was filed.³

³ Judgment Collis J para 8.

15. For the reasons alluded to above, I am not persuaded that the decision of the court is appealable and it therefore must follow that the application would not have a reasonable prospect of success, and stands to be refused.

16. It is as a result for the same reason that I do not deem it necessary to deal with any additional; grounds of appeal listed in the notice filed 4th December 2019.

ORDER

17. In the result the following order is made:

17.1 The application for leave to appeal the order dated 24 October 2019, is dismissed with costs such costs to include the costs consequent upon the employment of counsel.



COLLIS J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA

Dates of Hearing	: 14 February 2020
Date of Judgment	: 21 February 2020
Counsel the Applicant	: In Persona
Counsel for the First Respondent	: Adv. M Clark
Instructed by	: Webber Wentzel Attorneys