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

Case No 9331/13

In the matter between:

QUESTEK TRANSIT TECHNOLOGIES (PTY) LIMITED Applicant (Respondent)

and

LUMEN TECHNOLOGIES CC Respondent (Appellant)

JUDGMENT – LEAVE TO APPEAL
DELIVERED 17 SEPTEMBER 2013

GRIESEL J:

[1] On 16 September 2013, having heard oral argument, I granted the order appearing at the end of this judgment. I indicated at the time that written reasons for my order would be furnished in due course, which I hereby do.

[2] After my order in the main application, handed down on 2 September 2013, the first respondent delivered an application for leave to appeal, on a wide variety of grounds, against 'the entirety of the

judgment'. (For convenience, I continue to refer to the parties as they were in the main application.)

[3] In response, the applicant delivered a composite document, styled 'Notice of opposition to application for leave to appeal; Notice of application for declarator; Notice in terms of rule 49(11)', together with a supporting affidavit. The applicant sought a declarator to the effect that the order granted by me was not appealable. It also sought an order in terms of rule 49(11), to the effect that the operation of my orders should not be suspended pending any appeal or petition for leave to appeal.

[4] The applicant put up a strong argument in favour of its stance that the order of 2 September 2013 is not appealable. While I took the view, in paras 12–14 of the main judgment, that the application before me was one for interim, and not final, relief, I have been persuaded – at least insofar as para (c) of the order is concerned – that it falls into a different category. In this regard, I have been guided especially by the recent judgment of the Constitutional Court in *National Treasury & others v Opposition to Urban Tolling Alliance & others*,[1] where Moseneke DCJ, writing for the majority, said:

'[24] It is so that courts are rightly reluctant to hear appeals against interim orders that have no final effect and that in any event are susceptible to reconsideration by a court when the final relief is determined. That, however, is not an inflexible rule. In each case, what best serves the interests of justice dictates whether an appeal against an interim order should be entertained. That accords well with developments in case law dealing with when an appeal against an interim order may be permitted.

[1] 2012 (6) SA 223 (CC) (footnotes omitted).

[25] This court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is "the interests of justice". To that end, it must have regard to and weigh carefully all germane circumstances. 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.'

[5] Ms Chilwan, in her affidavit filed in opposition to the application in terms of rule 49(11), has given cogent examples of the likely effect of that part of the order on the further performance of the contract in question. I am persuaded that the potential harm that may flow from the order could be described as 'serious, immediate, ongoing and irreparable'. In my view, this is accordingly a case where it would be in the interests of justice to grant leave to appeal against that part of the order.

[6] As rightly observed by the respondent, the relief granted in para (c) of the order was not the relief initially claimed and motivated by the applicant in its founding affidavit. I am accordingly of the view that there is a reasonable prospect that another court may come to a different conclusion as far as such relief is concerned.

[7] As for paras (a) and (b) of the order, I remain firmly of the view that they are clearly of an interim nature. Moreover, even if they were appealable, I am satisfied, for the reasons given in the main judgment, that there is no reasonable prospect that another court may come to a different conclusion in that regard.

[8] With regard to the applicant's application in terms of rule 49(11), I am of the view that such relief is justified with regard to paras (a) and (b) of the order. First, the money in question forms part of two payment certificates, 92% of which accrued to the applicant. On the respondent's own version, its representatives regard themselves as being entitled to do with such money as they see fit, which attitude will no doubt continue unless they were restrained by an order of this court. In the circumstances, the order granted by me would be stultified in the event of an appeal unless it were to be ordered in terms of rule 49(11) that the original order not be suspended by such appeal or petition for leave to appeal.

[9] It follows from the foregoing that both parties have been partially successful with regard to the relief claimed herein. In these circumstances, I regarded it as fair to order each party to pay its own costs.

Order

[10] For these reasons, the following order was issued:

(a) Leave to appeal to the Full Bench of this Court against paragraph (c) of the Order dated 2 September 2013 is granted.

(b) Save as aforesaid, the application for leave to appeal is dismissed.

(c) It is ordered in terms of Uniform Rule 49(11) that the operation and execution of paragraphs (a) and (b) of the said Order shall not be suspended pending any further appeal or petition for leave to appeal.

(d) **Each party is ordered to pay its own costs in relation to the application for leave to appeal and the application in terms of Rule 49(11).**

B M GRIESEL
Judge of the High Court