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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case Number: A4610/2011

14366/2010

In the matter between:

Indwe Aviation (Pty) Limited

Applicant

and

**The Petroleum Oil and Gas Corporation
of South Africa (Pty) Limited**

First Respondent

The Minister of Defence

Second Respondent

JUDGMENT DELIVERED ON 20 SEPTEMBER 2011

Baartman,J

[1] This is an application by the first respondent for leave to appeal to the Supreme Court of Appeal against the judgment delivered on 1 June 2011, in which I granted interim relief to the applicant pending the determination of its appeal against my judgment, dated

4 February 2011 under case no. 14366/2010. It is in issue whether the 1 June 2011 judgment is appealable.

- [2] Advocate Newdigate SC, who appeared with Advocate Ferreira for the applicant, submitted that the judgment was interim and therefore not appealable. Advocate Rosenberg SC, who appeared with Advocate Golden, strongly held a different view. The parties were, however, in agreement that the applicable principles appear from the decisions below:

- (a) **Metlika Trading Ltd and Others v Commissioner, South African Revenue Service** 2005 (3) SA 1 (SCA):

“At 11 para 19: ...in the light of the decision in Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd 1996 (3) SA 686 (A).... This Court, relying on Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532 I–J ... held that the order was not final in effect and was susceptible of alteration by the court of first instance. ...

At 12 para 23: In determining whether an order is final, it is important to bear in mind that ‘not merely the form of the order must be considered but also, and predominantly, its effect.’”

(See also **Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd** 1996 (3) SA 686 (A) and **Maccsand CC v Macassar Land Claims Committee and others** June [1] 2005 2 All SA 469 (SCA))

- [3] It is necessary to consider the effect of the order against which the first respondent seeks leave to appeal. The order makes provision for the applicant to provide aviation services to the first respondent using two aircraft, a Bell 212 and a Sikorsky pending the finalisation of the appeal referred to above. In granting interim relief, I accepted that a court had discretion to grant interim relief pending the finalisation of an appeal, in circumstances where the applicant had already

obtained an interim interdict but had failed on the return date to satisfy the requirements for a final interdict. I distinguished this matter from the decision of **Plettenberg Bay Entertainment (Pty) v Minister van Wet en Orde en 'n Ander** 1993 (2) SA 396 (C). That finding will not be revisited at the appeal hearing.

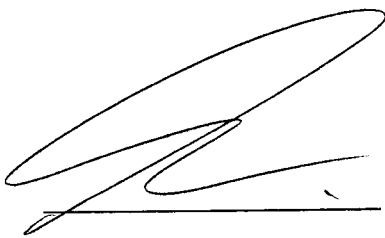
- [4] It was common cause that the applicant had withdrawn its services shortly after I delivered the February judgment. The first respondent therefore claimed that the applicant had waived its right to apply for interim relief. In granting the order, I dismissed the first respondent's reliance on waiver and instead found, based on the parties contractual history, that the withdrawal was "consistent with the tactics on the part of both parties in their relationship; the first respondent secretly stringing the applicant along while holding out for a favourable response from the second respondent, and the applicant threatening to bring the first respondent's off-shore activities to a halt and so create an emergency in which to negotiate."
- [5] The above findings paved the way for the interim relief. The first respondent cannot place further evidence before this court in respect of those issues and thereby cause a rescission or variation of the order granted. Therefore, in my view, the order is appealable. (See **Atkin v Botes** (566/10) [2011] ZASCA 125 (9 September 2011 and **Charlton v Parliament of the Republic of South Africa** (680/2010)[2011] ZASCA 132 (16 September 2011))
- [6] In the June judgment, I accepted that the aviation contract in terms whereof the applicant provided aviation services to the first respondent provided for the use of 2 Sikorsky helicopters. Notwithstanding, the interim order provided that the applicant may provide interim aviation services using a Bell 212 as an alternate to the second Sikorsky. The order followed the finding that the Bell 212 was a suitable replacement for the Sikorsky. That issue does not form the subject of the pending appeal.

[7] I am persuaded that the effect of the order, with particular reference to the findings in respect of the court's discretion and waiver, is final and appealable. I am further persuaded that there exists a reasonable prospect that another court will come to a different finding in respect of the issues referred to above.

CONCLUSION

[8] I, for the reasons stated above, make the following order:

- (a) The first respondent is granted leave to appeal to the Supreme Court of Appeal against the whole judgment and order handed down on 1 June 2011.

A handwritten signature in black ink, consisting of a large, stylized initial 'B' followed by a horizontal line and a short vertical stroke at the end.

Baartman, J