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
20/10/2020
DATE SIGNATURE

CASE NO: 22849/2020

In the matter between:

THAMSANQA CYPRIAN NKOSI	Applicant
and	
CAMEL LOGS TRADING AND PROJECTS (PTY) LTD	1st Respondent
FIRST NATIONAL BANK, A DIVISION OF FIRST RAND LIMITED	2ND Respondent
TST BROKERS (PTY) LTD	3rd Respondent

JUDGMENT

MIA, J

[1] I shall refer to the parties as in the urgent application. The appellant was the first respondent in an urgent application for an interim interdict which I heard on 3 September 2020. An order was granted on the 3 September 2020 and reasons furnished later.The first respondent applied for leave to appeal against the judgment

and order which was an interim order pending the final determination of the disputes between the parties by way of arbitration proceedings, to be instituted in terms of a sale of shares agreement.

[2] The first respondent's application for leave to appeal was against my factual findings and interpretation of the law relating to urgent applications and was set out as follows:

2.1 The first respondent submitted that the court erred in finding that the applicant had proved that the matter was urgent specifically in that it had not complied with the Practice Directive of the South Gauteng Local Division(the Directives) with regard to urgency. The matter did not bear a court stamp and the first respondent could not comply with the time frames.

2.2 The court did not take account of the applicant's failure to comply with its own time frames resulting in the matter standing down on 2nd September 2020 and the applicant filing a replying affidavit. This was contrary to the Directives of the Division and to the decision in *Luna Meubels Vervaardigers(Edms)Bpk v Makin t/a Makin Furniture Manufacturers* 1977(4) SA 135.

2.3 The court erred in finding that the applicant made out a proper case and finding that the matter was urgent and warranted a hearing.

2.4 The court misdirected itself in finding that the applicant was entitled to the relief it sought despite evidence to the contrary.

2.5 The first respondent demonstrated that the applicant failed to make out case in its founding affidavit and sought to revive it in the relying affidavit which is contrary to all motion court proceedings.

2.6 The first respondent alleged the court erred in rejecting the argument that there was a dispute of fact which could not be resolved on the papers. It was common cause that the first respondent was entitled to monies in the third respondent's account.

2.7 The first respondent furthermore alleged that the court erred in dismissing the point *in limine* in so far as it related to *locus standi* to institute proceedings.

2.8 The first respondent also contended that the court erred in accepting the late filing of the affidavit of Mr Mashiane without a substantive application. Furthermore, the court downplayed the importance of a confirmatory affidavit if regard was had to the averments made in the main affidavit, which was mainly hearsay.

2.9 Finally, the applicant alleged that it appeared that the court may have prejudged the matter in that it did not take any issue with the applicant's address but appeared irritated with the first respondent's address.

[3] On the first point Mr Ndlovu argued, I had misdirected myself in finding the applicant had made out a case for urgency. The applicant's papers were unstamped. The time reflected for the first respondent to file an opposition was 16h00 on 31 August 2020 but the time the matter was served was at 17h20 on 31 August 2020 which was already defective. In addition the applicant was not ready to proceed to argue the matter whilst the first respondent was. The applicant's papers were defective in that the confirmatory affidavit of Mr Mashiane was not filed on the 2 September 2020. The matter was postponed to enable the applicant to file same. He submitted thus, that the applicant's case was made out in the replying affidavit which contained the confirmatory affidavit of Mr Mashiane. Mr Ndlovu continued that it was trite that the applicant was required to make out its case in its founding affidavit.

[4] Mr Ndlovu contended that the interim interdict was final in that the time that ran could not be recalled. (*Radio Islam v Chairperson, Council of the Independent Broadcasting Authority, & another* 1999 (3) SA 897 (W). He explained that at present, the decisions taken by the applicant could not be recalled. Therefore, the first respondent was suffering prejudice. He further stated that it affected the first respondent's standing as the director of TST Brokers. In addition he argued that decisions taken by the applicant could not be recalled. This he submitted prejudiced the first respondent. Such prejudice he submitted could not be remedied at any given time. The effect of the order he submitted was that the applicant could do as it pleased. In this regard, he submitted another court would surely arrive at a different decision than this court arrived at. He relied on the case of *Cipla Agrimend (Pty) Ltd v Merck Sharp Dohme Corporation and Others* [2017] 4 All SA 605 SCA to support his submission that the decision I made was final in effect. At paragraph [29], the Court held:

> "...The trial court cannot be the final arbiter of whether its order is final in effect and substance. If it were otherwise, a trial court's granting of leave to appeal would be dispositive, which clearly it is not. This court has said on multiple occasions that in determining whether an order is interim or final (and thus appealable) it is not the form but predominantly the effect of the order which is important....
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> "The legal test, according to *BHT* (as apparently confirmed in *Reddy*), is that an interdict is final in effect if the trial court will not have another opportunity to make a final determination before the restraint (or here, the patent) expires. If that legal test is right (or assumed, without so deciding, to be right), there is no avoiding an enquiry into whether, in the present case, the CCP would have had an opportunity to make a final determination before 3 December 2018..."

[5] Mr Ndlovu argued for the first time that the agreement had many constitutional loopholes. The submission was not raised during the urgent hearing on 3 September 2020. He argued that this court could not

decide the constitutional loopholes. The court in granting the interdict was granting unfettered control to the applicant. When referred to paragraph 6.1 of the agreement, he agreed that the agreement did not make provision for the first respondent to hold exclusive control in the interim period until the effective date when final payment was made. He argued, however, that this provision was not fair. Mr Ndlovu argued further that there was a dispute of facts on the papers which ought to have been referred to oral evidence. It was common cause he continued, that the parties disagreed about what benefit the first respondent was entitled to. For that reason alone, he continued this court was not best placed to dispose of the matter by way of an interim order. The matter should have been referred to trial. When referred to the arbitration clause, he argued that this court was not aware whether the matter had been referred to arbitration as yet or not and the first respondent should not be forced to refer the matter to arbitration when the applicant had brought him to court. He continued that the matter ought to have been dealt with in this forum rather than arbitration since the applicant launched the application in this forum. He took the argument no further when it was put to him that the first respondent was at liberty to pursue the matter in either forum without coercion to protect his rights.

[6] Regarding the issue of service, he submitted that the issue of service needed to be interrogated more closely than I had done. He submitted that I did not deal with the details in that Mr Mostert did not dispute that the application was issued on 31 August 2020 and was served at 17h00 in the afternoon and required the respondents to notify the applicant of their opposition by 16h00 on 31 August 2020. In essence, the first respondent was served at 17h00 an hour later than the time they were required to respond. The first respondent ought to have been afforded a reasonable time to look at the application consider his position and time to respond. Nonetheless, he continued, the first respondent decided to oppose the application and to file his response. Mr Ndlovu continued that the applicant's lack of compliance continued in that on the day the matter was set down to be argued, the applicant was not ready to argue

whilst the respondent was ready to proceed. The court ruled that the matter be rolled over to enable the applicant to file a replying affidavit. A time limit was imposed for the filing thereof, and again the replying affidavit was not served before 16h00 as directed by the court; instead, it was served before 20h00 that evening. Once again he submitted there was non-compliance with urgency based on the *Luna Meubels* case and in such event the court ought to have struck the matter from the roll where the applicant was not compliant with the Directives. He argued that the court should deal with urgent matters and those that could not wait a minute longer. The applicant had rushed to court and was not ready. The applicant had served the replying affidavit late in the same way it served its application without regard for the Rules and the Directives and it was necessary to file the replying affidavit as there was no case in the founding affidavit. The reason for this he argued was because the confirmatory affidavit was not attached, and the importance of a confirmatory affidavit is trite.

[7] Finally Mr Ndlovu submitted that the applicant's lack of *locus standi* which was challenged in addition to the other grounds all amounted to errors on the facts and law which were such that the appeal would have reasonable prospects of success.

[8] Mr Mostert argued that the interim order was not appealable and this court was not requested to determine competing rights of the parties. The sale of shares agreement provided for referral to arbitration in the event of a dispute. The parties competing rights would be determined at arbitration. In response to the referral to the *Radio Islam* case above, he referred to page 911 at paragraph H and argued that the first respondent did not raise the issue in their opposition that the agreement was oppressive or that it was in the interests of justice. In this regard, he referred to paragraphs 38,47,48 and 74 of the answering affidavit where there was no mention made by the first respondent that the agreement is oppressive. Instead, he argued the first respondent's attitude throughout remained that it was his money, and he was entitled to the

money. The first respondent relied on that leg and could not make out a different case in the application for leave to appeal. In any event, he continued the interim order was not appealable.

[9] Furthermore, regarding appealability of the interim order, Mr Mostert referred to the *Cipla* case above, where the Court stated at paragraph [38]:

> "[38] It is worth briefly sketching the general approach to appealability. Section 20(1) of the Supreme Court Act[1] provided that an appeal lay from a 'judgment or order'.[2] These words were interpreted in *Zweni v Minister of Law and Order*:[3]
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> 'A "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.
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> This court has held that those three requirements do not constitute a closed list. This was made plain by the use of the words 'as a general principle'. In addition, the interests of justice are of paramount importance. However, since Cipla relies solely on what is meant by 'final in effect' in submitting that the order in question is appealable, the enquiry need only be confined to this.
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> [39] The appeal ability of interlocutory orders has been considered over time. One of the earliest matters dealing with this is *Prentice v Smith*,[4] where the court held that an order which grants an interim interdict 'is an interlocutory order, and that consequently there can be no appeal.' The earliest statement of the test in this court was that of Innes J in *Steytler NO v Fitzgerald*:[5]

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[1] Supreme Court Act 59 of 1959.
[2] The words 'any decision' in s 16(1) of the Superior Courts Act 10 of 2013 hold the same meaning. See *Van Wyk v S; Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA); [2014] 4 All SA 708 (SCA) para 20.
[3] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).
[4] *Prentice v Smith* (1889) 3 SAR 28 at 29.
[5] *Steytler NO v Fitzgerald* 1911 AD 295 at 313.

'It is sufficient for the purposes of this case to say that when an order incidentally given during the progress of litigation has a direct effect upon the final issue, when it disposes of a definite portion of the suit, then it causes prejudice which cannot be repaired at the final stage, and in essence it is final, though in form it may be interlocutory.'

In that matter, a special plea was raised as to jurisdiction and was dismissed. This court held that, although made in the course of the action between the parties, it disposed of a definite portion of the suit and was, accordingly, in essence final and thus appealable. This was an early, clear, statement of what is meant by 'final in effect' or 'in essence . . . final'. In *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)*,[6] Innes CJ restated and clarified what he said in *Steytler*:

'It was then laid down that a convenient test was to inquire whether the final word in the suit had been spoken on the point; or, as put in another way, whether the order made was reparable at the final stage.'

[10] Mr Mostert submitted that having regard to the decision in the *Cipla* case above the interim order did not possess any of the three attributes referred to in *Cipla*, capable of rendering the interim order appealable. This was so he continued as it was not final in effect as it governed limited aspects until the arbitration finalised the disputes. In addition he continued the interim order did not define the rights of the parties. The parties' conflicting contentions regarding their rights will be resolved at arbitration. Besides, he submitted the interim order did not dispose of any relief that would be claimed in the arbitration proceedings. Thus he submitted the interim order was not final in any shape or form or way. The application for leave further did not make out a case that it would be in the interests of justice to grant leave against the interim order. Thus he submitted the interim order was not appealable and should be dismissed with costs.

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[6] *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601.

[11] Regarding the first respondent's complaint about how I dealt with the urgency, Mr Mostert argued that the court's finding on urgency was a procedural directive and involved a judicial discretion which was not appealable. The applicant had succeeded in persuading the court that it would not be afforded relief if the interim relief were not granted, i.e. the harm was irreparable. In any event, Mr Mostert submitted that at the urgent hearing there was no opposition to the matter standing down on the day. Ultimately, Mr Mostert submitted that it was within the court's discretion to determine whether a matter should be heard as a matter of urgency. He pointed out that an appeal court would not readily interfere with a trial court's discretion. The Court had in *Highveld Steel and Vanadium Corporation Ltd v Oosthuisen* 2009(4) SA 1 SCA at paragraph [7] confirmed that a ruling on urgency was a procedural ruling with no final impact on the rights of the parties. He argued that this was further support that this court's finding on urgency was thus not appealable.

[12] Mr Mostert argued that there was no evidence or particularity to support the first respondent's submissions that the court misdirected itself by granting the interim order. The first respondent failed to particularise the evidence relied upon and thus he was unable to address this aspect other than to point out that the facts in the matter fully justified the granting of an urgent order in the application.

[13] On the point that the applicant failed to make out its case in the founding affidavit Mr Mostert argued that this point was manifestly without merit as the founding affidavit contained all the allegations necessary to satisfy the requirements for an interim interdict and no new matter was introduced. He argued therefore, that this ground ought to fail as well.

[14] Mr Mostert submitted that the first respondent was mistaken in relying on the case of *Plascon Evans Ltd v Van Riebeeck Paint (Pty) Ltd* 1984(3) SA 624 AD which applied to an application for a final interdict. The applicant had applied for an interim interdict, and the *Plascon Evans* rule

did not apply. He continued that the applicant did not have to establish a right on a balance of probabilities. It was sufficient if the right was established on a *prima facie* basis, although open to some doubt. Consequently, he argued this ground was also destined to fail.

[15] In response to the ground that the court refused to uphold the first respondent's point *in limine,* Mr Mostert referred to the same authority relied upon in the main application and submitted that to challenge the applicant's authority the first respondent was required to utilise Rule 7 proceedings as described in *Ganes and Another v Telecom Limited Namibia Ltd* [2004] 2 All SA 609 (SCA) at paragraph [19]. The first respondent did precisely what the Court in the *Ganes* case said it should not do. The first respondent contends that the applicant relied on hearsay evidence because the founding affidavit was delivered late. Having regard to the definition of hearsay, this was not true. In any event, the confirmatory affidavit was delivered before the first respondent's answering affidavit was delivered. Thus all the evidence was before the court and was not hearsay, he continued. He submitted; therefore that there was no prejudice to the first respondent, and that they had alleged none in their response. Furthermore, there was no hearsay before the court when the matter was heard as the affidavit of Mr Mashiane was before the court when the matter was heard.

[16] Regarding the allegation that the court prejudged the matter, Mr Mostert submitted that this was manifestly without merit and disrespectful. He argued that the papers had been read. During the hearing the first respondent's arguments took more time, and the court extensively engaged counsel allowing the first respondent to ventilate all issues.

[17] In conclusion, he submitted that the test in leave to appeal applications had been changed by section 17 (1) of the Superior Courts Act 10 of 2013. The important difference was in the change in the wording which raised the bar. It required that an appeal would have a reasonable prospect of success. The introduction of the word "would" indicated that

the court had to be satisfied that the appellant's application would achieve a measure of success. In the present matter, Mr Mostert argued that the first respondent would not achieve that measure of success. Because of the first respondent taking the liberty to address the court from the bar to inform me that the matter had not been referred to arbitration, he advised me that a meeting had taken placed wherein the parties agreed to refer the matter to arbitration. He thus moved for the application to be dismissed with costs.

[18] There was no reply from Mr Ndlovu.

[19] The test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on 23 August 2013, and which provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that "the appeal would have a reasonable prospect of success". I agree with Mr Mostert the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. This view has been supported in a number of decisions.[7]

[20] I have considered the submissions made by Mr Ndlovu and Mr Mostert. The submissions made by Mr Ndlovu do not persuade me that the appeal would have a reasonable prospect of success before another court. I am persuaded by the submissions made by Mr Mostert on all the grounds raised by the first respondent. I highlight a few. On the issue

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[7] *Mont Chevaux Trust v Goosen*, LCC 14R/2014 (unreported), the Land Claims Court; *MEC for Health, Eastern Cape v Ongezwa Mkitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016).

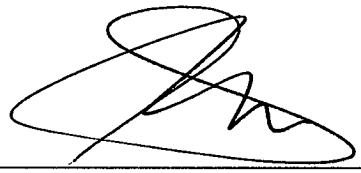
that the first respondent may refer the matter to arbitration or elect to litigate in court, Mr Ndlovu conceded the point. He did not correctly inform me that the matter has been referred to arbitration. This court has not made an order that is final in effect in my view. The issues in dispute are still to be decided. The issues about the agreement being oppressive are new and were not canvassed in the urgent hearing. The interim interdict is interlocutory in nature and thus not appealable. I was satisfied that the matter was urgent and the monies in the bank account needed to be protected from being dissipated and withdrawals by way of an interim order until the parties resolved their dispute. The applicant's submissions were persuasive and satisified me that the relief was necessary.

[21] I am not persuaded that the issues raised by the first respondent in his application for leave to appeal are issues in respect of which another court is likely to reach different conclusions. I am therefore of the view that there are no reasonable prospects that another court would come to different conclusions, be they on aspects of fact or law, to the ones reached by me. The appeal does not, in my judgment, have a reasonable prospect of success. Leave to appeal should therefore be refused.

[22] In the circumstances, I make the following order:

ORDER

1. The first respondent's application for leave to appeal is dismissed with costs.



S C MIA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv. M Mostert
Instructed by	:	JJFB Incorporated Attorneys
On behalf of the respondent	:	Adv. WB Ndlovu
Instructed by	:	Peter Zwane Attorneys
Date of hearing	:	16 October 2020
Date of judgment	:	20 October 2020