REPUBLIC OF SOUTH AFRICA

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

CASE NO: 44762/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
(4) Judgement Delivered Electronically by E-Mail

29/05/2020
DATE

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SIGNATURE

In the matter between:

DALENE GLENBA ORONI	**1st APPLICANT**
INCENTIVES AT SEA AND BEYOND (PTY) LTD	**2nd APPLICANT**
And	
CRUISE INTERNATIONAL SA (PTY) LTD	**RESPONDENT**
In re:	
CRUISE INTERNATIONAL	**PLAINTIFF**
And	
DALENE GLENBA ORONI	**1st DEFENDANT**
INCENTIVES AT SEA AND BEYOND	**2nd DEFENDANT**

JUDGEMENT ON LEAVE

MATSHITSE, AJ:

Introduction

[1] In this matter the Applicants has brought an application to appeal against this court's order of the 07th April 2019 wherein it was ordered that:-

1.1 First Defendant/Respondent to provide to the Applicant/Plaintiff the documents requested in its notice of Rule 35(3) dated 8 June 2018 more particularly to all agreement and contracts concluded between herself and Development Promotion (Pty) Ltd from 01 March 2017 to 30 April 2018, within ten(10) days from date of service of the courts order;

1.2 Second Defendant/ Respondent to provide to the Applicant/Plaintiff the documents requested in its notice of Rule 35(3) dated 8 June 2018 and particularly

1.2.1 all bank statements from 01 march 2017 to 30 April 2018 in respect of each and every bank account held by the second defendant/respondent,

1.2.2 all agreements and contracts concluded between second respondent and Development Promotions (Pty) Ltd from 01 March 2017 and 30 April 2018.

1.3 First and Second Respondents to pay the costs of the application

The court will not repeat the reasons as why it came to the above order as same where stated on the judgement including the background to the application

Brief Summary of the Reasons of Appeal

[2] The Court will not state the whole reasons as state by the Applicants in their application for leave to appeal dated 29 May 2019 and also on their heads of arguments, which were presented on the day of hearing of this matter. The court will summarise reasons of leave to appeal as follows:-

the Court erred in granting the order in:

2.1 fact and law, in finding that the agreements should be provided, because he (the Learned Judge) he believed that the agreements existed as he ought to have applied the principle that a probability with some degree of certainty as to the existence of the agreements established by the plaintiff in order to go behind the affidavits of the first and second respondents. The believe of the learned Judge in the absence of a finding that there is a probability the agreements exist is not sufficient in fact or in law to go behind the first and second respondents' affidavits;

2.2 That prior to the granting of the order mentioned in paragraph 1 above Development Promotions (Pty) Ltd ("DevProm") was reluctant to can provide first and second respondents with an affidavit confirming that there were no written agreements between it and the first and second respondent, however subsequent to the granting of the above mentioned order DevProm have agreed to provide the confirmatory affidavit to the effect that there are no written agreements between itself and the first and second respondent. As a result, the respondents

wish to bring an application on appeal, that the confirmatory affidavit from DevProm be accepted as evidence;

2.3 The Court erred in granting an order for the discovery of the agreements for the period 1 March 2017 and 30 April 2018 as the period is not claimed for in the Plaintiff's particulars of claim;

2.4 The court erred in fact and law in respect of the order that the second respondent provide to the applicant all bank statements from 1 March 2017 to 30 April 2018 in respect of each and every bank account held by the second respondent, since Plaintiff has failed to furnish a substantive basis or cause of action or probabilities with a reasonable degree of certainty that further bank statements are relevant;

2.5 The court erred in granting an order that first and second respondents to pay the costs of the application.

[3] Application was opposed by the Respondent/Plaintiff. Though it did not file any papers, however heads of argument were presented in court on the day of hearing of the matter and also counsel for the respondent argued from the bar.

[4] According to the Plaintiff's heads of argument and submission by the application by Defendants ought to be dismissed on the following reasons:

4.1 the order is in its nature not appealable;

4.2 even were the order to be appealable, the defendants have not met the threshold for leave to appeal.

[5] The issues in this appeal are two-fold. In view of the interlocutory nature of the order of this court the first issue that arises for determination is whether it is appealable or not. The court believes that the starting point is to determine if the abovementioned order is appealable or not, if the court can find that the order is appealable then the second question to be decided is, as put by the plaintiff on its heads of argument, have the defendants met the threshold for leave to appeal to be granted or not.

Is the order Appealable or not?

[6] Counsel for the defendant argued from the bar that it will be in the interest of justice that the court should grand the defendants leave to appeal the above order. He referred the court to paragraph 8 and 9 of the case Nova Property Group Holdings Limited and others v Cobbett and another (MANDG Centre for Investigative Journalism NPC as amicus curiae) (20815/2014) [2016] ZASCA 63 (12 May 2016) (SCA)

"[8] On the test articulated by this court in *Zweni v Minister of Law and Order,*[1] the dismissal of an application to compel discovery, such as by the court a quo, is not appealable as it is (a) not final in effect and is open to alteration by the court below; (b) not definitive of the rights of the parties; and (c) does not have the effect of disposing of a substantial portion of the relief claimed. However, three years later in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service,*[2] this court held that the requirements for appealability laid down in *Zweni* '. . .[d]o not purport to be exhaustive or to cast the relevant principles in stone'. Almost a decade later, in *Philani-Ma-*

[1] *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532J-533A.
[2] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 10E-G.

Afrika v Mailula,[3] this court considered whether an execution order (which put an eviction order into operation pending an appeal) was appealable. It held the execution order to be appealable, by adapting 'the general principles on the appealability of interim orders . . . to accord with the equitable and more context-sensitive standard of the interests of justice favoured by our Constitution'.[4] In so doing, it found the 'interests of justice' to be a paramount consideration in deciding whether a judgment is appealable.[5]

"[9] It is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts.[6] The considerations that serve the interests of justice, such as that the appeal will traverse matters of significant importance which pit the rights of privacy and dignity on the one hand, against those of access to information and freedom of expression on the other hand, certainly loom large before us. However, the most compelling, in my view, is that a consideration of the merits of the appeal will necessarily involve a resolution of the seemingly conflicting decisions in *La Lucia Sands Share Block Ltd & others v Barkhan & others*[7] and *Bayoglu*[8] on the one hand, and *Basson v On-Point Engineers (Pty) Ltd*[9] and *M & G Centre for Investigative Journalism NPC v CSR-E Loco Supply*[10] on the other".

[7] He further submitted that by ordering that the Defendants discover the documents ordered will invade their privacy.

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[3] *Philani-Ma-Afrika & others v Mailula & others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA). See also *S v Western Areas Ltd & others* [2005] ZASCA 31; 2005 (5) SA 214 (SCA) paras 25-26; *Khumalo & others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) para 8.
[4] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 53.
[5] *Philani-Ma-Afrika* para 20.
[6] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & others* [1998] ZACC 9;1998 (4) SA 1157 (CC) para 32.
[7] *La Lucia Sands Share Block Ltd & others v Barkhan & others* [2010] ZASCA 132; 2010 (6) SA 421 (SCA).
[8] Footnote 2 above.
[9] *Basson v On-Point Engineers (Pty) Ltd & others* (64107/11) [2012] ZAGPPHC 251 (7 November 2012); 2012 JDR 2126 (GNP).
[10] Footnote 2 above.

[8] On this point counsel for the Plaintiff on its heads of argument referred the court to the cases of Zweni v Minister of Law and Order, Nova Group Property Holdings Limited as quoted above and the case of Guardian National Insurance Co Ltd v Searle NO 1993 (3) SA 296 (SCA) at 301

[9] He further argued that a judgment or order is a decision which, as a general principle, has three attributes: -

[9.1] first, the decision must be final in effect and not susceptible of alteration by the court of first instance;

[9.2] second, it must be definitive of the rights of the parties; and

[9.3] third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceeding,

As such the defendant's application for leave to appeal stand to be dismissed since it does not meet the above requirements

[10] It is not in dispute that this court's order mentioned in paragraph 1 above does not dispose off the whole matter, the trial court still have to make a final determination of the whole matter. Accordingly, when eventually the trial Court's award is made it could still be open to either party to appeal the decision of the said court or not

[11] The eventual decision of the trial court might bear little or no trace of having been influenced by this court order mentioned above in paragraph 1. Appeals must be entertained upon issues which are live, not academic. And cost-effectiveness is also a most material consideration. The enquiry as to

appealability is therefore "whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution" (Zweni's case at 531 J - 532 A).

[12] A somewhat similar formulation is to be found in Priday t/a Pride Paving v Rubin **1992 (3) SA 542** (C) at 547 E, save that the reference there was not to "the main dispute" but to "one or more of the disputes", a phrase on which counsel for defendant sought to call in aid. It does not assist him. Manifestly the disputes which the trial judge in Priday had in mind could not realistically have been disputes on evidential issues or, as here, disputes about methods of calculation. They were obviously disputes the resolution of which would pronounce finally upon the claim or defence concerned or a substantive element of the claim or defence.

[13] One may put it this way. If this court order, mentioned in paragraph 1 above, will still be relevant after the final award, then the defendants will still be at liberty to attack this order in the course of an appeal against the decision of the trial court. If it is not, there will be no justification for an appeal directed against it. And if such an appeal against this court's order will not be justified then, as may be the case, plainly it will not have been justified now.

[14] As to the disposal of disputes in an efficient and cost- effective way, what remains to be done in the trial in the instant case cannot take much

Court time. Subsequent to the award, when made, the defendant will, if armed with grounds for leave to appeal, have the opportunity to appeal in any event.

[15] As stated in the case of Nova Property Group Holdings Limited and others that it is established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts, therefore this court cannot find any exceptions that have been made in order to grant leave to appeal this interim order in the interest of justice. Counsels argument that by discovering the documents as ordered by this court will invade the defendants privacy was dealt with by this court when it gave its reason on the its previous judgement and as such same will not be repeated here

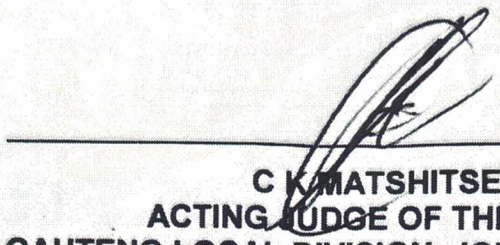
[16] Therefore this court is of the view that the order it has given is not final and does not dispose off a substantial part of the relief claimed as such the application for leave to appeal this courts order as stated above stand to be dismissed.

[17] As a result this find that it would not be necessary to look into the second argument raised as to whether the defendants have satisfied the threshold for leave to appeal to be granted or not.

[18] The following order is made:

The application for leave to appeal is dismissed with cost of two counsels.

DATED at JOHANNESBURG on this the 29th day of May 2020



C K MATSHITSE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	06 March 2020
DATE OF JUDGMENT delivered by E-Mail	10 June 2020
FOR APPLICANT	ADV C WHITCUTT SC and C VAN CASTRICUM
INSTRUCTED BY	STEIN AND SCOP ATTORTHEYS GROUND FLOOR 18 MELROSE BOULEVARD MELROSE ARCH JOHANNESBURG
FOR RESPONDENT	ADV W B BOONZAIER
INSTRUCTED BY	GRESSE & ASSOCIATES INC C/O KG TSERKEZIZ INCORPORATED 37 OLD KILCULLEN ROAD BRYANSTON, JOHANNESBURG