IN THE HIGH COURT OF SOUTH AFRICA

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

23.09.2016
SIGNATURE **DATE**

23/9/16

CASE NO: 28952/2016

In the matter between:

DIMENSION DATA (PTY) LTD First Applicant
(Respondent in the application for leave to appeal)

NAMBITI TECHNOLOGIES (PTY) LTD Second Applicant

YOTTA ZETTA (PTY) LTD Third Applicant

and

STATE INFORMATION TECHNOLOGY AGENCY (SOC) LTD First Respondent
(Applicant in the application for leave to appeal

EOH MTHOMBO (PTY) LTD Second Respondent

JUDGMENT
APPLICATION FOR LEAVE TO APPEAL

AC BASSON, J

[1] This is an application for leave to appeal against the whole of the judgment and order granted on 6 May 2016. More in particular, the leave to appeal is directed against the following:

(i) A prohibitory interdict restraining SITA pending the final determination of the relief sought in Part B of the Notice of Motion from further implementing the award made under RFB1221/2014 and taking steps to procure good or services pursuant to or as envisage in the tender.

(ii) A mandatory interdict compelling SITA to provide Dimension Data with copies of certain documentation.

(iii) A cost order to pay Dimension Data's costs including the cost of 2 counsel on an attorney and client scale.

[2] I will refer to the parties as they were cited in the main application. Although Dimension Data does not take issue with the fact that the mandatory interdict and the costs order constitute final relief, it does take issue with the submission advanced on behalf of SITA that the prohibitory interdict constitutes final relief. On behalf of Dimension Data it was contended that this is but the latest instalment in the strategy employed by SITA throughout these proceedings to frustrate Dimension Data's rights and to undermine the provisions of the 6 May order.

The probibitory interdict

[3] On behalf of SITA it was contended that the prohibitory interdict is final in effect and therefore appealable.

[4] The general rule concerning the appealability is that an order or judgment will be appealable if it has three attributes:

(i) It must be final in effect and not susceptible to alteration by the court of first instance.
(ii) It must be definitive of the rights of the parties; and
(iii) It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[5] An important factor to be taken into account is whether the judgment or order sought to be appealed against has disposed of all the issues between the parties. Even if it did, the court must still consider whether a piecemeal determination of the issues is desirable. See in this regard: *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS*[1]

> "[14] Appealability can be a vexed issue. The appellants rely on the principles stated by Harms AJA in *Zweni v Minister of Law and Order*. The learned judge said that, as a general rule, a judgment or order will be appealable if it has three attributes: it must be final in effect and not susceptible of alteration by the court of first instance; it must be definitive of the rights of the parties and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.
> [15] There have been many glosses on the principle since. In *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* Hefer JA said that the three attributes were not cast in stone nor exhaustive. And in *Jacobs and Others v Baumann NO and Others* this court reiterated the principle laid down in *Zweni*, that in considering whether an order is

[1] 2010 (6) SA 469 (SCA).

final one must have regard to its effect. But the court also stated that even if an order does not have all three attributes, it may be appealable if it disposes of any issue or part of an issue. Conversely, however, even if an order does have all three attributes it may not be appealable, because the determination of an issue in isolation from others in dispute may be undesirable and lead to a costly and inefficient proliferation of hearings. I shall elaborate on this later.

[16] The appellants submit that the finding that the appeal in terms of s 20 is a wide appeal does dispose of a substantial portion of the relief claimed. And it cannot be revisited by the High Court. This much is true. But an appeal court must also have regard to the reason for refusing to entertain interlocutory appeals: a piecemeal determination of issues undesirable. In *Guardian National Insurance Co Ltd v Searle NO* Howie JA said that the 'piecemeal appellate disposal of the issues in litigation' was not only expensive, but that generally all issues in a matter should be disposed of by the same court at the same time. Thus even if, technically, an order is final in effect, it may be inappropriate to allow an appeal against it when the entire dispute between the parties has yet to be resolved by the court of first instance.

[17] It should not be forgotten that Harms AJA in *Zweni* also said that - 'if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition, favour a piecemeal consideration of the case. In other words, the test is then -

> "whether the appeal - if leave were given - would lead to a just and reasonably prompt resolution of the real issue between the parties". . . .'

[5] The question would therefore be - in the words of Harms JA in *Zweni*[2] - "whether the appeal – if leave were given – would lead to a just and reasonable prompt resolution of the real issue between the parties". In this regard the court will evaluate whether the relief granted was final in effect,

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[2] As quoted in the previous paragraph.

whether the order granted was definitive of the rights of the parties, whether the order disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.

[6] It is clear from the prohibitory order itself that the order will only operate until such a time as the relief sought in Part B of the Notice of Motion (in the review application) is determined by the review court and that it is not intended to be definitive of the rights of the parties. In paragraphs [36] – [37] of the judgment the court also made it clear that the matter "will ultimately be fully ventilated in terms of Part B of the Notice of Motion" and that the court is mindful of the fact that the applicant only needs to establish a *prima facie* right though open to some doubt (coupled with the other requirements for interim relief). The disputes between the parties therefore remain unresolved and must still be fully ventilated in the (pending) review application.

[7] Despite the clear wording of the order, SITA still contended that the relief is final in effect because the effective period of the tender is one year from the end of January 2016 and that the determination of the review application is unlikely to occur within a meaningful period before the end of January 2017. This submission was made with reference to the fact that the agreement concluded between SITA and the successful bidder comes to an end on 4 February 2017.

[8] It is important to point out that the review application was launched simultaneously with the urgent application. In the review application, as is the general practice, SITA was invited to dispatch within 15 days after the receipt of the Notice of Motion, to the Registrar the record of the decision under review together with such reasons as by law it is required to give. It is common cause that the record has up to date not been dispatched and no reason why this has not been done was forthcoming. It is also trite that until SITA has complied with its obligations, the review application cannot be progressed.

[9] I am in agreement with the submission that a litigant cannot, through its own inaction, transform a clearly interlocutory order to one which is now appealable. If SITA had complied with its obligations in terms of the review application, this matter would in all probabilities have been heard within a meaningful period of time.

[10] Furthermore, even if the review application is not heard before February 2017 that does not mean that the prohibitory interdict is final in nature. The principle issue between the parties have not yet been finally determined by the court. All of the findings made by the court were *prima facie* findings and are susceptible to alteration by the review court.

[11] The applicant also took issue with this court's findings in respect of non-joinder. I have fully dealt with this issue in the judgment. Suffice to point out that SITA is the author of its own misfortune in respect of this issue. It was pointed out in the judgment that it would have been a simple matter for the information regarding the winning bidder to have been provided to Dimension Data before the launching of the urgent application. Its failure to do so, which this court found to be *mala fide*, resulted in this court exercising a discretion that it was not a sufficient ground to further delay an application that was clearly urgent.

[12] In light of the above I am of the view that the order of this court is not final in effect and accordingly the order is not appealable.

Mandatory interdict and the costs order

[13] Turning briefly to the mandatory interdict and cost order. It was submitted on behalf of Dimension Data that an appeal against the mandatory interdict would be entirely academic in light of SITA's concession that it has to some extent complied with the order. Although SITA has conceded that it has complied with the order it is unclear exactly to what extent SITA has complied with the order. Counsel on behalf of SITA endeavoured to obtain an instruction in this regard but was unable to confirm to what extent there was compliance with this order.

[14] In light of the limited information that was furnished to the court it is unclear to what extent there was compliance with the order and it may well be that an appeal against the mandatory interdict would be entirely academic.

[15] In respect of the costs order, I am equally of the view that an appeal against this order would have no reasonable prospects of success. In general leave to appeal will not be granted in respect of an award of costs unless exceptional circumstances exist. I am not persuaded that such circumstances exist. The court made it clear in paragraph [91] why a costs order was granted at this stage of the proceedings. Suffice to reiterate that the court took into account the manner in which the urgent application was opposed and the fact that the state conducted itself in such a manner that it may ultimately have resulted in this court not being able to grant a remedy.

[16] In the event the application for leave to appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant	:	Adv. J Peter (SC)
Instructed by	:	Hogan Lovells Inc.
For the respondent	:	Adv. Micheal Adv. S M Wentzel
Instructed by	:	Eversheds Inc.