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

Case NO: 2024- 052019

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

18 September 2024

DATE	SIGNATURE
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In the matter between:

LYNX INVESTMENT (PTY) LTD

First Applicant

BENFLAT PROPERTIES (PTY) LTD

Second Applicant

And

PICNOORD KITCHEN (PTY) LTD

First Respondent

MICHELE BUVE

Second Respondent

ORDER

1. Leave to appeal is dismissed with costs.

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

WINDELL, J

Introduction

[1] The first respondent, Picnoord Kitchen (Pty) Ltd (Picnoord), operates the business of a restaurant. It was evicted on 13 May 2024 from the leased premises at the Valley View Retail centre, Krugersdorp (owned by the first and second applicants) in terms of an order of the Kagiso Regional Court ('the judgment') dated 7 May 2024.

[2] The first and second respondents approached the urgent court for an interim order, inter alia, reinstating Picnoord in the premises, pending the finalisation of an appeal that was noted against the judgment on 14 May 2024 (6 days after the judgment). In the interim, Picnoord tendered to continue making payment of its monthly obligations towards the applicants should Picnoord's possession of the premises be reinstated.

[3] This court granted the application and issued an interim mandatory interdict in the following terms:

1. The rules of time and service in accordance with Rule 6(12) of the Rules of the above Honourable Court are dispensed with and the matter is declared to be one of urgency.
2. It is ordered that the execution of the Judgement handed down by the learned Magistrate Louw on 7 May 2024 in the Kagiso Regional Court under Case Number RCK541/2021, and the consequent warrant of ejectment and execution, is stayed pending the outcome of the Appeal.
3. The First and Second Respondents are ordered to immediately reinstate the First and Second Applicants' occupancy of the leased premises situated at Shop 2[...], V[...] V[...] R[...] C[...], C[...] R[...] B[...] D[...] and V[...] O[...] Street, Noordheuwel Ext 17, Krugersdorp ("the leased premises").
4. The First and Second Respondents are ordered to reinstate, within five (5) days of this order and at its cost, the leased premises to the condition in which the leased premises were at the time of the ejectment of the First

Applicant, to enable the First Applicant to operate the business of a restaurant.

5. The First Applicant is ordered to continue effecting full payment of its monthly obligations to the First and Second Respondents as provided for in the lease agreement entered into between the parties dated 31 July 2019.

6. The First and Second Respondents are ordered to pay the costs of this application, on party and party (Scale C), jointly and severally, the one paying the other to be absolved.

[4] The applicants' main opposition to the application was that at the time that Picnoord's ejectment was commenced with on 13 May 2024, there was no Notice of Appeal, and the applicants were entitled to, despite the respondents request to hold over the ejectment, to execute the judgment. It was thus not competent, so it was argued, for Picnoord's possession of the premises to be reinstated because the law does not prescribe any restorative measures pending appeal; it merely places a stay of execution.

[5] The court granted the order, reinstating Picnoord in the premises, for mainly five reasons: One, in terms of Rule 51(3) of the Magistrate Court Rules (the Rules) a party has 20 days in which to file a notice of appeal. The respondents filed a notice to appeal within the 20-day period. The ejectment order was however implemented and executed before the appeal was noted and before the expiration of the 20-day period.

[6] It is trite that as soon as an appeal is noted the order is suspended. The purpose of the suspension rule is to avoid irreparable damage to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other matter appropriate to the nature of the judgment appealed from. This court found that Picnoord had establish a prima facie right for the granting of a mandatory interim interdict, namely the entitlement to the protection of the suspension rule pending the outcome of an appeal.

[7] Two, the respondents have set out in their founding affidavit the attempts it had made to secure an undertaking that the applicants would not proceed with the

ejection of Picnoord in circumstances when the respondents' notice of appeal would be served eminently. The applicants refused this request and continued with the ejection.

[8] Three, the applicants were not left remediless. If there was the potentiality of irreparable harm or prejudice being sustained by them as a result of the suspension rule, they had the right in terms of section 78 of the Act to apply for the execution of such order even though there is an appeal pending.¹ The respondents were aware that the notice of appeal would be served shortly. Their collective conduct was evidently intended to render any notice of appeal that would have stayed the execution of the order of no consequence. Under these circumstances section 78 of the Act cannot be negated by a landowner by executing the order before the 20 days has expired during which a party can note an appeal. By stealing a march, the respondents had been deprived of the protection of the suspension rule and deprived of the opportunity to remain in the premises until the appeal has been finalized.

[9] Four, the interim right to have the benefit of a suspension order while remaining in the premises until the appeal has been finalized, lies at the heart of the rule of law. A contrary approach would lead to a situation where the protection of this fundamental right might exist only on paper and would have the effect of eroding the very right which was sought to be protected.²

[10] Five, the remainder of the requirements for an interim order were all met. The respondents had a well-founded fear of irreparable damage in the event that the interim relief is not granted. The damage is ongoing and there is no other adequate remedy. The balance of convenience weighed heavily in favour of the respondents who sought to uphold and preserve the integrity of the judicial process and the rule of law.

¹ Section 78 of the Magistrate's Court Act 32 of 1944, provides that 'the court may direct that the judgment shall be carried into execution' pending the decision upon appeal. To obtain such leave the party in whose favour the judgment was given must make special application. See *Thirlwell v Johannesburg Building Society* 1961 (4) SA 665 (D); *Lewis v Culwick* 1966 (3) SA 52 (D) at 58.

² *Ferreira v Levin, NO and Others; Vryenhoek and Others v Powell, NO and Others* 1995 (2) SA 813 (W).

Grounds of appeal

[11] The applicants seek leave to appeal to the Full Court alternatively to the Supreme Court of Appeal (SCA). It is trite that leave to appeal should only be granted if: (1) The appeal would have reasonable prospect of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.³

[12] The applicants submit, firstly, that the appeal has reasonable prospects of success in that another court would come to a different conclusion. The applicants specifically have issue with paragraph [26] of this court's judgment which stated as follows:

“[26] What is the status of the order if it is executed within the 20-day period specified in Rule 51(3) of the Rules, but before an intended appellant notes an appeal, albeit timely? First, in the absence of proper service of the notice of appeal upon the respondent or his attorney no appeal has been noted. The successful party is entitled to assume that the judgment is a final judgment unless the other party notes an appeal in terms of the Rules. Second, the successful party is only entitled to make such an assumption when the 20 days provided for in Rule 51(3) has expired. The status of the order thus remains one of suspension and the appellant remains entitled to the protection of the suspension rule until the appeal has been finalized. That is just simple justice between man and man. In the current matter the applicants are therefore entitled to the protection of the suspension rule and entitled to be in possession of the property until the appeal is finalized.”

[13] Secondly, the applicants submit that there are conflicting judgments on the issue, and that there is thus a compelling reason why appeal should be granted.

Is the order appealable?

³ Section 17(1) of the Superior Courts Act 10 of 2013.

[14] Dealing with appealability of orders, the Appeal Court in *Zweni*⁴ held that:

*'(G)enerally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive 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. . . .*⁵

[15] The nature of the order granted by this court is clearly what is referred to in *South Cape Corporation (Pty) Ltd v Engineering Management Services Pty Ltd*⁶ as “a simple (or purely) interlocutory order”. The order is not final nor is it definitive of the rights of the parties. The “main action” between the parties in casu is the determination of whether the respondent was entitled to a remission of rental and, if so, to what extent. The court that is adjudicating the appeal is yet to determine this aspect. Consequently, the reinstatement order is not a definitive statement of the parties' rights.

[16] Under the common law as laid down in *Zweni*, if none of the requirements set out therein were met, it would have been the end of the matter. In *UDM v Lebashe Investment Group*,⁷ however, the Constitutional Court examined the *Zweni* factors and concluded that, while they remain significant, the current standard is the interests of justice. In *Government of the Republic of South Africa and Others v Von Abo*,⁸ the SCA summarised the approach to appealability of interim orders and found:

“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

⁴ *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A) at para 24.

⁵ See also *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk*; *Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk*; *Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A) at 414F – H.

⁶ 1977 (3) SA 534 (AD) at 549F– 551H.

⁷ 2023 (1) SA 353 (CC) at paras [43] and [45].

⁸ 2011 (5) SA 262 (SCA) at para [17]. See also *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA); *Tshwane City v Afriforum* 2016 (6) SA 279 (CC); *National Commissioner of Police v Gun Owners South Africa* 2020 (6) SA 69 (SCA); *Cyril v Commissioner: South African Revenue Service* [2024] ZASCA 32.

which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.” (Footnotes omitted.)

[17] In *City of Cape Town v South African Human Rights Commission*,⁹ the SCA set out the current approach:

‘[10] After confirming that the interests of justice were paramount in assessing the appealability of an interim order, the Constitutional Court in National Treasury and Others v Opposition to Urban Tolling Alliance and Others¹⁰ went on to set out what factors a court should consider in assessing where the interests of justice lay:

“ . . . To that end, [a court] must have regard to and weigh carefully all the germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.”

[11] The interests of justice standard will inevitably involve a consideration of any irreparable harm. To successfully appeal an interim order an applicant will have to show that it will suffer irreparable harm if the interim appeal were not granted. Even so, stated the Constitutional Court in International Trade Administration Commission v SCAW South Africa (Pty) Limited, irreparable harm although important, is not the sole consideration and the interests of justice require an evaluation of a number of factors:

“ . . . The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if the appeal is not granted . . . ”

⁹ *City of Cape Town v South African Human Rights Commission* [2021] ZASCA 182 at paras 10-12.

¹⁰ [2024] ZASCA 110 (10 July 2024).

[12] The first enquiry is to ascertain whether the orders granted by the high court have a final effect. For this it is necessary to compare the orders granted in respect of Part A and the orders sought in Part B, to ascertain to what extent they overlap.’¹¹

[18] Firstly, there are no facts set out in the papers to suggest that leave to appeal should be granted in the interest of justice. The appellant will suffer no harm that is serious, immediate, ongoing or irreparable. Picnoord tendered payment of its monthly obligations towards the applicants should Picnoord’s possession of the premises be reinstated.

[19] Secondly, this court exercised a discretion. This discretion is not limited to situations where the execution of an order has not yet commenced or completed but is aimed at undoing a wrong and placing the parties back in the position they were in prior to the wrong. This principle is best illustrate in *Winkelbauer and Winkelbauer t/a Eric’s Pizzeria and Another v Minister of Economic Affairs and Technology and Others*,¹² in which the court held:

‘the purpose of interim relief pendente lite is to obviate an injustice to a party who prima facie has been wronged, but who needs time to obtain redress through the due process of law. The Court grants interim relief on the assumption that the relief should have been granted in the first place.’ (My underlining).

[20] This court found that the applicants’ conduct in failing to suspend the execution, was “regrettable” and “aimed at rendering any notice of appeal that would stay the execution of the order of no consequence”. It was clear that the respondents have been wronged and have suffered an injustice. It was under these circumstances that the urgent interim relief was granted as a matter of urgency to prevent the applicants from being defeated by the applicants’ conduct.

¹¹ Quoted with approval by Mbatha JA in *City of Tshwane Metropolitan v Vresthena* [2024] ZASCA 51 (18 April 2024).

¹² *Winkelbauer and Winkelbauer t/a Eric’s Pizzeria and Another v Minister of Economic Affairs and Technology and Others* 1995 (2) SA 570 (T). See also Joubert “*The Law of South Africa*” vol 11 at 297.

[21] The findings are in line with the judgment of *Knoop N.O. and another v Gupta (Execution)*¹³ where the Court encountered a similar situation in which a party to the litigation attempted to stifle the appellants appeal both against the execution order and against the removal order. In dealing with these facts Wallis JA, commented as follows:

“We had started preparing a directive to the parties governing the further conduct of the proceedings, when our attention was drawn to a news report that Mr Tayob had purported to terminate the business rescue and restore Islandsite to its directors. On Monday 26 October 2020 the respondent's attorneys confirmed this by delivering a letter to the registrar attaching a copy of a document from the CIPC reflecting that the business rescue of Islandsite had been terminated by Mr Tayob and recorded by the CIPC on 16 October 2020. The letter indicated that in the circumstances Mr Tayob would not be pursuing his application to intervene in the main appeal and it would not be necessary for the appeals to tie adjourned as suggested by the appellants' attorneys.

[15] The impression given by these actions on the part of Mr Tayob was that they might have been directed at stultifying the appellants' appeals both against the execution order and against the removal order. That was of concern, because our law is clear that if that is done with dolus it may amount to contempt of court. As long ago as 1906 Mason Jin Li Kui Yu said: '(yif)here a person knows or has reason to believe or ought to know that an application is being made to the Court for a certain purpose — where he has that knowledge, or that suspicion, then, if he takes any action before the Court can be approached, the Court will regard that as an interference with the administration of justice, and will exercise its powers to prevent itself being defeated by anything of that kind' (my underlining)

[22] The applicants conduct amounted to an interference with the administration of justice and fall squarely within the conduct described by Willis JA.

¹³ 2021 (3) SA 135 (SCA).

[23] Finally, in *Cloete and Another v S; Sekgala v Nedbank Limited*¹⁴ the Constitutional Court held that ‘*in considering whether to grant leave to appeal, it is necessary to consider whether “allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs”*’.

[24] Consequently, the determination of whether an interim order is appealable must be made on an ad hoc basis, taking into account the specific circumstances of each case.¹⁵

[25] In the circumstances of this case, I am satisfied that granting leave to appeal, would most certainly prolong the litigation and lead to wasteful use of judicial resources. The interim interdict was granted in the exercise of my discretion and was aimed at preserving or restoring the status quo of the parties before the eviction, pending the final determination of the rights of the parties. I am thus satisfied that the order is not appealable.

Conflicting judgments

[26] The applicants submit that the import of paragraph 26 of the judgment is that a judgment is not final until the time period to note an appeal has expired. It is argued that the aforesaid principle is not confined or limited to certain specified instances; in other words, it is of general application and is in conflict with numerous other judgments of courts of equal standing. In support of their argument reference were made to several judgments. There are discussed hereunder.

[27] In *Perelson v Druin*¹⁶ the full bench held that there is no rule of law that a writ of execution issued without allowing an intervening period is invalid. The court thus held that it is in order to seek payment almost immediately after judgment.

¹⁴ *Cloete and Another v S; Sekgala v Nedbank Limited* [2019] ZACC 6; 2019 (5) BCLR 544 (CC) at para 57.

¹⁵ *Consortium Comprising KC Cottrell Co Ltd and Others v Santam Limited and Others* (2023/000702) [2024] ZAGPJHC 598 (26 June 2024) at para [25].

¹⁶ 1910 TS 458 at 462.

[28] I dealt with this judgment in the main judgment. I found that the facts in *Perelson* were wholly distinguishable from the present matter.¹⁷ Significantly, all three judges left the question as to whether a success party was to wait a reasonable time before taking out a writ for his judgment and costs open. The court therefore did not deal with the rights of an intending appellant when an order is immediately executed during the period afforded to it to note an appeal. In fact, Bristowe J stated:

"I quite see the force of Mr. Jeppe's observation that a reasonable interval should be allowed between the giving of the judgment and the issue of the writ. A man cannot be expected to come into court with sufficient money in his pocket to meet any judgment which may be given against him, and it is only reasonable that he should have enough time, for instance, to go to his house, or to a bank, to obtain the money necessary to satisfy the judgment."

[29] In *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and a similar matter*,¹⁸ the applicant sought an order suspending the execution of the judgments pending the outcome of a petition for leave to appeal that was yet to be delivered. It argued that it had a 'clear right' to an interdict suspending the High Court's order pending the finalisation of the appeal process. In the same vein, this judgment did not address the complex issue of the rights of a blameless party against whom an order is executed during the period allotted by the Rules for appealing.

[30] In *Myeni v Organisation Undoing Tax Abuse NPC*¹⁹ the Full Court dealt with section 18 of the Superior Courts Act 10 of 2013 and the applicant's failure to timeously lodge a petition to the SCA. Section 18 only deals with an instance when leave to appeal has been filed and not with the period before such filing. The facts of this matter are thus also distinguishable from the present matter and is, in my view, not of any assistance.

¹⁷ See paragraph [29] of the court's main judgment.

¹⁸ 2022 (1) SA 162 (GJ)

¹⁹ (15996/2017) [2021] ZAGPPHC 56 (15 February 2021).

Conclusion

[31] Section 173 of the Constitution states that: *"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."*

[32] In *S v Molaudzi* ²⁰ the Constitutional Court held that:

"This inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. The power in section 173 must be used sparingly otherwise there would be legal uncertainty and potential chaos."

[33] In *Oosthuizen v Road Accident Fund* ²¹ the SCA said that the High Court *"can only exercise its inherent jurisdiction in relation to the regulation of its own process when confronted with a case over which it already has jurisdiction and when faced with procedures and rules of the court which do not provide a mechanism to deal with an instant problem. A court will, in that case, be entitled to fashion the means to deal with the problem to enable it to do justice between the parties."*

[34] To permit execution of a judgment within the period permitted for the filing of an application for leave to appeal or petition, especially whilst knowing that a party is intending to appeal the order, would negate the appeal process. The finding in paragraph 26 of the main judgment was clearly directed at the circumstances of this specific matter and was procedural in nature.

[35] In conclusion: I am satisfied that the order is not appealable and that the interest of justice does not dictate that leave to appeal should be granted. There are

²⁰ 2015 (2) SACR 341 (CC).

²¹ 2011 (6) SA 31 (SCA) at para [20].

also no prospects that another court would come to a different conclusion on the facts nor is there a compelling reason to grant leave. In the result the following order is made:

1. Leave to appeal is dismissed with costs.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 September 2024.

APPEARANCES

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Instructed by:	Swanepoel van Zyl Attorneys
Counsel for the respondent:	Mr D.H. Hinrichsen
Instructed by:	Raymond Joffe & Associates
Date of hearing:	26 August 2024
Date of judgment:	18 September 2024