

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 48357 / 2021

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

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SIGNATURE

DATE: 2 December 2021

In the matter between:

CNA OPERATIONS (PTY) LTD	1 st Applicant
STEPHANUS MARTHINUS JOHANNES STEYN N.O	2 nd Applicant
DALLIE VAN DER MERWE N.O	3 rd Applicant
SOUTH AFRICAN COMMERCIAL, CATERING AND	
ALLIED WORKERS UNION	4 th Applicant
JOHANNES CHRISTIAAN BOTHA	5 th Applicant

REDEFINE PROPERTIES LTD

6th Applicant

and

ANGLOWEALTH SHARIA (PTY) LTD

1st Respondent

TASHYA GIYAPERSAD, N.O

2nd Respondent

SIMI MAHARAJ, N.O

3rd Respondent

DR KENNETH MOODLEY, N.O

4th Respondent

COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION

5th Respondent

JUDGMENT – LEAVE TO APPEAL AND SECTION 18 APPLICATION

MANOIM J

[1] On 4th November 2021, I granted an order rescinding an earlier judgment involving these parties. Now the one party brings two further applications for me to consider.

[2] The first is an application for leave to appeal my rescission judgment. The second, is an application in terms of section 18 of the Superior Courts Act, 10 of 2013, to declare that my rescission order is:

“... an order envisaged under section 18(1) of the Superior Courts Act 10 of 2013, the operation and execution of which is suspended pending the decision of any application for leave to appeal or any appeal; Alternatively

2. Suspending the operation and execution of the Rescission order pending the outcome and final determination of any application for leave to appeal or appeal in terms of section 18(2) of the Superior Courts Act 10 of 2013;

- [3] The parties have retained the same nomenclature as they did in the rescission application. I will follow the same convention.
- [4] Thus, Anglowealth continues to be referred to as the first respondent, which is what it was in the rescission application, although it is the applicant in both the application for leave to appeal and the section 18 application. The applicants in the rescission application will continue to be referred as such, although they are the respondents in both the latter applications. They are variously, CNA Operations (Pty) Ltd (in business rescue) or CNA, the first applicant, Stephanus Steyn N.O. the second applicant, Dallie Van der Merwe, the third applicant, South African Commercial and Catering and Allied Workers Union, the fourth applicant and Johannes Botha, the fifth applicant. For convenience I will refer to them collectively as the applicants and where necessary, to distinguish them, I refer to the first applicant as CNA, and the second and third applicants, who are the current Business Rescue Practitioners of CNA, as the BRP's.
- [5] The applicants oppose both applications.

Background

- [6] In January 2021, Anglowealth extended R 30million rand as part of a financing agreement to CNA. As security, it registered a general notarial bond over the movable assets of CNA. At that stage CNA was not yet under business rescue. CNA was placed under business rescue on 2nd June 2021.
- [7] Anglowealth then brought an application to perfect its security. This application was granted by Keightley J on 15 July 2021 on an unopposed basis, with the consent of the then BRPs (all of whom have since resigned and been replaced by the current BRP's) and CNA's directors. From now on I will refer to the order of Keightley J as the perfection order.
- [8] The effect of the perfection order was to impose stringent conditions on the future operations of the company. Effectively without the consent of Anglowealth, CNA then

in a parlous financial situation, was starved of the commercial oxygen it required to exit business rescue.

[9] New BRPs were appointed on 12 August 2021. They negotiated with Anglowealth for some relaxation of the terms of the order, but this was a temporary arrangement. On 13 October the new BRP's launched an application to rescind the perfection order. The application was supported by the company, a trade union SACCAWU and Johannes Botha, an employee representative.

[10] I heard the application on an urgent basis on 28 October 2021 and granted an order to rescind the perfection order on 4 November 2021. In brief, the basis for my decision was that in terms of High Court Uniform Rule 42(1)(a), the perfection order had been erroneously granted in the absence of "*any party affected*". This was because parties entitled to notice of the proceedings in terms of the Companies Act, viz. employees, creditors, and the holders of issued securities, had not been given this notice by the former BRP's.

[11] On 9 November 2021, Anglowealth filed an application for leave to appeal. A flurry of correspondence then flowed between the BRP's attorneys and those of Anglowealth. The dispute was whether the application for leave to appeal suspended my rescission judgment. Anglowealth's view was that it did. This meant that the *status quo* had been returned and the perfection order stood and hence they were entitled to the protection as a secured creditor. The BRPs' disagreed. Their stance was that the order was not appealable. If Anglowealth wanted to perfect its security, it needed to bring another application to do so.

[12] But Anglowealth did not bring another perfection application. Instead on 22nd November, its response was to bring an application in terms of section 18(1), alternatively section 18(2), of the Superior Courts Act for the court to declare that the effect of the leave to appeal was to suspend the operation and execution of the rescission order, pending the appeal.

[13] I heard both applications at the same time on 30th November 2021.

Events after the rescission order was granted.

[14] Since I gave my rescission order on 4 November 2021, two events of significance have happened. First, the business rescue practitioners have identified a third party willing to buy the business as a going concern. Second, the BRPs published their business rescue plan in the light of this offer. Broadly speaking the BRP's recommend the acceptance of the offer and attempt to persuade creditors why they would be better off under this scenario than the alternative of liquidation. This plan was to be put before creditors to vote on, on the same day I heard the applications, although neither party suggested I must decide the matter before this meeting took place.¹

[15] Nevertheless, in terms of that plan creditors such as Anglowealth will get no dividend. However, if the plan is approved some employees will benefit by keeping their jobs and some creditors, who do ongoing business with the company, will have the prospect of CNA retained as a future customer. Anglowealth is still intent on perfecting its security. Undoubtedly this would lead to the liquidation of the company; at least that is what the BRP's believed when they filed their papers in the rescission application.

Grounds for appeal

[16] Although several points of appeal were raised in the notice of leave to appeal, Anglowealth persists with only two; they are: (i) that the applicants were perempted from bringing the rescission and; (ii) that there has been an erroneous conflation between the notion of what constitutes an affected person for the purpose of Rule 42(1(a) and an affected person in terms of the Companies Act, 71 of 2008. I will refer to this as the 'conflation' point.

[17] The peremption point is only good if the conflation point is good. This is because if the affected parties in terms of the Companies Act (those specified in section 144(3), 145(1) and 146) are entitled to have been given notice of the perfection application, then they, and, at the very least, the fourth and fifth applicants in this matter, cannot be taken to have acquiesced in its outcome. Without acquiescence there cannot be peremption.

¹ See further on this my postscript below.

[18] As far as the conflation point is concerned there has been no conflation. The point at issue is whether one follows a traditional common law approach to interpreting Rule 42(1)(a) (the Anglowealth approach), where the parties applying for a rescission must demonstrate a direct and substantial interest or one has regard to the unique provisions given to ‘affected persons’, as they are defined in the Companies Act (the applicants approach).² Whilst both the Rule and the Companies Act use the term ‘affected’, there is no conflation of the legal distinction in the use of these terms respectively in terms of the Rule and the Act. The question relates to what rights the Companies Act confers to what it defines as ‘*affected persons*’ in terms of the business rescue provisions and hence the implications of this in how one should approach reading Rule 42(1)(a)’s reference to “*any party affected*”.

[19] Whilst I stated in my reasons that this point has, according to both parties, not previously been decided, there is a prior question to be decided before I can consider if this constitutes a sufficient ground for granting leave to appeal. I must first consider the argument by the applicants that the rescission judgment is not appealable. If that is correct, then that is decisive of the matter.

[20] The applicants argue that generally a rescission of a judgment is not appealable because it lacks the core element of finality. The leading decision on this point is the Supreme Court of Appeal (SCA) decision in ***Zweni v Minister of Law and Order*** where the court explained that, what is meant by finality is the presence of 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.”³

[21] Anglowealth argued that recent court decisions indicate a trend in which a strict adherence to *Zweni*’s three requirements has been superseded by a pragmatic, fact-based approach.

² For the traditional approach see *United Watch & Diamond Co Pt Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415A

³ 1993 (1) SA 523 at 532J -533A.

[22] Perhaps the most succinct summation of this more flexible post *Zweni* approach come in the remarks of Moseneke DCJ in the **OUTA** case where he stated:

*“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.”*⁴

[23] A subsequent example of this more flexible approach is a decision of a full bench of this division in the case of **R v R**⁵. This was an appeal against an interim award of custody. In terms of the interim order, the care and custody of a minor child was transferred from the mother to the grandmother, pending a final award. The mother appealed the interim order unsuccessfully and then petitioned the SCA. Pending that petition she sought to have the order suspended. The full court had to decide whether the order was final in effect despite being an interim order. The court held it was final in effect. Here the court explained:

“In general, the attribute of “finality” which may attach itself to a, supposedly, interim order is of course not to be equated with an order which is literally “irreversible”. The point at issue is effect not form. However, even with a reversible order, the aspects of the duration that the order is to operate, the likelihood of contingent factors that might provoke a reconsideration of the order and the logistics of a reverse transition from a change brought about by a new status quo created by the implementation of the order all weigh in the assessment of the true “effect” of an order.”

[24] These cases indicate that when the facts justify it, a more flexible approach to applying the *Zweni* factors has been adopted. But this does not mean the *Zweni*

⁴ *National Treasury and Others v Opposition to Urban Tolling Alliance and others* 2012(6) SA 223(CC) paragraph 25

⁵ 18 March 2021 case number: 44169/2019 (GDJ) paragraph 14, unreported.

requirements have been dispensed with. The question rather is whether the facts of a particular case justify such a departure.

[25] In two recent cases the SCA has continued to follow *Zweni*. Moreover, they are directly in point because both involve appeals in respect of rescission orders.

[26] In ***FirstRand bank Ltd v McLachlan and Others***⁶ the court in the passage I cite below held (Note this passage also quotes from the second case in point, *HMI Healthcare Corporation*⁷):

“The law on which judgments are appealable is settled. I am in full agreement with the counsel for the appellant that the rescission order granted by the magistrates court was not appealable in terms of s 83(b) of the Magistrates Courts Act 32 of 1944. It was an interlocutory order, which placed the parties back in the position in which they were before the rearrangement order was granted. This court in HMI Healthcare Corporation (Pty) Ltd v Medshield Medical Scheme and Others [2017] ZASCA 160 stated in para 18: ‘It is plain that a rescission order does not have a final and definitive effect. In De Vos v Cooper & Ferreira this court expressed the view that (s)o ‘n bevel [that is, a rescission order] het immers nie enige finale of beslissende uitwerking op die geskilpunte in die hoofgeding nie. The rescission order simply returns the parties to the positions which they were in prior to the ex parte order being granted.’”⁸

[27] Importantly, it is apparent from the *HMI* decision that the court was aware of the post-*Zweni* change of approach in some court decisions, but nevertheless this did not cause it to alter its approach to a rescission case:

“More recently, this court and the Constitutional Court have expanded on this test 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.” A consideration of the interests of justice is now of particular importance. But, this does

⁶ 2020 (6) SA 46 (SCA)

⁷ *HMI Healthcare Corporation (Pty) Ltd v Medshield Medical Scheme and Others* [2017] ZASCA 160

⁸ *McLachlan* supra, paragraph 21.

*not mean that it is the sole consideration or that one no longer takes into account the factors set out by this court in Zweni. Specifically, this court has held that in deciding what is in the interests of justice, each case has to be considered on its own facts, including whether a judgment is dispositive of the main or real issues between the parties. The Constitutional Court has elaborated on this as follows: '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 leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular'*⁹

[28] These cases illustrate that there is still a strong line of recent authority that rescission orders are not appealable because they simply place parties back to the *status quo* before the impugned order was granted.

[29] The question then before me is whether there are any facts in this matter which would justify departing from this approach and adopting instead the flexible one followed in cases such as *R v R*?

[30] Anglowealth argues that there is. The failure to grant leave and to declare the order suspended would leave it without a remedy it contends, because with the effluxion of time, its security would be eviscerated. But this ignores the fact that it can still perfect its security by bringing another application. Nothing in the rescission decision prevents this. Anglowealth says there is no time left. This is not demonstrated on the facts. The application can be brought by way of urgency. Moreover, it could have been brought at any time after the rescission order was delivered on 4th November 2021.

[31] Nor is the perfection of security analogous to the effects of a custody order on a young child where duration was a factor because of its psychological effects. Human beings in this sense are not equivalent to stock in trade. This distinguishes the facts of this case from those described in *R v R*.

[32] Nor does the fact that the judgment raises a novel point of law make it appealable. Novelty may be a ground for considering that another court may decide a case

⁹ *HMI op. cit.*, paragraph 17. The Constitutional Court decision cited in this passage is *International Trade Administration Commission v Scaw South Africa Pty Ltd* 2012(4) SA 618 (CC) paragraph 55.

differently, but the judgment would first need to be appealable before one considers the implications of novelty.

[33] I am satisfied to find that the judgment is not appealable. It follows then that, leave is refused and the main relief terms of section 18(1) of the Superior Courts Act does not need to be considered because I have found the order is not final in effect.

[34] It remains for me to consider the alternative relief in terms of section 18(2). Given my conclusion about appealability I am not sure that I need to do so. Nevertheless, out of an abundance of caution I will do so.

[35] Section 18(2) needs to be read together with 18(1) and 18(3). I quote all of them below.

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.

[36] In terms of section 18(2), if an appeal is of an interlocutory nature, then any appeal does not automatically suspend the order unless there are “exceptional circumstances.” Given my finding that, at best this order is interlocutory, Anglowealth would - as the applicant for a suspension have to establish in addition to its own irreparable harm that the other party will also not suffer irreparable harm.

[37] But Anglowealth has not established either. It will not suffer irreparable harm because it is still open to it to apply to perfect its security. Second, it has put up no

facts to establish that the other party – which in this case would be both CNA and the affected parties - would not suffer irreparable harm. In the rescission application the BRP's had made out the case for continuing harm from the perfection order.

[38] Thus, Anglowealth's application fails as well under section 18(2).

Postscript

[39] Subsequent to the hearing, and after I had already prepared my reasons, I received a further affidavit from the third applicant who is one of the current BRP's, and thereafter, correspondence in response from Anglowealth's attorneys. Both concerned the outcome of the meeting of creditors. Since this outcome took place after the hearing of argument in this matter had concluded, I have not had regard to these filings. I point out that neither party had at the hearing requested I postpone the matter pending the outcome of the creditors meeting.

Costs

[40] Costs must follow cause. The applicants are entitled to their costs in respect of opposing both the leave to appeal and the section 18 application.

ORDER

[41] The application for leave to appeal is dismissed.

[42] The application for a declaratory order in terms of section 18(1), alternatively 18(2) of the Superior Courts Act is dismissed.

[43] The first respondent is liable for the costs of the applicants in respect of opposing the application for leave to appeal and the section 18 application.



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JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 16h00 on 2nd December 2021

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