



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2023-000702

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED: YES

SIGNATURE

26 JUNE 2024
DATE

In the matter between:

THE CONSORTIUM COMPRISING: K C COTTRELL CO LTD, ELB ENGINEERING SERVICES (PTY) LTD (IN LIQUIDATION), ELB EDUCATIONAL TRUST FOR BLACK SOUTH AFRICANS

Applicant

and

SANTAM LTD

First Respondent

NGODWANA ENERGY (RF) (PTY) LTD

Second Respondent

NEDBANK LTD C/O NEDBANK INC

Third Respondent

Summary: Appealability of interim orders – where *Zweni* requirements not met, authorities considered in which leave to appeal was granted – in interests of justice standard two overriding considerations distilled (1) whether a constitutional right or obligation is impacted and (2) the prejudice to be suffered should the appeal not be heard prior to the completion of the main case. In general, it is in the interests of justice that an appeal await the completion of the main case.

This order was handed down electronically by circulation to the parties' legal representatives by email on 26 June 2024.

JUDGMENT

INGRID OPPERMAN, J

Introduction

[1] This is an application for leave to appeal to the Supreme Court of Appeal against an order granted on 10 November 2023, with reasons provided on 8 December 2023 (“the main judgment”). This judgment should be read with the main judgment and the parties are referred to as in the main judgment. All abbreviated descriptions used herein are defined in the main judgment.

Variation of the order

[2] On the first occasion that the application for leave to appeal was set down, counsel was hospitalised for an emergency procedure and the hearing was postponed. When the hearing resumed on 18 April 2024, I raised with counsel representing the contractor, Mr Mc Aslin SC, and counsel representing the employer, Mr van Vuuren SC, the first ground of appeal which was that the order granted on 10 November 2023 was “impermissibly wide”.

[3] The order provided:

- "1. The First Respondent is interdicted and restrained from making payment under the Performance Guarantee No.14816, pending the outcome of the action instituted under case number 2023-00166 (the action);
2. The costs are reserved for determination in the action."

[4] Mr Mc Aslin pointed out that this criticism against the ambit of the order had not been raised during the hearing and that this was so because it was common cause that the litigation concerned the specific demand which was in respect of Delay Liquidated Damages, a fact which was also common cause.

[5] I enquired from Mr van Vuuren whether he would be persisting with the point and/or whether to eliminate any uncertainty, I should amend the order in terms of Rule 42 of the Uniform Rules of Court to bring it in line with everyone’s understanding.

Mr Van Vuuren advised that although the employer had no objection to such amendment, Santam was interpreting the order so as to mean that it (Santam) is interdicted from making any payment under performance guarantee number 14816 as was evident from a letter handed to the Court dated 6 March 2023. It was then agreed that a *rule nisi* be issued affording Santam (and any interested party) an opportunity to object to an amendment to the order.

[6] The following order was issued:

- "1. The order of this Court dated 10 November 2023 read with the reasons dated 8 December 2023 is varied in terms of Rule 42(1)(b) by the Court, *mero motu*, as follows:

"The first respondent is interdicted and restrained from making payment under the performance guarantee number 14816, pursuant to the demand dated 6 January 2023 and annexed as "A", pending the outcome of the action instituted under case number 2023/00166 (the action)."
2. The order in (1) above will operate as a *rule nisi* with all interested parties called upon to show cause on 30 May 2024 at 09h00 why the contemplated variation of the order should not be made final.
3. The application for leave to appeal is postponed to 30 May 2024 at 09h00.
4. The costs of the appearance on 18 April 2024 shall be costs in the application for leave to appeal."

[7] Predictably, no cause was shown on the return date and prior to the application for leave to appeal being argued, the rule was confirmed.

[8] I intend dealing with the grounds of the application for leave to appeal first and to then deal with the issue of appealability of the order. The reason for doing so, in what would seem to be the incorrect sequence, will become apparent.

Grounds of Appeal

[9] The argument advanced by the employer in respect of the finding of fraud and why leave to appeal should be granted, was two-fold. Issue was taken with the absence of an affidavit filed on behalf of Ms Seate but it was conceded that this criticism was unfounded as the confirmatory affidavit which had been filed, did not deal with the relevant allegations.

[10] The employer was left with one argument in respect of the fraud finding only, being that, although it did not dispute the conclusion of the discharge agreement, the contractor was obliged to allege and prove the employer's indebtedness to the contractor, that such debt was due and legally payable and that the reciprocal debts were both liquidated.

[11] This argument was dealt with in the main judgment and is disposed of with reference to clause 84.7(e) of the contract which contemplates liquidated damages expressly. The discharge agreement is thus legally competent. No answer is proffered to paragraphs [53] to [63] of the main judgment. That being so, it is difficult to conclude that another court, certainly on a *prima facie* basis, bearing in mind that the relief under consideration is interim, would come to another conclusion.

[12] An argument advanced in the application for leave to appeal but not during the initial hearing was that this Court was bound by a judgment of Wilson J who pronounced upon the meaning of the guarantee. The meaning of the guarantee was not an issue that was addressed by this Court as the basis of the demand in Judge Wilson's matter and the basis of the demand in the current matter, was different.

[13] To recap - clause 4 of the guarantee provides:

"We, SANTAM LIMITED (Reg. No. 1918I001680i06) ("Guarantor"), hereby irrevocably and unconditionally undertake with you that whenever you or the Facility Agent gives a written notice to us demanding payment by way of original letter (a "Demand"), without further proof or condition (which notice shall state that contractor has failed to comply with its obligations in respect of the Contract, including any remedy period stipulated therein), we will, notwithstanding any objection which may be made by the contractor and without any right of set-off or counterclaim, immediately, but within no later than 5 (five) Business Days, pay to you:

- (a) in respect of amounts claimed as delay liquidated damages into the Operating Account (Account Number 1120842514, Branch Code 198765) with the Facility Agent;
- (b) in respect of all other amounts into the Compensation Proceed Account (Account Number 1138181188, Branch Code 198765) with the Facility Agent; or
- (c) into such other account as the Facility Agent may direct, such an amount as you or the Facility Agent may in that Demand require not exceeding (when aggregated with any amount(s) previously so paid, under this Guarantee) the Guaranteed Sum ("Guarantee")."

[14] The matter which served before Wilson J, resorted under clause 4(b) of the guarantee.

[15] It was common cause, until the application for leave to appeal was filed, that the basis of the demand in this matter, was the alleged indebtedness of the contractor in relation to the Delay Liquidated Damages.¹ This matter was argued and was dealt with as one clearly resorting under clause 4(a) of the guarantee.

[16] In this case the trigger event was the alleged failure by the contractor to have paid the Delay Liquidated Damages. The fraud related to this event.

Appealability

[17] The order preserves the *status quo* pending the trial court making a final finding on the existence of the fraudulent demand. Accordingly, the order is interim in nature. The finding of fraud will be revisited at trial.

[18] The three criteria applicable in order to determine whether an interim order is appealable are (i) it must be final in effect i.e. it must not be susceptible of alteration by the court of first instance; (ii) it must be definitive of the rights of the parties; and (iii) it must have the effect of disposing of a substantial portion of the relief claimed in the main proceedings.²

[19] The order in this matter does not meet any of the criteria in *Zweni* and historically that would have put an end to the application for leave to appeal. However, the law in relation to the appealability of an interim order has undergone change recently.

[20] In *UDM v Lebashe Investment Group*³ Madondo AJ held that the test is now the interests of justice and whether or not an order lacking one or more of the *Zweni* factors constitutes a decision for the purpose of section 16(1)(a) of the Superior Courts Act.⁴ Madondo AJ referenced Howie JA in *S v Western Areas Ltd*⁵ in which Howie JA

¹ Paragraph [9] of the main judgment.

² *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A) ("*Zweni*").

³ 2023 (1) SA 353 (CC) ("*Lebashe*") at paras [43] and [45].

⁴ 10 of 2013.

⁵ 2005 (5) SA 214 (SCA) at paras [23] to [28].

held that the “general rule” was against piecemeal appeals and that “[l]ong experience has taught that it is in the interests of justice that an appeal await the completion of a case whether civil or criminal”.⁶

[21] What ensued was a debate in the Supreme Court of Appeal as to the balance to be struck between the interests of justice and the requirements in *Zweni*. Central to the debate was the decision of Unterhalter AJA in *TWK Agriculture Holdings*.⁷ The decision of Unterhalter AJA aligned with that of Howie JA insofar as the interests of justice would constitute a deviation from the three-pronged test established in *Zweni*.

[22] In *City of Tshwane Metropolitan v Vresthena (Pty) Ltd*,⁸ Mbatha JA pointed out that *TWK* did not reference the Constitutional Court decision of *Lebashe* and held as follows:

“[11] In sum, then, on the jurisprudence as it stands, an interim order may be appealable, taking into account a range of factors. The *Zweni* requirements play an important role in determining the issue of appealability in a particular case, but they are not immutable. The interests of justice continue to play a substantial role in the inquiry. What those interests are involves a finely weighed consideration of relevant factors in each case.”

[23] In *Polokwane Municipality v Double Four Properties*,⁹ Unterhalter AJA appears to have laid to rest the effort by the Supreme Court of Appeal in *TWK* to observe the doctrine of finality over the interests of justice which the court in *TWK* regarded as “a norm of great abstraction and porosity.”¹⁰

[24] Gorven JA in *Cyril v Commissioner: South African Revenue Service*¹¹ captured the current state of play as follows:

“[7] Since then, there have been significant developments in our law on this point. It is now accepted that the *Zweni* requirements are not ‘cast in stone’ and a matter may be appealable if ‘the interests of justice require it to be regarded as an appealable decision’. This has been affirmed by the Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*. The Constitutional Court

⁶ Para [25].

⁷ *TWK Agriculture Holdings v Hoogveld Boerderybeleggings* 2023 (5) SA 163 (SCA) (“*TWK*”) at paras [20] to [30].

⁸ [2024] ZASCA 51.

⁹ [2023] ZASCA 158 (“*Vresthena*”).

¹⁰ *TWK* above n 7 at para [41].

¹¹ [2024] ZASCA 32 (“*Cyril*”).

made it clear that the interests of justice approach is not limited to the Constitutional Court but applies equally to this court. In *Government of the Republic of South Africa and Others v Von Abo*, this court summarised the present approach to appealability of orders in our law:

“It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.” (Footnotes omitted.)

[25] It follows that the question of whether an interim order is appealable must now be decided on an *ad hoc* basis with reference to the facts of each case. In my view there is some guidance to be obtained from the decisions that have considered the issue of “interests of justice”.

[26] It would appear that common to all the cases where leave to appeal was granted, is that the order impacted one or more constitutional rights or obligations. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,¹² the issue in the interim interdict granted was whether the constitutional tenet of the separation of powers had impermissibly been encroached upon and so too in *Tshwane City v Afriforum*¹³ where the change of street names was interdicted pending a review of that decision. In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,¹⁴ the matter involved an interdict preventing the implementation of a decision to terminate anti-dumping duties on the importation of steel cable, thus the restraint of cabinet ministers from exercising executive powers conferred upon them by the Constitution and national legislation. In *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd*¹⁵ the intrusion upon the exercise of public powers was at stake, in the matter of *Lebashe*¹⁶ the interim interdict had resulted in the infringement of the right to freedom of expression.

¹² 2012 (6) SA 223 (CC) (“OUTA”).

¹³ 2016 (6) SA 279 (CC).

¹⁴ 2012 (4) SA 618 (CC).

¹⁵ 2023 (4) SA 325 (CC).

¹⁶ Above n 3.

[27] In the *Vresthena*¹⁷ matter, Mbatha JA emphasised that the interests of justice standard will involve a consideration of irreparable harm. So too was the spotlight shone on prejudice in the *Cyri*¹⁸ matter.

[28] The pearls of wisdom sounded by Howie JA many moons ago seem to have resurfaced prominently in the Supreme Court of Appeal and in emphasising “prejudice” it has, in my view, rekindled a measure of finality into the interim order itself. This is so as a litigant will in all likelihood not be able to demonstrate irreparable harm unless the interim order is final in its effect.¹⁹ Prejudice has of course always weighed heavily with the Constitutional Court.²⁰

[29] To sum up: in general a litigant should advance a constitutional interest or assert and demonstrate that she will suffer irreparable harm if the application for leave to appeal were refused, in order for a court to conclude that, despite non-compliance with *Zweni*, the interests of justice dictate that leave be granted. Ultimately though, it is inappropriate to elevate the distinction between interim orders that are appealable and interim orders that are not appealable, to one of principle. The facts of a particular case remain paramount and one should be flexible and pragmatic.

[30] The applicant in this application for leave to appeal despite not complying with *Zweni*, relied on neither a constitutional interest nor did it assert that it will suffer irreparable harm.

What factors does the employer contend weigh in its favour to conclude that the interests of justice would be served in granting the application for leave to appeal?

[31] The employer argues that the only purpose of the guarantee is to provide the beneficiary with immediate cash. In destroying the very purpose of the guarantee, the interim order becomes final in effect. The contractor contends that it is not the purpose of the guarantee to provide the employer with immediate cash in all circumstances and even where the employer acted unlawfully. The contractor argues that if that were the case, then the payment of the guarantee could be likened to a bank robbery. This

¹⁷ Above n 8 at para [8].

¹⁸ Above n 11 at para [11].

¹⁹ One asks whether the SCA has really moved away from the doctrine of finality that was so admirably set out in *TWK* above n 7.

²⁰ *OUTA* above n 12 at para [25].

latter argument is not unpersuasive. One asks, why would the interests of justice be served to ignore a *prima facie* finding of fraud?

[32] Moreover, the plant is functionally complete and Eskom confirmed on 11 March 2022 that the plant commenced with commercial operation. In other words, the employer is selling electricity to Eskom. The purpose of providing immediate cash is to ensure that the construction of a plant does not come to a standstill because of a dispute on a payment. This consideration has no application at this juncture i.e. more than 2 years after the completion of the plant. Under these circumstances it is for the employer to justify why it is in the interests of justice to be paid the amount of R164 163 815.10 before the completion of the main case. It is not as though the entire project will come to a standstill because of a lack of cash flow. This cannot be as the plant is complete and functional and the employer is deriving an income from the sale of electricity to Eskom.

[33] There is further no suggestion of the infringement of a constitutional right on the part of the employer.

[34] The employer deals with the finding of fraud as though it does not exist. The question is, why would it serve the interests of justice to let a party through the appeal gates who has *prima facie* perpetrated a fraud? What prejudice will be suffered if the matter is not heard before the completion of the trial? Why is it in the interests of justice to devote scarce judicial resources to the hearing of an appeal where the *Zweni* requirements have not been met? Where no constitutional interest is implicated and the prejudice sought to be avoided by honouring a guarantee has not been applicable since March of 2022, what compels one to conclude that the bar has been crossed?

[35] A factor which also weighs against the employer is its second ground of appeal which reads:

“2.1 The Court held that 'it was established that the agreement between Santam and the contractor is that Santam will not make payment to the Employer until finalisation of Part A ...'.

2.2 The first respondent's position however was, and is, as a matter of fact, that it will not make payment pending the finalisation of "*all legal proceedings*" between the parties. This was communicated to the Court on 25 September 2023, prior to the issue of the Order and/or the Judgment and was not refuted by the applicant.

2.3 By reason thereof, not only did (and does) the applicant have a satisfactory alternative remedy but, also, it stood to suffer no harm, and more so, irreparable harm, in the event of the order not being granted."

[36] Accepting the proposition contained in the quoted paragraph 2.2 at face value and for the moment only, it matters not whether leave to appeal is granted as the contractor has, on such version, an agreement in its pocket which extends to the trial. On the employer's version thus, how can it ever be in the interests of justice to dedicate judicial resources to an appeal which has no practical effect as, win or lose, the contractor is protected by the agreement with Santam.

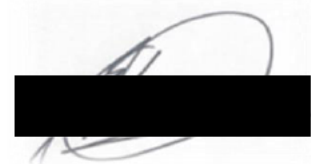
Conclusion

[37] I have considered the very extensive application for leave to appeal and nothing argued has persuaded me that another court would find differently nor that there is some other compelling reason why the appeal should be heard. Most of the grounds have been answered in the main judgment.

[38] Moreover, I find that the order is not appealable.

[39] I therefore grant the following order:

1. The application for leave to appeal is dismissed with costs on scale C.



INGRID OPPERMAN J
Judge of the High Court
Gauteng Division, Johannesburg

Appearances

For the Applicant:

C Mc Aslin SC instructed by Pinsent
Masons South Africa Inc

For the Second Respondent:

H van Vuuren SC with D Hodge instructed
by Tiefenthaler Attorneys Inc

For the Third Respondent:

M De Oliveira on a watching brief.

Date of hearing: 30 May 2024

Date of judgment: 26 June 2024