REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

15/12/2017
DATE

SIGNATURE

CASE NO: 2017/17232

In the matter between:

HUAYOU (HONG KONG) CO., LIMITED	Applicant
and	
C. STEINWEG BRIDGE (PROPRIETARY) LIMITED	First Respondent
TRANS-MED SHIPPING CC	Second Respondent
GERALD INDUSTRIAL SARL	Third Respondent
THE NATIONAL NUCLEAR REGULATOR	Fourth Respondent

JUDGMENT I.R.O LEAVE TO APPEAL

Summary – Whether section 18 (1) of the Superior Courts Act 10 of 2013 changed the effect of an *interim* order which was granted as an adjunct to a rule *nisi* and which rule was discharged on the return day – held that it did not and that the *interim* order was not revived upon the discharge of the rule and the filing of the application for leave to appeal

OPPERMAN J

INTRODUCTION

[1] I have 3 applications which serve before me: (a) an application for leave to appeal against a judgment which I handed down on 3 November 2017; (b) an application for the extension of the *interim* relief granted by Wepener J on 18 May 2017; and, (c) a conditional application for leave to cross-appeal.

[2] The interim relief was extended by agreement pending judgment by me in (a) and (b) above. In regard to (b), which I shall refer to as '*the extention application*', the applicant for leave to appeal, Huayou, prays for the *interim* relief to remain in force until the outcome of the appeal, whether leave to appeal be granted by me or by the Supreme Court of Appeal ('*SCA*').

[3] At the close of oral argument on 27 November 2017, of (a), the application for leave to appeal, and (b), the extension application, I made the following order by agreement between the parties:

3.1. The *interim* order granted by Wepener J is extended until judgment is delivered by this Court in respect of the application for leave to appeal and the extension application;

3.2. The parties are to file supplementary argument in respect of:

3.2.1. the meaning of section 18 of the Superior Courts Act, 10 of 2013 ('*the Act*'); and

3.2.2. the status of the application filed on 13 November 2017.

[4] The need for the additional argument arose because Huayou initially placed no reliance on section 18 of the Act. This position changed, and after heads of argument were filed it was clear that Huayou relied on section 18 (1) of the Act and that the extension application was *not* an application brought in terms of section 18 of the Act, but was brought for two reasons:

4.1. *Ex abundante cautela,* to deal with the possibility that this Court rejected Huayou's interpretation of section 18 (1) of the Act; and

4.2. To preserve Huayou's right to apply to the SCA for leave to appeal (what used to be called a petition) if this Court were to refuse leave to appeal, to keep it's right to specific performance alive whilst the application for leave to appeal was being considered by the SCA.

RELEVANT DECISIONS

[5] Two decisions are relevant to the application of section 18 of the Act in this matter, being: Wepener J's order made on 18 May earlier this year and my judgment delivered on 3 November 2017.

[6] The interim relief granted by Wepener J was in the form of a *rule nisi* ('*the interim order*') and it reads as follows:

> "2. That a *rule nisi* be issued calling upon the respondents to show cause on Tuesday, 1 August 2017 at 10h00 or so soon thereafter as the matter can be heard, why the following relief should not be made final:
>
> 2.1 The first and second respondents are interdicted from releasing the material held by them for the third respondent, and which was due to be shipped to the applicant in May, June, and July 2016, being all or part of:
>
> 2.1.1 750 metric tons of cobalt; and
> 2.1.2 300 metric tons of copper,
> and which is wholly or partly detained by a Directive issued by the fourth respondent (which directive is attached to the Notice of Motion as annexure "X"), pending the finalisation of the arbitration proceedings between the applicant and the third respondent (to determine applicant's right to delivery of such material) which are pending in an arbitration under the rules of the London Metal Exchange.
>
> 2.2 Costs to stand over for determination on the return date.
>
> 3. Directing that paragraph 2.1 above of the *rule nisi* shall operate as an interim interdict with immediate effect pending the final determination of this application."

[7] The order made by this court on 3 November 2017 ('*the final order*') reads:

> "[71] I accordingly grant the following order:
>
> > The *ex parte rule nisi* granted on 18 May 2017 is discharged and the application is dismissed with costs, including the costs consequent upon the appointment of two counsel and the costs of the qualifying (preparation) fees of first, second and third respondents' expert, Mr Schaff QC."

SUMMARY OF HUAYOU'S MAIN CONTENTION

[8] Huayou predictably argues that the final order is final in effect and is thus competently the subject of an application for leave to appeal. That being so, the argument goes, such decision is governed by section 18 (1) of the Act and only once the final order takes effect, will the *interim* order, the interdict preventing the release of the goods, be uplifted. Huayou contends that for as long as the final order is the subject of an application for leave to appeal, or of an appeal, such is suspended pending the decision of the application or the appeal.

[9] Thus, argues Huayou, the final order, for so long as it is the subject of appeal proceedings and is hence suspended in terms of section 18 (1) of the Act, can have no effect on the *interim* order. The success or otherwise of this argument requires an interpretation of section 18 of the Act.

THE MEANING OF SECTION 18 OF THE ACT

[10] Section 18 of the Act provides as follows:

> "**18. Suspension of decision pending appeal.—**
> (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of **a decision** which is the subject of an application for leave to appeal or of an appeal, **is suspended** pending the decision of the application or appeal.
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
> (4) If a court orders otherwise, as contemplated in subsection (1) -
> (i) the court must immediately record its reasons for doing so;
> (ii) the aggrieved party has an automatic right of appeal to the next highest court;
> (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
> (iv) such order will be automatically suspended, pending the outcome of such appeal.
> (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules." (my emphasis)

[11] Section 18 of the Act replaced Rule 49 (11) of the Uniform Rules which provided as follows:

"Where an appeal has been noted or an application for leave to appeal against an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."[1]

[12] Section 18 of the Act is structured as follows -

12.1. If there is an application for leave to appeal or an appeal against a final order, section 18(1) suspends the '*operation and execution*' of the final order when it is the subject of the leave to appeal or appeal proceedings, unless exceptional circumstances exist. Although the word '*final*' is not present in section 18(1) of the Act in relation to the '*decision*' referred to, it must mean '*final decision'* because section 18(2) deals with a separate category of order, i.e. interlocutory orders *not* having a final effect.

12.2. Section 18(2) of the Act provides that the '*operation and execution*' of '*an interlocutory order not having the effect of a final judgment*' is not suspended if it is the subject of an application for leave to appeal or an appeal, unless exceptional circumstances exist.

12.3. Section 18(3) of the Act provides that a court may order otherwise, (otherwise meaning in this case that final orders *not being suspended* by appeal processes or that interlocutory orders not having final effect *be suspended* by appeal processes)

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1 *University of the Free State v Afriforum* [2016] ZASCA 165 at [7]

in respect of both sections 18(1) and (2), only if the applicant for such exceptional order also '*proves* [in addition to the exceptional circumstances which must be proved by such applicant] on a balance of probabilities that she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

[13] The SCA in *Afriforum* held that the combined effect of sections 18(1) and (3) – the situation it was faced with – is that the requirements for not following the usual rule '*are more onerous than those of the common law*'[2] (and therefore of rule 49(11)). The requirements are these –

13.1. Exceptional circumstances, as set out in section 18(1).

13.2. Proof, on a balance of probabilities, that the applicant '*will*' suffer irreparable harm if the order is made, and that the other party will not suffer irreparable harm.

13.3. This '*proof on a balance of probabilities*' is a higher threshold than the previous weighing up of the balance of hardship or convenience under rule 49(11).[3]

[14] The SCA concluded that '*on a proper construction of section 18, it is clear that it does not merely purport to codify the common law practice, but rather introduces more onerous requirements*'.[4] Exceptionality is a question of fact. Because what is

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2 *University of the Free State v Afriforum,* supra, [10]
3 *University of the Free State v Afriforum,* supra, [10] and [11]
4 *University of the Free State v Afriforum,* supra, [11]

sought, in a section 18(3) application, is '*an extraordinary deviation from the norm*', this '*requires the existence of truly exceptional circumstances to justify the deviation*'.[5] The SCA, in a slightly later case, confirmed all of this.[6]

[15] In subsection (2), '*a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal*' is excluded from the primary default rule (i.e. suspension pending application for leave to appeal or appeal).

[16] In *Ntlemeza,* [7] Navsa JA held as follows, with reference to Section 18(2):

> 'The default position (a diametrically opposite one to that contemplated in s 18(1)) is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. This might at first blush appear to be a somewhat peculiar provision as, ordinarily, such a decision is not appealable.'

[17] In the *Ntlemeza* decision, the SCA stated the primary purpose of Section 18 (1) of the Act to be as follows:

> 'The primary purpose of s 18(1) is to re-iterate the common law position in relation to the ordinary effect of (the) appeal processes – the suspension of the order being appealed – not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of General Ntlemeza, by ensuring, that in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned. The suspension contemplated in s18(1) would thus continue to operate in the event of a further application for leave to appeal to this court and in the event of that being successful, in relation to the outcome of a decision by this court in respect of the principal order. Section 18(1) also sets

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5 *University of the Free State v Afriforum,* supra, [13]

6 *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) at p 416 A-D ([38] and [39])

7 at para 25.

the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s18(3). As already stated and as will become clear later, the Legislature has set the bar fairly high.'

[18] In *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd*[8], Harms, JA (speaking on behalf of a full unanimous court) held as follows:

'[6] It is convenient at the outset to say something about the judgment of Selikowitz J. The *ratio* of the decision was based on *SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C), where Corbett J had held that the granting of *interim* relief as an adjunct to a rule *nisi* is to provide protection to a litigant pending a full investigation of the matter by the court of first instance**. Once that interim order is discharged, it cannot be revived by the noting of an appeal.** This approach was and still is generally accepted as correct. Dissenting views were, however, expressed in *Du Randt v Du Randt* 1992 (3) SA 281 (E) and *Interkaap Ferreira Busdiens (Pty) Ltd v Chairman, National Transport Commission, and Others* 1997 (4) SA 687 (T). The essence of these judgments was that Corbett J had failed to have regard to the common-law rule as received by our Courts that an appeal suspends the execution - **or, in the words of Rule 49(11), the operation and execution - of an order** (cf *Reid and Another v Godart and Another* 1938 AD 511). Unfortunately, the criticism was based upon a misunderstanding of the concept of suspension of execution. For instance, an order of absolution from the instance or dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied. **Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side** (*Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc and Another* 2000 (2) SA 188 (W) at 190B - C). **Any other conclusion gives rise to an unacceptable anomaly:** If an applicant applies for an *interim* order with notice

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8 2000 (4) SA 746 (SCA) at para [6]

> and the application is dismissed, he has **no** order pending the appeal; on the other hand, the applicant who applies without notice and obtains an *ex parte* order coupled with a rule *nisi* and whose application is eventually dismissed, has an order pending the appeal.' (emphasis provided)

[19] It is the conditionality of the *interim* order on the final decision that is the reason why an appeal does not revive the *interim* order once the final decision is made and subjected to appeal.

[20] The *interim* order has, for purposes of determining the position of the parties pending appeal, been '*erased*' by the final order. Nonetheless, Huayou contends that the aforegoing *dicta* by Harms JA was *obiter*, predates section 18 and does not effect its interpretation of section 18.

[21] I make no findings on whether such *dicta* was *obiter*, but refer to *National Director of Public Prosecutions v Rautenbach*[9], at paras [12] where Nugent JA referred to para [6] in the *MV Snow Delta* matter with approval and restated the underlying principle being that a litigant:

> '...who secures such an order [ex parte] is not better positioned when the order is reconsidered on the return day.....It follows that when an appeal is sought to be brought against the discharge of such an order there is nothing to revive for it is as if no order were made in the first place.'

[22] Huayou argues that Section 18 of the Act is a wide ranging statutory provision with the fundamental objective of effectively preserving the *status quo* pending the exhaustion of all available remedies on appeal, in the case of decisions which are final in effect. This, so the argument goes, is to prevent irreparable damage being done to the intending appellant by implementing the decision (or judgment appealed

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9 2005 (4) SA 603 (SCA)

against) pending the appeal. It is suggested that the intention of the legislature, by the introduction of Section 18 of the Act, is to significantly increase the protection afforded to preserving of the *status quo* by repeal of the Court's wide common law discretion. It supersedes older case law and common law in this regard.

[23] My final order is, it is argued, accordingly governed by Section 18 (1) of the Act and is thus suspended. No application has been made in terms of Section 18 of the Act, for the Court "*under exceptional circumstances*" to order that this decision be put into operation pending the hearing of the present application or a subsequent application for leave to appeal for which the warehouses and Gerald only have themselves to blame. Huayou contends that its interpretation of section 18(1) results in the *interim* order being revived, and that this better promotes the spirit, purport and objects of the Bill of Rights in that such interpretation better protects Huayou's constitutional right of access to courts. It argues that if the *interim* interdict is not revived by the appeal process, or the *interim* interdict extended, its consitutional right will be '*unjustifiably violated*'.

[24] In my view, the aforegoing interpretation is fundamentally flawed. Section 18 of the Act suspends the '*operation and execution of a decision*'. Even if it were assumed that the *status quo* should be preserved, the question is, which *status quo*? Is it the *status quo,* which existed before the *interim* order was granted (i.e. when no order was in place at all) or the one which existed before my final order (i.e the *interim* order which was in place interdicting the release of the materials)?

[25] This question was authoritatively answered in *Rautenbach*[10] where Nugent JA explained the position thus:

> "[11] The appellant submitted that in the present case two separate orders were made - first, the provisional order that was made by Blieden J and secondly, the order by Rabie J discharging it - and that the effect of initiating an appeal against the second order was to suspend only that order, with the logical result that the first order remained extant.
> [12] **That is to misconstrue the true nature of the orders**. As pointed out by Goldblatt J in *Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc and Another* 2000 (2) SA 188 (W) at 190B - E, orders of this kind are not independent of one another. An *interim* order that is made *ex parte* is by its nature provisional - it is *'conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side'* (per Harms JA in *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) in para [6]), which is why a litigant who secures such an order is not better positioned when the order is reconsidered on the return day (*Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) in para [45]). It follows that when an appeal is sought to be brought against the discharge of such an order there is nothing to revive for it is as if no order were made in the first place."

[26] The two orders are not independent of one another. The former (the *interim* order) is *conditional upon* confirmation by the same Court (*'albeit not the same judge'*[11]). The phrase *'operation and execution of an order'* in rule 49 (11), was adopted, unchanged, by Parliament in section 18 of the Act. Parliament can be taken to be aware of the interpretation given to this phrase by the SCA in *MV Snow Delta,* and by not changing the words, signified that there was no legislative intention to alter this interpretation.

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10 see footnote 8
11 See para [20] hereof

[27] I therefore conclude that the filing of the application for leave to appeal did not trigger the suspension of the operation or execution of the final order as envisaged in section 18(1) of the Act, nor did it revive the *interim* order.

APPLICATION FOR LEAVE TO APPEAL

[28] In the decision of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*[12], Wallis JA observed that a court should not grant leave to appeal, and indeed is under a duty not to do so, where the threshold which warrants such leave, has not been cleared by an applicant in an application for leave to appeal. In paragraph [24] he held as follows:

> "[24] For those reasons the court below was correct to dismiss the challenge to the arbitrator's award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to her reasons for thinking that enjoyed reasonable prospects of success. Clearly it did not. Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit**. It should in this case have been deployed by refusing leave to appeal." (emphasis added)

[29] It bears mentioning that the legislature has deemed it appropriate to raise the bar by providing in section 17 of the Act that what an applicant in an application for leave to appeal should show is that the appeal '*would* ' have reasonable prospects of success, not '*may* '.

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12 2013 (6) SA 520 (SCA)

[30] I have considered the grounds of appeal and the arguments advanced in the application for leave to appeal. I do not intend dealing with each ground of appeal. I have nothing to add to that which is contained in my judgment.

[31] I should however say a few things about the new approach adopted in ground 12 of the notice of appeal. Huayou now concedes that it has no right at all against the warehouses but argues that it's case is that the warehouses hold goods, delivery of which is due to Huayou. They contend that the warehouses are in a position of stakeholders and once the NNR detention is lifted, they would face competing claims, one from Gerald for release of the goods and an adverse claim by Huayou for delivery to it of the same goods.

[32] I disagree. The warehouses are not in the position of stakeholders and this has never been alleged against them. Furthermore, they do not face competing claims from Gerald and Huayou. They face no claim at all from Huayou. For this argument to have any merit, the *status quo* relief would have had to be pending by Huayou against the warehouses for delivery of the material. But it was never formulated in this way because Huayou has no claim against the warehouses. Huayou has never alleged such a claim, and how it arises (ie whether in contract or delict or enrichment).

[33] Huayou conceded that it could have approached a court in London for *interim* relief and if successful, could have applied in a South African court to have such an order enforced. Its failure to have done so was justified on the basis that there is more than one way to skin a cat. This concession defeats one of the requirements for an *interim* interdict being that there should be no alternative remedy. Huayou placed much reliance on the fact that it alleges it's relief is quasi-vindicatory and that this

requirement is accordingly dispensed with. On its own version, this issue is still something that needs to be ruled on in the arbitration hearing in London.

[34] The applicant must allege and establish, on a balance of probabilities that it has no alternative remedy. The dispute resolution tribunal mechanism mandated by the agreement concluded between Gerald and Huayou is applicable. In *Meyer v Administrateur, Transvaal*[13] Hiemstra J held that arbitration, which was applicable in the circumstances, was a suitable alternative remedy and he was not prepared to grant a final or *interim* interdict. I remain of the view that there is no justifiable reason why Huayou could not proceed against Gerald (and not the warehouses) before the LME and the UK High Courts. Mr Hancock QC confirmed that the LME would have the power to make an order as against the parties to the arbitration agreement under Regulation 10.1 (i) of the LME Regulations.

[35] Another feature I consider necessary to address are my findings in respect of Huayou's failure to have made an unconditional tender to perform should specific performance be awarded and its failure to have indemnified the warehouses for any damages they might suffer as a result of the interdict. The two separate and distinct issues appear, in some instances, to have been conflated both in the application for leave to appeal and in argument before me.

[36] Huayou wants specific performance of the goods held by the warehouses. This is what they are claiming in the arbitration proceedings in London. They have not made an unequivocal tender to pay the full contract price. In the absence of such

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[13] 1961 (4) SA 55 (T) at 58 F - G

tender from its founding papers, specific performance is not competent[14]. There simply does not appear to be a response to this *lacuna* in the papers.

[37] Huayou's founding affidavit contains no undertaking that it would pay Gerald (or the warehouses) such damages as they may suffer as a result of the *rule nisi* being set aside and/or Huayou failing in the arbitration proceedings in London. The damages that arise from the interdict being wrongly granted, arise in South Africa and ought to have been the subject of an undertaking. Admittedly at the hearing it was suggested that the order be amended to include an invitation to the warehouses that should their position change prejudicially at any point they could approach a court for relief.

[38] This is cold comfort as this option is available to the warehouses in any event, whether included in the order or not. The warehouses' difficulties are compounded by the fact that Huayou is a peregrinus. The warehouses are not parties to the proceedings in London and an undertaking, as Huayou does to pay such damages as may be finally awarded in favour of Gerald in the arbitration proceedings in London, does not assist the warehouses who are not parties to such proceedings and thus have no *locus standi*. Huayou also appear to be arguing one thing in London and another in South Africa. In London it contends that Gerald's counterclaim for damages falls outside the contract.

[39] The two overriding considerations for refusing leave to appeal are, firstly, that Huayou had the UK courts available to it as well as the LME to protect its interests

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[14] *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* 1955 (3) SA 541 (N) at pp 542H – 543B; *RM Van de Ghinste and Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) at p 256 E-G; *Sandown Travel (Pty) Ltd v Cricket* SA 2013 (2) SA 502 (GSJ) at para 62

but elected not to go that route. It initiated proceedings in London claiming, *inter alia*, the goods in the warehouses and five days later, approached a South African court, *ex parte* and urgently for the *interim* order. I have dealt with this extensively in the judgment. Secondly, the relief Huayou procured behind the back of Gerald, does not, in any event, protect its interests adequately. It does not prevent a subsequent sale.

[40] Having carefully considered all the grounds of the application for leave to appeal, I am driven to conclude that Huayou would not have reasonable prospects of success on appeal.

THE EXTENSION APPLICATION

[41] The applicant applied on 13 November 2017 for the following relief:

> '1. That, in the event that the applicant's application for leave to appeal is granted, the interim relief granted by the Honourable Mr Justice Wepener on 18 May 2017, and which was further extended by Order of the Honourable Ms Justice Opperman on 3 November 2017 ("the interim relief"), is further extended pending the final determination of the applicant's appeal.
> 2. Alternatively, and in the event that the applicant's application for leave to appeal is dismissed, that the interim relief is extended pending the final determination of the applicant's application to the Supreme Court of Appeal which must be delivered within one month from such dismissal by this Court of leave to appeal.'

[42] The extension application is not an application brought in terms of Section 18 of the Act. Prayer 1 of the extension application caters for the situation where leave to appeal is granted, the alternative, prayer 2 of the extension application, caters for a refusal of applicant's application for leave to appeal.

[43] The application is thus necessary as I have now found, that the launching of the application for leave to appeal, did not suspend the operation and execution of the final order and that the application for leave to appeal would not have reasonable prospects of success.

[44] In *Kelly Group Ltd v Jockey Club of South* Africa[15], the court held as follows:

> 'I do not believe that the mere fact that an interim interdict is discharged on the return day, when the final interdict is considered, precludes the applicant from succeeding in obtaining an interim interdict pending an appeal against that decision. I do however accept the correctness of the Constantinides decision, that if an application for an interim interdict is refused, on the basis of a finding that no prima facie right has been established, the court is not entitled to grant an interim interdict pending the appeal.'

[45] In the present circumstances, Huayou contended that this court did not make a finding as to whether it had established a *prima facie* right. I disagree. This court addressed this feature in paras [19] and [55] – [60] in which I had found no right, let alone a *prima facie* right, as against the warehouses. Gerald was cited as an interested party only. No relief was sought against it. Whether Huayou has a *prima facie* right against Gerald was, and remains, irrelevant. But even if I were wrong on this, Huayou has admitted that this Court has no jurisdiction over Gerald. Without jurisdiction being established, all other considerations are of no consequence.

[46] These findings, i.e. the absence of a *prima facie* right as against the warehouses and the admitted absence of jurisdiction against Gerald, accordingly, and applying the principle formulated in *Kelly Group* as quoted herein before, puts an end to the extension application.

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[15] 2010 (5) SA SA 224 (GSJ) at 21.

[47] As mentioned earlier, the relief Huayou obtained, does not protect its interests adequately as it does not prevent a subsequent sale. It serves no purpose to extend ineffective relief.

ORDER

[48] I accordingly grant the following order:

48.1. The application for leave to appeal is refused with costs including the costs consequent upon the employment of two counsel.

48.2. The application for the extension of the *interim* relief granted by Wepener J on 18 May 2017 pending the final determination of the applicant's application to the Supreme Court of Appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Heard: 27 November 2017
Judgment delivered: 15 December 2017
Further heads of argument received: 29 November 2017, 1 and 4 December 2017
Appearances:
For Applicant: Adv C. Badenhorst SC
Adv M. Williams
Instructed by: Attorneys: Werksmans Attorneys
For First to Third Respondent: Adv J. Campbell SC
Adv B. Maselle
Instructed by: Bowman Gilfillan
For Fourth Respondent: No Appearance