THE REPUBLIC OF SOUTH AFRICA

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

Case No: **17255/2020**

Before the Honourable Ms Acting Justice Pangarker
Hearing: 30 July 2021
Judgment Delivered: 02 August 2021

In the matter between:

K2017455767 (SOUTH AFRICA) (PTY) LTD — Applicant

and

CLOETE MURRAY NO — First Respondent

MOSES MACK BALOYI NO — Second Respondent

[In their capacities as joint liquidators of
Aeronastic Properties Ltd (in liquidation)
with registration number 2001/011967/06]

AERONASTIC PROPERTIES LTD (IN LIQUIDATION) — Third Respondent

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JUDGMENT DELIVERED ELECTRONICALLY

PANGARKER AJ.

1. On 23 July 2021, the applicant's urgent application for an interim interdict related

to the sale of helicopter and aviation related tools and equipment as listed on Annexure A to the Notice of Motion by the first and second respondents who are the liquidators of the third respondent, was on the Third Division roll pursuant to a direction by the Judge President. The application was opposed and additionally, the respondents had launched an application for security for costs against Mr Gary Walter van der Merwe, the sole director of the applicant company who instituted the proceedings on its behalf. The opposed application was heard on 30 July 2021 via Microsoft Teams. It is common cause that the application comprises a Part A for the interim interdict, and Part B for declaratory relief that the applicant is the owner of the equipment referred to above. Further affidavits were sought to be submitted and on 29 July the applicant delivered its opposing affidavit in the security for costs application, which was followed by further affidavits from both parties and further heads of argument from the respondents regarding the opposed security for costs application and a point *in limine* taken by the respondents in the answering affidavit. The record in the application comprises more than 1000 pages.

2. In paragraphs 3.7 and 7.1 to 7.9.2 of the answering affidavit, the respondents make the averment that Mr van der Merwe in his personal and representative capacities, is interdicted from instituting proceedings in any Court without leave of the Court or a Judge. In elaboration, the respondents refer to an order granted by his Lordship Mr Justice Henney in case number 7255/2019, dated 6 August 2020, in terms of which Mr van der Merwe is interdicted as aforesaid. It is submitted that in the absence of obtaining leave from this Court or a Judge, Mr van der Merwe lacked

authority and permission to institute the interdict application on behalf of the applicant and therefore the application should be dismissed with costs to be awarded on a punitive scale.

3. Proceedings commenced at 10h00 on 30 July 2021 and after I heard counsels' submissions on what aspects should be argued first, I ruled that the point *in limine* related to the absence of leave granted by the Court or a Judge in lieu of the Henney J order, should be argued first, whereafter I would make a ruling on the question. I heard the submissions and requested the legal representatives to provide me with the authorities they were relying on in support of their respective clients' views on the point *in limine*. The matter stood down for receipt of the authorities and my judgment. I must add that the sale of the aviation equipment is due to take place on 4 August 2021 and this judgment thus relates to the point *in limine* only.

4. In April 2019, the Commissioner for the South African Revenue Service applied in case number 7255/2019 for an order in terms of the Vexatious Proceedings Act[1] that Mr van der Merwe in his personal capacity and representative capacity as a trustee of a certain Trust together with two other trustees, be declared a vexatious litigant. Henney J granted an interim order after hearing the applicant's counsel on 6 August 2020, and the pertinent part of the order[2] which is relevant to the point *in limine* to be determined in this matter, reads as follows:

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[1] 3 of 1956

[2] See ML4 and ML5. The order comprises 4 paragraphs and only paragraph 1 is relevant this application. The other paragraphs relate to costs and the postponement of the main application. I point out that ML5 is a slight variation

1. *Pending a final determination of the application, no legal proceedings may be instituted by the first respondent ("Mr Van der Merwe"), in his personal capacity, or his capacity as a director, member or trustee of any company, close corporation or trust, or by the second, third or fourth respondents, in their capacities as trustees of the Eagles Trust, IT 3019/95, against any person in any court or any inferior court, without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and only if that court, judge or inferior court is satisfied that the proceedings are not an abuse of the process of the court and that there are prima facie grounds for the proceedings;*

5. Mr van der Merwe delivered a Notice of Application for Leave to Appeal[3] against the whole order of Henney J. From the affidavits filed as annexures to this application, and **ML18** which is an order by Henney J granted on 11 November 2020, it is apparent that the main application in that matter was postponed *sine die* and that the applicant could apply for hearing of the main application in the second term of 2021. From the documents and correspondence filed, it seems that the leave to appeal application was also postponed *sine die*.

6. It is the respondents' case in this matter that the interim order granted by Henney J is not suspended by the application for leave to appeal, and hence, Mr van der Merwe was required to seek leave of the Court or a Judge before instituting the urgent

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of ML4 in that a postponement date for hearing of the main application is indicated at paragraph 3 thereof (paragraph 1 of ML4 and ML5 is exactly the same). The underlined portions are my emphasis.

application for the interdict and declaratory relief related to the aviation equipment. Mr van der Merwe's view is that the application for leave to appeal is still pending and it accordingly suspended the operation of the Henney J order granted on 6 August 2020 by operation of section 18 of the Superior Courts Act *(the Act)*[4].

7. The crisp question to decide is the nature of the order granted by Henney J and whether the leave to appeal application suspended the order requiring Mr van der Merwe to first seek leave to institute the proceedings in this matter. From **ML6,** the Notice of Application for Leave to Appeal in case number 7255/2019, it is evident that Mr van der Merwe was of the view and accepted that the Henney J order granted interim relief *pendente lite*[5]. Yet, he also submits that the interim relief would have the effect of limiting his constitutional rights, particularly the right to freedom of expression in terms of section 16(1) of the Constitution of the Republic of South Africa and his right of access to Courts protected in section 34; furthermore, that the interim relief is identical to final relief sought by the applicant in case number 7255/2019 and would in the circumstances have final effect, despite being couched in the form of an interdict pending the final application. That being the case, it is submitted, that the order has final effect and is suspended by the leave to appeal application.

8. The respondents disagree, and contend that Mr van der Merwe on behalf of the applicant in this matter, confuses the question of whether an order is appealable or not in terms of section 16 of the Act, with the classification of the decision or order as set

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[3] ML6
[4] 10 of 2013

out in section 18(2) of the Act. The classification in section 18(2) determines whether an application for leave to appeal or an appeal itself, suspends the operation and execution of a decision.

9. Firstly, I must point out that this Court does not sit in appeal or review of the Henney J order. The arguments raised in the point *in limine* has necessitated an examination of the authorities and the classification of the order granted by the learned Judge. Thus, on an ordinary reading of paragraph 1 of the Henney J order *(the order)*[6] and in view of the correspondence related to the order, it is apparent that the main application in that matter was an application in terms of the Vexatious Proceedings Act. Inasmuch as the submission by the applicant's counsel was that the order relates to a matter between SARS and Mr van der Merwe, thus possibly implying that it is not relevant to these proceedings, I point out with respect that the fact that the order was granted in a different matter is irrelevant. The relevance of paragraph 1 of the order is that it is an order precluding or interdicting Mr van der Merwe from instituting *any legal proceedings*[7] *in his personal capacity or in his capacity as a director of any company against any person and in any Court without the leave of the Court or a Judge*. In this matter, Mr van der Merwe instituted the application on behalf of the applicant in his capacity as its sole director[8] and in doing so, his action falls full square within the ambit of paragraph 1 of the Henney J order.

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[5] Paragraphs 1 and 3 of ML6
[6] See paragraph 4 above
[7] My emphasis
[8] See GM1

10. Furthermore, it requires mentioning that the interdict and declaratory application relating to the aviation equipment was instituted in November 2020, more than three months after Henney J granted the order in 7255/2019. Having considered the record in this matter, there is no evidence that leave to institute legal proceedings was sought from the Court nor a Judge.

11. In order to answer the question posed by the point *in limine*, section 18 of the Act bears closer scrutiny. Section 18 is set out below:

> ***18 Suspension of decision pending appeal***
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> *(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*[9].

12. It is evident that section 18(1) cannot be read in isolation in view of the words

"subject to subsections (2) and (3)", hence I agree with the respondents' counsel that section 18 (2) is relevant to the determination of the point *in limine* as it classifies the type of order or decision which is not suspended on mere delivery of an application for leave to appeal and it thus follows that it requires a determination whether the order granted by Henney J was an interlocutory order not having the effect of a final judgment, or as submitted by the applicant, that it was an order having final effect. The evaluation necessitates a discussion on characteristics of orders which are final, interim or interlocutory.

13. The starting point of the evaluation is ***Zweni v Minister of Law and Order***[10] ,wherein it was held that a non-appealable decision has the following characteristics: (i) it is not final because the Court of first instance may alter it; (ii) it is not definitive of the rights of the parties, and, (iii) it does not have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings[11]. In ***Zweni***, the Court *a quo* had dismissed an application related to privilege attached to police dockets in an action and refused leave to appeal in respect of its dismissal. Harms AJA (as he then was), when considering the common propositions generally advanced on the subject of whether a decision is an appealable 'judgment' or 'order', held that so called simple interlocutory orders which are matters incidental to the main dispute or during the progress of litigation do not have a final effect[12]. In ***Moch v Nedtravel (Pty)***

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[9] My emphasis
[10] 1993 (1) SA 523 (A)
[11] Page 536 A-C – my summation
[12] Page 532G-I (the Appellate Division in ***Zweni*** ruled against the appealability of the interim order granted by the High Court)

Ltd t/a American Express Travel Service[13] the SCA found that the three attributes referred to in ***Zweni*** regarding the appealability of a judgment or order, were not exhaustive nor cast in stone, while in ***Jacobs and Others v Baumann NO and Others***[14] the SCA reiterated the principle laid down in ***Zweni*** that the high watermark in determining whether an order or judgment is final is to have regard to its effect, but 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. The order or judgment in issue in ***Jacobs*** was a dismissal by the Court *a quo* made during action proceedings and regarding the substitution of an executor, the nullity of the Summons and an issue related to prescription[15].

14. In ***Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS***[16], which the applicant's counsel referred me to, the appealability of an order or judgment was discussed and the SCA warned against dealing with issues in isolation[17]. In my view the relevance of the ***Health Professions Council*** judgment to the determination of the point in *limine* may be found in paragraph 25 where Lewis JA, with reference to appealability of interlocutory orders and judgments, warned that where a litigant may suffer prejudice or injustice if the interlocutory order remains extant, then leave to appeal should be granted[18]. The applicant's counsel also referred me to ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association as applicant for***

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[13] 1996 (3) SA 1 (A) at 10F-11C
[14] 2009 (5) SA 432 (SCA) at par 9
[15] See para 6 - 8
[16] 2010 (6) SA 469 (SCA)
[17] See par 25
[18] My summation of par 25 of the judgment

leave to intervene)[19] where the appellants brought an urgent direct appeal to the Constitutional Court against an order of the High Court which interdicted the South African National Roads Agency Ltd from levying and collecting toll on Gauteng roads pending final determination of a review of a decision declaring Gauteng roads as toll roads. At paragraph 24 of the judgment the Constitutional Court observed that while Courts were reluctant to hear appeals against interim orders which had no final effect and which were to be reconsidered when final relief was to be determined, this rule was not an inflexible one. Thus, the question of whether an appeal against an interim order should be entertained depends on the interests of justice standard to be considered on a case-to-case basis[20]. In ***Philani-Ma-Afrika v Mailula***[21]and ***Nova Property Group Holdings v Cobbett***[22], the Courts emphasised the interests of justice as being of paramount importance in determining whether orders were appealable or not[23].

15. Thus, having considered the respective submissions of counsel and the authorities, there is no doubt that the parties, particularly Mr van der Merwe on behalf of the company, considered the order granted by Henney J as an interim order. In addition, the order was granted prior to the hearing of the main vexatious application proceedings application as indicated earlier in this judgment. Herbstein and Van Winsen[24] on an interlocutory order defines it as:

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[19] 2012 (11) BCLR 1148 (CC)
[20] See also
[21] 2010 (2) 573 (SCA)
[22] 2016 (4) SA 317 (SCA)
[23] ***Philani-Ma-Afrika*** dealt with the appealability of an execution order related to an eviction, and ***Nova Property*** considered an application to compel discovery to be appealable

'an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties'.

16. Applying the attributes set out in ***Zweni***, it follows that the Henney J order was granted during the course of litigation and while not dealing with a procedural aspect, it clearly is of interim nature and, in my view, susceptible to alteration or variation by the Court. Furthermore, paragraph 1 of the order grants relief pending the final determination of the main application, and thus it is not the final word on the rights of the parties as that issue still fell to be determined in the main application. Thus I do not agree with the applicant's submission that the order is couched as a final order. In addition, while the argument has been submitted that paragraph 1 of the order is identical to the main relief, the applicant overlooks that the main order is sought in terms of the Vexatious Proceedings Act while the order granted on 6 August 2020, is in the nature of an interim interdict against Mr van der Merwe. In the result, I thus do not agree nor do I find that paragraph 1 can be considered to have disposed of a substantial portion of the relief sought in the main application. In my view, none of the three attributes in ***Zweni*** are features of paragraph 1 of the Henney J order. This should be end of the enquiry but for decisions such as ***Health Professions Council*** and ***National Treasury*** which I referred to above.

17. In my view, the order falls within the category of orders referred to in section 18(2) of the Superior Courts Act, but even if one were to hold a view that the order is

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[24] The Civil Practice of the High Courts of South Africa 5th edition, volume 2 at p 1204

per se not an ordinary interlocutory order as it does not refer to a procedural aspect in the litigation, it is quite evidently an interim order which does not have the effect of a final order as it was *"pending a final determination of the application"*.

18. As to whether the order infringes on Mr van der Merwe's constitutional rights of access to Courts and freedom of expression, my view is that it certainly does not. At the risk of repetition, the order is not final, but more importantly, it leaves the door open to Mr van der Merwe to approach the Court or a Judge to seek leave to institute legal proceedings against any person. As an illustration, in ***Beinash and Another v Ernst & Young and Others***[25], the Constitutional Court found the procedural barrier to litigation imposed by section 2(1)(b) of the Vexatious Proceedings Act limits the rights of access to Courts in terms of section 34 but that the limitation was justifiable when having regard to the factors listed in section 36(1) of the Constitution[26]. Thus, though the interim interdict has hallmarks of an order granted in terms of the Vexatious Proceedings Act, in light of ***Beinash***, the limitation on Mr van der Merwe's rights has been held to be justifiable.

19. Furthermore, having regard to the interests of justice standard, in my view the interim order restraining Mr van der Merwe from instituting litigation does not render irreparable, serious and ongoing harm to him in his personal and/or representative capacity[27] as it is not final and has a mechanism in place to allow him an opportunity to seek leave to institute litigation, which is an opportunity which he clearly did not seize

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[25] 1999 (2) SA 116 (CC)
[26] Section 36 Limitation of rights

upon in respect of this matter. He still has a right of access to the Court should he wish to exercise such right. In view of these findings and considerations – that the order does not have final effect, that Mr van der Merwe's rights are not infringed by the order, that the Henney J order has not decided a substantial part of the main application in that matter, and that the interests of justice are not infringed upon – I agree with the respondents' counsel that the leave to appeal application, did not suspend the interim interdict granted by Henney J.

20. It thus follows, that in the absence of an order finding exceptional circumstances in section 18(2) of the Act, or a suspension of the order, the Henney J order remains in effect or in existence, and that being the case, Mr van der Merwe in his capacity as director of the applicant in this matter, was required to first seek leave of the High Court or a Judge before instituting the urgent application for an interdict. In the absence of leave of the Court authorizing and allowing the institution of these proceedings, Mr van der Merwe remained interdicted from instituting these proceedings in terms of the order granted by Henney J, and this is fatal to the application.

21. As far as costs are concerned, and having heard submissions from counsel I am of the view that a punitive costs order is warranted for the following reasons: the institution of proceedings was not authorized and this was a requirement of an existing Court order; the application comprises a record of over 1000 pages in what was launched as an urgent application; last minute affidavits were filed in respect of the opposed security for costs application; the point *in limine* was raised in the answering

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[27] ***National Treasury*** judgment at par 26

affidavit and only met with an averment that the Henney J order was suspended because of the filing of a leave to appeal application, and, rather than approach the Court or a Judge for leave in terms of the order, Mr van der Merwe as the applicant's director, drove this application with vigour. As to the costs of 23 July 2021, my view is that a fair and reasonable order would be costs in the cause as the matter stood down for a date when it could be accommodated virtually.

22. In the result, I grant the following orders:

22.1 The respondents' point *in limine* (interdict against the institution of legal proceedings) is upheld.

22.2 The application is dismissed, with costs on a scale as between attorney and client and such costs shall include costs of senior counsel.

22.3 Costs of 23 July 2021 shall be costs in the cause.

M PANGARKER
Acting Judge of the High Court

For Applicant	:	Adv P Tredoux
Instructed by	:	*Deon Perold & Associates*

For Respondents:		Adv M Leathern SC
Instructed by	:	*JI Van Niekerk Inc. Attorneys*