

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1753/2022

In the matter between:

GRIEKWALAND WES KORPORATIEF BEPERK

t/a VAALRIVIER DIENSSTASIE

Applicant

and

DESERT OIL (PTY) LTD

Respondent

In re:

DESERT OIL (PTY) LTD

Applicant

and

GRIEKWALAND WES KORPORATIEF BEPERK

t/a VAALRIVIER DIENSSTASIE

Respondent

Coram: Lever J

JUDGMENT

Lever J

1. This is an application for leave to appeal an interim interdict granted by me on the 17 November 2023. The said interdict is interim or *pendente lite* in the sense that the present applicant (GWK) is interdicted *inter alia* from purchasing petroleum products from anyone other than the present respondent (Desert Oil), pending the finalisation of an action to be instituted within 60 days from the 17 November 2023. GWK seeks leave to appeal to the Supreme Court of Appeal (SCA).
2. The relevant agreement between GWK and Desert Oil related to the purchase and re-sale of certain petroleum products at GWK's VAALRIVIER DIENSSTASIE. GWK purported to cancel the said agreement. The validity of this purported cancellation was the main subject of the application for the interim interdict. My understanding is that the said purported cancellation would also be the main subject of the contemplated action for *inter alia* declaratory relief relating to the validity of the purported cancellation of such agreement.
3. I am informed from the Heads of Argument filed on behalf of Desert Oil that the summons in the contemplated action was served and filed on the 8 December 2023. I am further informed that GWK has already filed its plea in the said matter and that Desert Oil is to file its replication, if any, on the 15 March 2024. Thereafter, the pleadings in the matter will be closed.

4. The agreement which is the core of the dispute between the parties is the end result of a long history of litigation between the parties. This agreement came about as a result of Desert Oil exercising an option to supply GWK with petroleum products on the same terms as a competitor 'Total', with the proviso that the parties can negotiate an alternative supply agreement in a stipulated time, which could be extended by agreement in writing. This is essentially the basis of the current dispute. The current dispute essentially has at its roots, a court order taken by agreement between the parties on the 22 April 2022.
5. The first issue to be considered in this application for leave to appeal is whether the interim interdict granted is a 'decision' as contemplated by section 16(1)(a) of the Superior Courts Act¹. In other words, whether this is a judgment or order capable of being appealed.
6. The common law test as to when a matter is appealable was restated in the matter of *ZWENI v MINISTER OF LAW & ORDER*, where Harms AJA set out the common law position 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 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."²

¹ Act 10 of 2013.

² 1993 (1) SA 523 (AD) at 532I to 533A.

7. The situation came before the SCA again in the matter of DRDGOLD & ANOTHER v NKALA & OTHERS, where the position was set out as follows:

"Thus, the following legal position crystallised under the Supreme Court Act. An order that met the three *Zweni* requirements would be an appealable decision. In accordance with the general rule against piecemeal entertainment of appeals, an order that did not have all of the *Zweni* attributes would generally not be an appealable decision. Such an order would nevertheless qualify as an appealable decision if it had a final and definitive effect on the proceedings, or if the interests of justice required it to be regarded as an appealable decision."³

8. The question of appealability again came before the SCA in the matter of TWK AGRICULTURE HOLDINGS (PTY) LTD v HOOGVELD BOERDERY BELEGGINGS (PTY) LTD & OTHERS⁴. Where Unterhalter AJA, writing for the unanimous Bench of the SCA considered the grounds upon which leave to appeal to the SCA should be granted.⁵ The SCA in the TWK case finds that the supremacy of the 'Rule of Law' as set out in section 1 of the Constitution requires that: "...the law be ascertainable and meet reasonable standards of certainty. This means that the courts should be cautious to adopt standards for their decisions so porous that a litigant cannot be advised, with any reasonable probability, as to the decision a court is likely to make."⁶

9. The SCA in the TWK case also reasons that generally the High Court should bring finality to the matter before it, as contemplated in the

³ 2023 (3) SA 461 (SCA) at para [24].

⁴ 2023 (5) SA 163 (SCA).

⁵ TWK above at paras [19] to [30].

⁶ TWK above at para [20].

Zweni judgment.⁷ As it prevents piecemeal appeals that are often costly and delay the resolution of matters before the High Court. It provides a degree of certainty with which clients can be advised as to the appealability of their matter, which is required by the concept of the 'Rule of Law'.⁸

10. In the TWK case, the SCA finds that different considerations are at play when considering leave to appeal to the Constitutional Court (CC) due to its position as the apex court under the amended constitutional provision and the provisions of the Constitution itself.⁹

11. The SCA in the TWK case also states that: "...the doctrine of finality, as articulated in *Zweni*, is central to a principled conception of when a matter may be appealed to this court. That, in turn, permits this court to discharge its appellate functions to allow the apex court the required freedom to act as a final court of appeal in carefully selected matters."¹⁰

12. Finally, in stating the SCA's position on the question of appealability, Unterhalter AJA, in the TWK case concludes:

"..., a number of decisions of this court have been willing, with different degrees of separation, to part from *Zweni*, or subsume *Zweni* in the capacious remit of the interests of justice. I do not here essay a general account of appealability. I do affirm, though, that the doctrine of finality must figure as the central principle of consideration when deciding whether a matter is appealable to this court. Different types of matter arising from the High Court may (I put it no higher

⁷ TWK above at para [21].

⁸ TWK above at para [21].

⁹ TWK above at para [25] and [26].

¹⁰ TWK above at para [29].

normatively) warrant some measure of appreciation that goes beyond *Zweni* or may require an exception to its precepts. Any deviation should be clearly defined and justified to provide ascertainable standards consistent with the rule of law. Recent decisions of this court that may have been tempted into the general orbit of the interests of justice should now be approached with the gravitational pull of *Zweni*.”¹¹

13. Although Unterhalter AJA in the TWK case states that he is not attempting a general account of appealability, it is to date hereof the most detailed and carefully reasoned guidance on how a High Court is to approach the question of appealability to the SCA. I dare say that I believe it also sets out how the SCA will approach petitions to consider the question of appealability where the High Court has refused to grant leave to appeal where the order granted does not have final effect.
14. My understanding of the SCA approach in the TWK case, to the question of appealability, is that *Zweni* is both the starting point and the primary test for appealability of a High Court decision to the SCA. The ‘interests of justice test’ regarding appealability of a High Court decision to the SCA will only apply in exceptional circumstances where the questions of law at issue or the factual circumstances provide compelling justification for an appeal against an order which is not final in effect.

¹¹ TWK above at para [30].

15. In my opinion, GWK's assertion that my decision granting an interim interdict in this matter on the 17 November 2023 is appealable fails all three of the considerations set out in *Zweni*.
16. Firstly, the order granted on the 17 November 2023 is not final in effect and in the right circumstances, it could be changed by the court of first instance. Secondly, save for the temporary rights of the parties up to the outcome of the contemplated action, the order granted on the 17 November 2023 is not definitive of the rights of any of the parties *inter se* and will have no influence on the outcome of the main trial in the said matter. Thirdly, the order granted on the 17 November 2023 does not dispose of any of the issues contemplated in the main action let alone a substantial portion of such relief.
17. The order of 17 November 2023 is clearly not final in effect. The disputes that arose in the application for the relevant interim interdict will be reconsidered in the trial relating to the main action. The court entertaining the main action is not bound by any of the conclusions this court reached in considering the interim relief.
18. GWK seeks to rely on the decision of the CC in the matter of UNITED DEMOCRATIC MOVEMENT & ANOTHER v LEBASHE INVESTMENT GROUP (PTY) LTD & OTHERS¹² (the UDM case) as a basis for the assertion that in the present application, this court should apply the 'interests of justice

¹² 2023 (1) SA 353 (CC).

test'. However, GWK loses sight of three important considerations in making this assertion. Firstly, given the architecture of the Constitution and the position the CC holds as the apex court in such architecture, different considerations apply.¹³ Secondly, the UDM case involved important constitutional rights encompassed in the right to freedom of speech. GWK has not established that any constitutional right is called into play in the instant case. Thirdly, GWK would have to show exceptional circumstances as contemplated in the TWK case to justify the application of the 'interests of justice test' to its application for leave to appeal to the SCA.

19. Mr Snellenburg SC submitted on behalf of GWK that the interdict would force GWK into a contractual relationship with Desert Oil for a long period, while the main action proceeded to trial.

20. In and of itself, I do not believe that this ground put forward by Mr Snellenburg creates the circumstances for the application of the 'interests of justice' test postulated by the SCA in the TWK case.

21. However, I am mindful of the fact that the prospects of success of the various grounds raised for leave to appeal might affect this situation. The stronger the prospects of success might be on any of the grounds raised, the easier it would be to find the exceptional circumstances to apply the 'interests of justice' test as contemplated in TWK.

¹³ See footnotes 7, 8, 9 and 10 above and the passages of the TWK judgment referred to therein.

22. Accordingly, I will hold off on a final conclusion as to whether I should on the facts of this case find that it is in the interests of justice to grant leave to appeal to the SCA until I have considered the prospects of success of the various grounds put forward for me to grant the requested leave to appeal.
23. The first ground that GWK seeks leave to appeal to the SCA on, is that initially Desert Oil brought its application on condition that, alternatively subject to an undertaking that Desert Oil would institute the contemplated action before a specific date, to wit Friday, 30 September 2022.
24. The argument advanced on behalf of GWK then proceeded with the submission that the relief sought was reliant on due compliance with that condition, alternatively undertaking to institute the action by the said date. Desert Oil did not amend its Notice of Motion. That by failing to comply with such undertaking a central pillar upon which Desert Oil sought relief was absent and the application had collapsed or had self-destructed.
25. These submissions made on behalf of GWK are decontextualised and present a misleading picture of how this matter developed before it was finally argued and indeed how it was argued in the court of first instance.

26. The matter was originally brought as an urgent application and was originally set down for 9 September 2022. It was in that context that the 30 September 2022 was initially put forward as the date upon which the contemplated action would be initiated.
27. The matter did not proceed as an urgent application on 9 September 2022. Instead, the parties reached an agreement that disposed of the urgency in the matter. In *lieu* of the contemplated interdict GWK gave an elaborate undertaking which would hold good for a month after this court, as the court of first instance, handed down judgment in the application for an interim interdict.
28. The said agreement, made an order of Court on 9 September 2022, provided for a timetable to file answering and replying affidavits as well as Heads of Argument by the respective parties. The said Order also provided that by agreement the matter would be postponed to be argued as an opposed matter on 6 October 2022 after the initial date contemplated for initiating the main action being 30 September 2022.
29. Ms Davis SC on behalf of Desert Oil conceded that Desert Oil had not amended its Notice of Motion. However, she submitted that given the context set out above and the fact that it would have been futile for Desert Oil to institute an action without an interdict in place, as well as the nature and terms of the agreement reached and made an Order of Court on 9 September 2022 GWK could not have believed that there

was, or relied upon an undertaking to institute the contemplated action before 30 September 2022.

30. Further, Ms Davis pointed out that at the hearing of this application a draft order was placed before this court on behalf of Desert Oil, where Desert Oil sought an interdict pending the outcome of an action to be instituted within 30 days from the date of the order handed down by the court of first instance. Ms Davis then submitted that if there was substance to the argument now raised by GWK, GWK would have objected to the draft order placed before the court on the 6 October 2022. GWK did not in fact raise any objection to the said draft order or its terms.

31. The one consideration that is fatal to the position now taken by GWK in relation to the alleged 'central pillar of relief' or 'undertaking' argument now advanced on its behalf, is that if this was a genuinely held view it would have been prominently placed before the court of first instance at the hearing of the application for the interdict. Mr Snellenburg, submitted that he had placed this issue before the court of first instance and at end of his address.

32. Ms Davis asserts that this matter was not argued in the court of first instance. I have gone back to my bench book and checked my notes, and I did not make a note of this argument.

33. After the Application for Leave to Appeal was argued, Mr Korber the attorney for Desert Oil wrote to the court and copied his letter to Mr Addinall the attorney for GWK, proposing that the parties agree to the transcription of the proceedings of the 6th October 2022 and that the parties share the expense. I indicated to both parties that I would delay my judgment on the ALA and await the transcription if both parties agreed to such transcription. GWK subsequently agreed to the transcription. I afforded both parties an opportunity to make written submissions on or before the 19th April 2024 on what the transcript revealed as it related to the dispute that arose when the ALA was argued before me. Both parties made written submissions before the cut-off date set out above.

34. This dispute is in my view a jurisdictional issue. If it is not technically a jurisdictional issue, it is akin to a jurisdictional issue in the context of the present matter. As such one would expect it to be front and central to GWK's argument in the court of first instance. In its nature it is not an argument that can simply be mentioned at the end of one's address or in passing at some other point of the address. It would have been determinative of the issue at hand and ought to have been raised at the outset in an appropriate way. In short it must be raised in a way that alerted Ms Davis in the court of first instance that it is a substantive matter that needed to be dealt with to the extent that she had a fair opportunity to deal with it. Ms Davis maintained in oral argument before

this court that if this issue was raised, she most certainly would have dealt with it appropriately.

35. As it turns out, from the transcript, it was raised but not in a manner in which such an issue ought to have been raised. Ms Davis dealt with it appropriately having regard to the manner in which it was raised.

36. I cannot escape the conclusion that at the time the matter was argued on the 6th October 2022 the context summarised above was very real to all concerned, including GWK. However, after the judgment of the court of first instance and for the purposes of the present application for leave to appeal this aspect was decontextualised to support an argument that is disingenuous in the circumstances.

37. I do not believe that a court of appeal could reach a different conclusion in the context of the circumstances set out above.

38. The next ground upon which GWK seeks leave to appeal is that in granting Desert Oil 60 days from the 17 November 2023 within which to institute the relevant action, I was guilty of judicial overreach. As the basis for this ground for leave to appeal, Mr Snellenburg submitted that I erred when I stated that Desert Oil sought an interdict pending the outcome of an action to be launched within 30 days of the court's judgment in the court of first instance. Mr Snellenburg submitted that Desert Oil was to institute its action on or before the 30 September 2022. Further, Mr Snellenburg submitted that I was guilty of judicial

overreach when I gave Desert Oil 60 days from the 17 November 2023 to institute the relevant action. On the basis that Desert Oil did not ask for such relief.

39. The answer to this ground for leave to appeal is in two parts. The first part of the answer incorporates the answer to the preceding ground for leave to appeal dealt with above. In that, taken in its proper context I do not believe GWK can have any real and honest belief that Desert Oil ought to have instituted the action by 30 September 2022. I relied upon the draft order handed to me in circumstances where the only conclusion that can be reached was that GWK acquiesced to the draft order should I grant an interdict. The circumstances allow for no other conclusion.

40. The second part of the answer to this ground for seeking leave to appeal is that in effect I only adjusted the number of days within which Desert Oil was to initiate the contemplated action. I did this in response to what the circumstances seemed to require at the time. The end of the court year was upon us. Attorneys and Counsel generally close their offices over this period. In an attempt to avoid further unnecessary litigation and expense I extended the time period within which the contemplated action was to be instituted.

41. This is well within the rights of a presiding High Court Judge to regulate the proceedings in the High Court to suit the prevailing circumstances. It is different from, and distinguishable from a situation

where the Judge concerned 'enters into the arena' and offers one party advice on substantive issues or on the relief such party ought to seek. That never happened in the present case. The circumstances of the present case are quite different from what transpired in the case of NATIONAL COMMISSIONER OF POLICE & ANOTHER v GUN OWNERS SOUTH AFRICA¹⁴

42. In these circumstances, I do not believe that this is a valid ground to grant GWK leave to appeal in this matter. I do not believe another court would reach a different conclusion.
43. The next ground upon which GWK seeks leave to appeal, is the finding that the court of first instance made in relation to Mr Addinall and the alleged statement that GWK will not enforce the breach in the circumstances. This conclusion was reached in the context of establishing a *prima facie* right, though open to some doubt, upon which interim relief could be granted. To the extent that I found that a *prima facie* right open to some doubt had been established in this regard my reasoning in coming to such conclusion can be found from paragraph 37 to paragraph 42 in my judgment in the court of first instance in this matter. I have considered the arguments raised by Mr Snellenburg on this aspect and from the submissions made on behalf of GWK I see no rational basis that another court would reasonably come to a different

¹⁴ 2020 (6) SA 69 (SCA).

conclusion on this aspect. In the circumstances, I cannot grant leave to appeal on this ground.

44. The next ground on which it was contended that leave to appeal should be granted was that I erred in finding that the 'Total contract' did not come into operation between the parties until the 1st August 2022. This finding affected when notice to correct a breach could be given. My reasoning is succinctly set out in paragraph 69 of my judgment in the court of first instance. I do not believe another court would come to a different conclusion. Therefore, I cannot grant leave to appeal on this ground.

45. The next ground of appeal is that I erred in finding that the letter to remedy dated 5 August 2022 cannot be regarded as a clear and unequivocal notice of breach and that the notice to remedy did not give sufficient particularity of the alleged breaches to give rise to a valid right to cancel.

46. I have dealt with this aspect in paragraphs 53 to 58 in my judgment which is now the subject of the present application for leave to appeal. On this aspect I need to go further than that in response. Mr Snellenburg argues that the letter from Mr Korber, Desert Oil's attorney in this matter, dated 11 August 2022 (Annexure FA41), being a direct response to the letter to remedy dated 5 August 2022 (Annexure FA40) does not raise the issue of the letter to remedy being vague and non-specific. Mr

Snellenburg then contends that the issue of vagueness was raised by Mr Korber for the first time in his letter of the 25 August 2022 (FA44).

47. Dealing first with annexure "FA44", here indeed Mr Korber raises the issues of vagueness, but in the context of a different alleged breach. It does not help GWK's argument on this point.

48. Mr Korber's letter of the 11 August 2022 (FA41) focused much of his attention on his belief that in the factual situation that prevailed at the time, the 'Total agreement' and more particularly its terms did not come into operation between the parties on the 15 July 2022.

49. There is nothing in the said letter to indicate that Mr Korber was aware which of the discounts dealt with in schedule "C" to the Total agreement GWK claimed it was entitled to. Mr Korber simply denied the alleged breaches.

50. None of this detracts from the fact that a 'Notice to Remedy', such as the one contemplated in clause 19 of the Total agreement, needs to be specific in its terms to enable the alleged defaulting party to know specifically what needs to be done to purge any breach. That is after all the real purpose of a 'Notice to Remedy'.

51. In these circumstances I cannot conclude that on this ground another court would come to a different conclusion.

52. I turn next to the dispute around the right to 'own collection' as a ground to seek leave to appeal.

53. Mr Snellenburg argued that Desert Oil exercised the option contemplated in the Court Order taken by agreement on the 22 April 2022, knowing full well that it could never grant GWK the option to 'own collection' having regard to the bulk supplier Astron's policy to not allow 'own collection'.

54. Ms Davis objected to such argument contending it amounted to testifying from the Bar and that it was improper and unfair to allow it in circumstances where this contention did not appear in GWK's answering affidavit. That Desert Oil had never had the opportunity to deal with such contention.

55. In debating this argument with Mr Snellenburg, I put to him that under the terms of the order taken by agreement on the 22 April 2022 both GWK and Desert Oil contemplated negotiating a supply agreement with terms that may well differ from the Total agreement. That in these circumstances, the argument that Desert Oil exercised the option whilst knowing it could not fulfil this 'own collection' clause could not stand. The best answer Mr Snellenburg could give me was that Desert Oil 'took a chance'. That may well be so, but it does not constitute a ground upon which I can grant leave to appeal in the relevant circumstances. Accordingly, it is not necessary for me to rule on Ms Davis's objection.

56. Mr Snellenburg further submitted that GWK had the right to insist on performance *in forma specifica* in respect of the option to 'own collection' contained in the Total agreement. Desert Oil on the other hand claims that GWK will not suffer any prejudice in the circumstances of the case if performance *per aequipollens* is accepted.

57. I dealt with this matter in paragraphs 83 to 88 in my judgment of the court of first instance. I reached the conclusion that initially GWK's concern was with potential financial prejudice it might suffer. This is evident from the 'Notice to Remedy' itself. Desert Oil tendered to put GWK in the same position financially as if it had collected its own fuel from the Astron depot on the coast. However, to give effect to this tender Desert Oil required the cooperation of GWK to establish its costs in collecting fuel. This cooperation was not forthcoming from GWK. Essentially those are the reasons for deciding that GWK would not be prejudiced by equivalent performance in these circumstances. It follows from these circumstances that GWK could not cancel the 'Total agreement' on this ground.

58. I am satisfied that another court would not come to a different conclusion on the substituted performance in these circumstances. Accordingly, I cannot grant leave to appeal on this ground.

59. The next ground upon which GWK seeks leave to appeal is that I erred in finding that as at the 5 August 2022, GWK was not entitled to

30-day credit terms. That on considering this ground I failed to have regard to the terms of the 'Total agreement'.

60. The 'Total agreement' consisted of a suite of documents that were annexed to the 22 April 2022 court order. One of those documents was described as annexure "B" and was a Total credit application form. As such it was part and parcel of the 'Total agreement'. This, under the provisions of paragraph 2.2 of the said document, gave Desert Oil the right to revoke any credit facilities on written notice to GWK. Such notice was given on the 2 August 2022. Also, paragraph 2.3 of the said document gave Desert Oil the right to insist on cash on delivery, without any notice. Accordingly, I cannot find that another court would come to a different conclusion in regard to the alleged failure to allow GWK 30 days credit. In these circumstances, I cannot allow leave to appeal on this ground.

61. The next ground upon which leave to appeal was sought is that I erred in finding that the Notice of Cancellation of the 24 August 2022 contained a new ground for cancellation which should have been preceded by a new Notice to Remedy in terms of clause 19 of the Total agreement.

62. Mr Snellenburg submitted that where a party gives notice of cancellation on grounds that do not validly constitute grounds for cancellation. Such party may rely on a different breach, which would

justify termination, that existed at the time that the original notice was sent. That a new notice of termination was not required.

63. In making such submission Mr Snellenburg relied on the following authorities: PUTCO LIMITED v TV AND RADIO GUARANTEE Co (PTY) LTD AND OTHER RELATED CASES 1985 (4) SA 809 (A); MATADOR BUILDINGS (PTY) LTD v HARMAN 1971 (2) SA 21 (C); DATACOLOR INTERNATIONAL (PTY) LTD 2001 (2) SA 284 (SCA); and STEWART WRIGHTSON (PTY) LTD v THORPE 1977 (2) SA 943 (A).

64. The relevant termination clause is quoted verbatim in paragraph 46 of my judgment in the court of first instance. None of the authorities relied upon by Mr Snellenburg in making his argument as set out above related to the enforcement of a *lex commisorio* of the kind stipulated in clause 19 of the Total agreement, which, as set out above, is quoted in paragraph 46 of my judgement.

65. Such *lex commosoria* must be strictly complied with. See the authorities cited at paragraph 46 in my judgment of the court of first instance. Accordingly, I cannot grant leave to appeal on this ground.

66. The next ground upon which GWK seeks leave to appeal is that I erred in finding that GWK had not established an adequate case to cancel the agreement with Desert Oil based on the Total agreement. I have dealt with this extensively in my judgment from paragraph 73 to 93 thereof. No purpose will be served by restating what is set out in my

judgment. I believe I have provided comprehensive reasons. I do not believe given the facts and circumstances as they emerged from the papers before the court of first instance that another court would come to a different conclusion. Accordingly, I cannot grant leave to appeal on this ground.

67. Then GWK submits as a ground for leave to appeal that I erred in finding that an award for damages is not a suitable alternative remedy.

68. Here Mr Snellenburg argued that I ought not to have found that Desert Oil was at risk of losing its branded marketer agreement with Astron as this only came out in the replying affidavit and that GWK did not have an opportunity to deal with this.

69. Desert Oil did aver in its founding affidavit that it was at risk of losing its standing with Astron. In my view, this sufficiently lays the foundation for Desert Oil in responding to the answering affidavit to explain in its replying affidavit that it was at risk of losing its branded marketing agreement with Astron.

70. Ms Davis relied on the authority of *V & A WATERFRONT PROPERTIES (PTY) LTD v HELICOPTER AND MARINE SERVICES (PTY) LTD & OTHERS*¹⁵ for her argument that a claim for damages is not a suitable alternative

¹⁵ 2006 (1) SA 252 (SCA) at para [23].

remedy where it would in effect compel Desert Oil to part with its right to enforce the contract with GWK. In my view Ms Davis is correct.

71. Accordingly, I do not believe this ground for seeking leave to appeal can be supported. I do not believe that another court would reach a different conclusion.

72. GWK has not persuaded this court on any of the grounds advanced that another court would come to a different conclusion. Having regard to my view, set out above, in relation to the argument advanced by Mr Snellenburg on behalf of GWK for applying the 'interests of justice' test to determine if a matter is appealable and also having regard to the fact that I am unpersuaded on the prospects of success if an appeal is allowed. In these circumstances, I cannot find that it is in the interests of justice to grant leave to appeal to the SCA.

73. Even if GWK would succeed on appeal, it would not dispose of any of the issues between the parties. All that would mean is that Desert Oil, if it were to lose the interdict and succeed in the trial in the main action, would have engaged in a long and expensive futile exercise as there is no way to turn back the clock if the interdict falls away and GWK contracts with another party. This would result in the infrastructure of Desert Oil being removed from the Vaal Rivier Dientsstasie site. Leaving Desert Oil with no way to enforce any judgment it might win in its favour.

74. In these circumstances, it is my view that GWK has not established that the order of 17 November 2023 is appealable. Certainly not on the grounds set out in *Zweni* for the reasons set out above. Also, not on the grounds of it being in the interests of justice to allow such appeal.

75. GWK has not established that there are prospects of success as contemplated by section 17(1)(a)(i) of the Superior Courts Act¹⁶. GWK has also not established that there is any other reason why the appeal should be heard as contemplated in section 17(1)(a)(ii) of the said act.¹⁷ Further, GWK has also not established that the appeal would lead to a just and prompt resolution of the real issues between the parties as contemplated by section 17(1)(c) of the said act.¹⁸

76. The last remaining issue is the issue of costs. There is no reason why the ordinary rule that costs follow the event should not be applied.

77. In these circumstances the application for leave to appeal stands to be dismissed with costs.

Accordingly, the following order is made:

- 1) The application for leave to appeal is dismissed.
- 2) The present applicant (GWK) is to pay the costs of this application.

¹⁶ Above.

¹⁷ Above.

¹⁸ Above.

[REDACTED]
Lawrence Lever
Judge
Northern Cape Division, Kimberley

REPRESENTATION:

<i>Applicant:</i>	<i>ADV N SNELLENBURG (SC) and ADV JG GILLILAND</i>
<i>Instructed by:</i>	<i>VAN DE WALL INC.</i>
<i>Respondent:</i>	<i>ADV DM DAVIS (SC)</i>
<i>Instructed by:</i>	<i>HAARHOFFS INC.</i>
<i>Date of Hearing:</i>	<i>04 March 2024</i>
<i>Last Written Submission:</i>	<i>19 April 2024</i>
<i>Date of Judgment:</i>	<i>26 April 2024</i>