

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

CASE NO: 2023-059368

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES
Date	Signature

In the matter between:

YG PROPERTY INVESTMENTS (PTY) LTD

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

1st Respondent

EKURHULENI METROPOLITAN POLICE DEPARTMENT

2nd Respondent

Date of hearing: 17 July 2024

Judgment: 13 August 2024

JUDGMENT IN THE LEAVE TO APPEAL APPLICATION

MOVSHOVICH AJ:

Introduction

1. This is an application for leave to appeal by the respondents against the whole of my order and reasons issued on 3 October 2023 ("**the order**") and 19 January 2024 ("**the reasons**") respectively.

2. I do not intend to rehearse the subject-matter of this case, as this is dealt with in detail in the parties' papers and in the reasons.

3. The applicants for leave to appeal were the respondents in the main application, and the respondent in the leave to appeal application was the applicant in the main. I shall refer to the parties as they were referred to in the main application.

4. It is trite that an appeal lies only against the order and not reasons for the order and thus it is the former (interpreted in light of the reasons, of course) which must be the focus of the leave to application process.

5. It is important to set forth key features of the order which I granted on 3 October 2023. That order granted, *inter alia*:

5.1 condonation for various deviations from the rules in terms of rule 6(12) ("**the urgency order**");

5.2 a rule *nisi* with a return date a maximum of four months from the date of the 3 October 2023 order ("**the rule nisi order**");

5.3 an interim order pending the aforesaid return date which required the respondents to adhere to their own by-laws and related delegated legislation ("**the interim order**"); and

5.4 a costs order against the respondents in respect of the hearings in the urgent court before me ("**the costs order**"), while reserving the balance of the costs of the application for later determination.

6. The respondents contend that I erred in a number of respects in the reasons, including not taking into account the affidavits they filed and the explanations they proffered on the merits. They also attack my finding on urgency. In the above respects, the respondents resuscitate most of the arguments on procedure and substance which I rejected in the reasons. Finally, they contend that there was material non-disclosure on the part of the applicant as by the time that the order was granted, the disturbances and

misconduct which led to the proceedings before me on an urgent basis had dissipated, and the applicant should have informed me about this. The respondents argue that this could have materially altered the order.

7. The applicant, on the other hand, contends that the order is not appealable, that any appeal will be of no practical effect and that the appeal does not otherwise bear prospects of success. It also contends that there are no compelling factors warranting leave being granted.

Appealability

8. Historically, interim orders of the kind issued by me on 3 October 2023 have not been appealable as they lacked finality in the manner contemplated by the Appellate Division in *Zweni*.¹

9. While finality remains a key consideration, interim orders may be appealable if an appeal is in the interests of justice. This Court recently summarised some of the key principles in this regard in *Consortium Comprising KC Cottrell Co Ltd and Others v Santam Limited and others* [2024] ZAGPJHC 598 (26 June 2024). I gratefully adopt the exposition. I would add to the factors the court must take into account in deciding on appealability of interim orders the question as to whether the order in question is still in force or is likely to be in force by the time of the appeal.

10. Both the interim order and the rule *nisi* order were manifestly interim in nature. The rule *nisi* had no effect on the respondents at all (at any time). The interim order simply obliged the respondents to comply with their legal obligations for an interim period, until – at the latest – early February 2024. As it turns out, the applicant did not seek confirmation of the rule *nisi* (for practical reasons) and thus both the rule *nisi* order and the interim order lapsed in January 2024. From what the parties described to the Court, it appears that those orders may not even have had practical effect between October 2023 and January 2024. Moreover, the case did not, at least at the interim, urgent stage, entail any issue of monumental legal principle or legal issues which are in any way novel or exceptional.

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

11. It is difficult to understand on what possible basis it could ever be in the interests of justice to burden an appeal court with rehearing a comprehensively dead interim relief order – where even the final relief has been abandoned. In my view, those orders are not appealable.

12. The same reasoning applies to the urgency order. Not only are findings of urgency ordinarily not appealable,² but there is absolutely no point in appealing against them in this case.

13. All that remains is the costs order. The costs order is final, but only relates to the portions of costs and expenses pertaining to the hearings before me in the urgent court. It is trite that a high threshold must be met before a costs order alone will be permitted to form the subject of an appeal. Given the limited remit of that order and the context in which is granted, it must suffer the same date as the substantive parts of the order. It relates inextricably to the grant of the interim order and thus an appeal against it may entail adjudication of the merits through the back-door, which would be an enormous waste of judicial resources and would undermine the non-appealability of the interim orders in question. The costs order also entails no issue of great legal principle and in any event is an exercise of a wide discretion with which appeal courts will seldom interfere. The respondents have not begun to lay sufficient basis for such interference in this case.

14. In the circumstances, the costs order is likewise not appealable.

15. Given the above conclusions, the application for leave to appeal must be struck from the roll. But even if I am wrong in this regard, there is no doubt that the application is unsustainable and would, but for unappealability, fall to be dismissed. I briefly set forth the bases for this conclusion.

No practical effect

² *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE), 242-244; *K Malao Inc v Investec Bank* 2021 JDR 0108 (GP).

16. In terms of section 16(2) of the Superior Courts Act, 2013, if an appeal will have no practical effect or result, the Court may dismiss the appeal on this basis alone. Whether there is a practical effect must be determined, save in exceptional circumstances, without reference to consideration of costs. The Supreme Court of Appeal readily dismisses appeals which fall into the above categories save the exceptional cases where the legal issues are of such import that a moot appeal should be heard.

17. For the reasons set forth above, the proposed appeal is of no practical import and entails no far-reaching legal principles which require resolution or any other exceptional circumstances.

No merit

18. There is also no merit in the proposed appeal. The respondents simply do not put up a substantive version of events on affidavit which dealt with the key merit-related allegations by the applicant. In those circumstances, the relief granted cannot seriously be impugned; moreso given that the order and the reasons expressly left the final adjudication of the legal and factual issues between the parties for the return date or another future occasion. There is simply no merit in the substance of the leave to appeal application.

19. The fact that by the time of the order some facts on the ground may have changed does not, in my view, alter the above conclusions. The facts on which the court adjudicates the matter are the facts in affidavits before it. The order was granted on that basis. Either party (applicant or respondents) could have notified me that the facts have changed over time, should they have believed it was material to the case. They did not do so and I granted the order. If the order is to be overturned on appeal on the basis of additional facts, then there would have to be a full substantive application to adduce evidence on appeal, which would not only entail further substantial expense, but would be utterly pointless given that the substantive orders as granted had all long lapsed in their terms and might not have had a substantive effect at all.

20. I do not think there is any basis for the suggestion by the respondents that this panoply of paperwork should or will be entertained by an appeal court; let alone that the

appeal court will actually uphold an appeal on this basis. The above is only fortified by the fact that applications for adducing evidence on appeal are rarely granted, and the test is a strict one.

21. In all the circumstances, had I not struck the application for leave to appeal from the roll, I would have dismissed it for want of practical effect and lack of merit.

Costs and result

22. There is no reason to deviate from the usual principle that costs follow the result. I gave serious consideration to the applicant's request that costs be awarded on a punitive scale here, given the meritless and prolix leave to appeal application, which has only resulted in a material compounding of costs in circumstances where the proposed appeal is clearly pointless, quite apart from being unmeritorious.

23. I have come to the conclusion, however, after consideration of all the circumstances, that this is a case which falls just short of warranting the award of punitive costs. The respondents were represented by a senior and junior counsel and given the scope and nature of the matter, as well as my findings in this judgment, I have come to the conclusion that Scale C should apply.

24. In the premises, the application for leave to appeal is struck from the roll with costs on Scale C.

Hand-down and date of judgment

25. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 12:30 on 13 August 2024.

VM MOVSHOVICH
ACTING JUDGE OF THE HIGH COURT

Applicant's Counsel: K Naidoo

Applicant's Attorneys: Shaheed Dollie Inc

Respondents' Counsel: R Ram SC and H Mutenga

Respondents' Attorneys: KM Mmuoe Attorneys

Date of hearing: 17 July 2024

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