IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no.: **3253/2021**

In the matter between:

PHILIP TSHEPISO MOTSIMA First Applicant

THANDIWE PATIENCE MOTSIMA Second Applicant

and

THE TRUSTEES OF THE VAN DER MERWE FAMILY TRUST[1] First Respondent

THE REGISTRAR OF DEEDS: FREE STATE Second Respondent

Coram: Opperman, J

Date of hearing: 6 May 2022

Order: 30 June 2022

Reasons for Judgment: The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 30

[1] "The trust". The Registrar of Deeds did not partake in the litigation.

June 2022. The date and time for hand-down is deemed to be 30 June 2022 at 15h00.

Summary: Application for leave to appeal – Interim interdict

JUDGMENT

---

[1] The matter served before De Kock, AJ. She is engaged in Circuit Court and not available. The matter is thus entertained in terms of section 17(2)(a) of the Superior Court Act 10 of 2013 read with Rule 49(1)(e) of the High Court Rules in that leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.

[2] The hearing happened on 7 October 2021 and it was ordered that:

1. The first and second applicants' application is dismissed with costs.

[3] The applicants applied *a quo* for an interim interdict prohibiting a property from being transferred to any third party pending:

1. the finalisation of the appeal; and
2. in the event that the applicants are successful in the aforesaid appeal the institution of an action within 30 days from the date of the appeal to set aside the transfer of the property from Mr. and Mrs. Kopa to the first respondent.

[4] The reasons for the finding *a quo* to dismiss were the following:[2]

---

[2] Page 7 of the judgment, line 6 and further.

The Court is of the view that none of the orders sought in the action can be affected anymore. The latest transfer did not occur in conflict with an operative order of this Court. The fact of the matter is that the Kopas are no longer the owners of the property. The appeal has therefore become a moot appeal. The fact of the matter is that the Kopas cannot transfer the property to the applicants anymore as sought in the action and it will become irrelevant whether the agreements between the applicants and trust no.1 were unlawful.

[5] The Court *a quo* concluded that:[3]

With reference to the matter of *Olympus Passenger services,* the Court is of the view, that due to the fact that the applicants failed to establish a *prima facie* right, there is no need to adjudicate on the further elements required for an interim interdict, due to the fact that an interim interdict cannot be granted in the absence of a *prima facie* right. The Court, however, highlights the fact that the applicants do have an alternative remedy in that it is open to them to establish an action against trust no. 1, the C&D Trust, should they be of the view that they have reason to do so.

[6] The test and major factors to consider in an application for leave to appeal on an interlocutory or interim order have finally been established. The interest of justice and thus potential for irreparable harm are vital factors. Guidance of future cases, incorrect statements of law in the judgment *a quo* and the milieu and perception in which the law must be interpreted may cause a need for the adjudication of an interlocutory order on appeal.

[7] Each case must be adjudicated on its own peculiar facts. A fixed maximum of factors will not suffice and must be read with the test as pronounced in

---

[3] At page 8 line 20 of the judgment.

sections 16[4] and 17 [5] of the Superior Courts Act 10 of 2013 ("SC Act") and the law that evolved around it.

[8] As was eloquently put in *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others* (1032/2019) [2021] ZASCA 4 (13 January 2021) at paragraph [9] the assessment is now: "to accord with the equitable and the more context-sensitive standard of the interests of justice favored by our Constitution."

---

[4] Section 16. Appeals generally. —
(1) Subject to section 15 (1), the Constitution and any other law—
(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted—
(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17 (6); or
(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal; and

(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.

(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

(b) If, at any time prior to the hearing of an appeal, the President of the Supreme Court of Appeal or the Judge President or the judge presiding, as the case may be, is prima facie of the view that it would be appropriate to dismiss the appeal on the ground set out in paragraph (a), he or she must call for written representations from the respective parties as to why the appeal should not be so dismissed.

[5] See Proclamation R. 36 of 2013 dated 22 August 2013 (Government Gazette 36774). Section 17(1) to read:
(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that -
(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[9] The facts of the case are imperative to understand the mootness of the application for leave to appeal. Mootness can have vast consequences for a court case.[6]

[10] Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact.

[11] In other words, a court cannot take on a purely hypothetical debate in which it would be called on to decide what might happen if something were to arise between two parties. "If the court determines that the conflict has died and the parties no longer have any actual, vested interest in what the outcome might be, then the court will find that the issue is moot and dismiss the case…"[7]

[12] The law that is applicable on the appealability of the issue of interlocutory orders has been declared upon in numerous cases since the Zweni – judgment (*Zweni v Minister of Law and Order* 1993 (1) SA 523 (A)).[8] The Cipla – dictum evolved (*Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and others* 2018 (6) SA 440 (SCA)).

---

[6] Where the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone [S 16(2)(a)(i)]. Save under exceptional circumstances the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs [S 16(2)(a)(ii)]. *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and another* (245/2017) [2018] ZASCA 012 (8 March 2018).

[7] https://study.com/academy/lesson/mootness-legal-definition-doctrine.html on 27 February 2022.

[8] *Mannatt and Another v De Kock and others* (18799/2018) [2020] ZAWCHC 54 (22 June 2020).

[13] The final word was now spoken in *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others* (1032/2019) [2021] ZASCA 4 (13 January 2021).

The majority Judgment: Sutherland AJA (Cachalia and Mbha JJA concurring):

[7] What is required to render an order appealable is well trodden judicial turf. It is to the law on appealability in this regard we now turn.

[9] … More recently, in Philani-Ma-Afrika v Mailula, the Supreme Court of Appeal had to decide whether an order of the high court which puts an eviction order into operation pending an appeal was appealable. In a unanimous judgment by Farlam JA, the Court held that the execution order was susceptible to appeal. It reasoned that it is clear from cases such as S v Western Areas that "what is of paramount importance in deciding whether a judgment is appealable is the interests of justice." As we have seen, the Supreme Court of Appeal has adapted the general principles on the appealability of interim orders, in my respectful view, correctly so, to accord with the equitable and the more context-sensitive standard of the interests of justice favored by our Constitution. In any event, the Zweni requirements on when a decision may be appealed against were never without qualification. For instance, it has been correctly held that in determining whether an interim order may be appealed against regard must be had to the effect of the order rather than its mere appellation or form. In Metlika Trading Ltd and Others v Commissioner, South African Revenue Service the Court held, correctly so, that where an interim order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings it will generally be final in effect. Lastly, when we decide what is in the interests of justice, we will have to keep in mind what this Court said in Machele and Others v Mailula and Others. In that case, the Court had to decide whether to grant leave to appeal against an order of the High Court authorising execution of an eviction order pending an appeal. In granting leave to appeal, Skweyiya J, relying on what this Court held in TAC (1), reaffirmed the importance of "irreparable harm" as a factor in assessing whether to hear an appeal against an interim order, albeit an order of execution: "*The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution*

is, therefore, whether irreparable harm would result if leave to appeal is not granted".' (Emphasis added)

[14] Whether irreparable harm will eventuate will depend on the merits of each case. This brings the other hurdle to be jumped by the applicants and that is the leave to appeal itself on the facts of the case.

[15] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Access to justice is access to justice.

[16] Historically the rule was: "In that reasonable prospect exists that another Court, sitting as the Court of Appeal, would come to different findings and conclusions on the facts and the law."[9]

[17] The words "would" and "only" in the current legislation caused some to opinion that the bar for granting leave to appeal has been raised.[10] All it in reality articulates is that the matter must be pondered in depth and with careful judicial introspection. It did not raise the bar because as said, access to justice is access to justice. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal and another court would come to another conclusion.

---

[9] *S v Smith* 2012 (1) SACR 567 (SCA) at [7].

[10] *Moloi and Another v Premier of the Free State Province and others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021), *Hans Seuntjie Matoto v Free State Gambling and Liquor Authority* 4629/2017[ZAFSHC] 8 June 2017, *K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency (SOC) Ltd* 2021 JDR 0273 (FB).

[18] The final word was spoken recently in the Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021:

> [10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as oppose to "could" possibly means that the threshold for granting the appeal has been raised. *If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.* (Accentuation added)

[19] The fact remains that *the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal is that it should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision*

that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court.[11]

[20] In the instance the words of Binns-Ward, J in the Mannat - case *supra* is eerily applicable to this case:

> [9] The decision to strike the principal application in the current matter from the roll for lack of urgency was of a purely procedural character. It did not have any of the three attributes of a 'judgment or order' identified in Zweni. On the basis of the authorities just referred to that counts strongly against it being regarded as appealable. In addition, there are no considerations that would make it susceptible to appeal 'in the interests of justice'. *On the contrary, it would be inimical to the interests of justice to permit or encourage the applicants to continue on their misguided path in the current litigation. It is purposeless, and nothing more than an abusive imposition on the court's resources and an unwarranted derogation from the prima facie rights of those of the respondents who are applicant's judgment creditors.* (Accentuation added)

[21] On signing a contract, the parties become servants to the terms thereof and they acknowledge and concede to the Law of Contracts. (The principle of *pacta sunt servanda* decrees agreements, freely and voluntarily concluded, must be honoured.) They pledge themselves to the Rule of Law and an open and democratic society based on human dignity, equality and freedom; constitutional integrity within the facts and circumstances of their case.

[22] Parties to a contract are barred from believing themselves to be above the law and the contract they committed to. Integrity is vital to ensure business efficacy and democratic commercial certainty and security. Lawlessness will have punitive repercussions. Anarchistic parties must accept the legal

---

[11] *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC*).*

consequences of non-compliance to contracts; rogue arrogance towards law and contract shall not be tolerated by courts.

[23] Reading of the facts shows that the application for leave to appeal cannot succeed. These are the facts:

1. The present applicants caused a summons to be issued in 2019 and the present first respondent was cited as the fifth defendant in the aforementioned action. The Kopas, C&D Investment Trust ("C&D"), the Registrar of Deeds, Free State and the Trustees of the Van der Merwe Trust were the defendants.
2. The matter went on trial and on 8 February 2021, Molitsoane, J dismissed the applicants' actions against all the defendants with costs.
3. About five years before the trial the applicants were the registered owners of a property known as 7 Wittels Road, Woodland Hills, Bloemfontein.
4. The applicants fell into financial hardship and could not pay the debts in respect of the property.
5. It is the case for the applicants that they entered into a verbal agreement with C&D and ultimately entered into two (2) written agreements with the C&D to rescue their situation.
6. They entered into a Deed of Sale in terms whereof they sold the aforementioned property to C&D and at the same time entered into an agreement of lease of the same property which included an option to repurchase from C&D. The option was not exercised and lapsed.
7. The property was transferred into the name of C&D.

8. The applicants' financial pressure and hardship did not improve and they failed to pay the monthly rental owed to C&D.
9. Amazingly so; during July 2018 the Kopas came into the fray. The applicants, again in a verbal agreement, convinced the Kopas to agree that the Kopas would purchase the property from C&D. The purchase price would be the amount that C&D had advanced to the applicants. That is an amount allegedly paid to Standard Bank.
10. The Kopas would then lease the property to the applicants. The lease agreement to be "concluded in the future and upon such terms as the parties may agree."
11. The lease period bizarrely so, according to the applicants, would be for such a lease amount as the parties may agree, "but after a hiatus on rent payments and in order to provide the applicants with an opportunity to better their financial position."
12. The applicants would lease the property from the Kopas until such time as they were able to purchase the property back from the Kopas.
13. The applicants, almost haughtily so, had to give the Kopas permission before they could sell the property to a third entity. At the same time, they did not pay rent and at the same time the Kopas had to carry all the financial expenditures involved with the property.
14. The applicants did not pay the agreed rent to C&D and they gave C&D permission to sell to the Kopas.
15. The purchase price was paid by the Kopas and the property transferred into their names.
16. Again, the applicants remained in occupation of the property and again they did not pay the rent.

17. The Kopas, having received transfer of the property into their name, through their attorney on or about the 24th October 2018 send a proposed lease agreement to the applicants, however, the applicants did not accept it.

18. Incongruously and with astounding hubris, the Motsimas allege that the agreement did make provision therefore that they could, for an undetermined period, not pay any rent.

19. Correspondence at the time were exchanged between the applicants' attorneys and the Kopas' then attorneys. This correspondence included a letter dated the 5th November 2018 wherein the Kopas attorney wrote among others:

> …your client wants to run up a bill with Mr. and Mrs. Kopa, that is not going to happen … therefore: if your clients are bona fide, and want to buy back the property, please give an indication/proof of how this is going to be done before the 12th November 2018.

20. The applicants got notice that the property was sold by the Kopas to the present first respondent. On the 4th July 2019 the Court granted an order in favour of the applicants interdicting the Kopas to give transfer to the present respondent and restraining the Registrar "pending finalization of the main action, from registering the transfer of the immovable property."

21. During the trial (main action) the applicants in cross-examination conceded that the Kopas at the time had to bear all the expenses in respect of the said property for example, rates and taxes and even penalties imposed by the Woodland Hills Estate. The interim order prevented them from dealing with the property at the time and they could not utilise the property at all.

22. The applicants conceded in cross-examination that according to their discovery affidavits, there was no indication of any availability of funds or a bank loan to pay for the aforementioned property.

23. It is not in dispute that they properly signed the Power of Attorney to pass transfer of the property from themselves to the C&D.

24. Notwithstanding having entered into a purchase agreement during 2019, the respondent had to outwait the Court's decision on the trial; which it did. The Court in the main matter dismissed the applicants' actions.

25. The moment that the action was dismissed by Molitsoane, J; no action was pending and the interim order on page 84 of the record lapsed.

26. The trial court in dismissing the action found that the transfer from the applicants to the C&D and thereafter to the Kopas were not tainted with fraud nor was it unlawful and against public policy. It is imperative to emphasize that the contracts were entered into between all the parties and at all times freely and voluntary and without any constitutional impediments.

27. Notwithstanding the action having been dismissed, a letter, for purposes of notice (and action if any) was directed on the 2nd of March 2021 to the applicants' attorney to warn and confirm that the judgment dismissed the protection afforded the applicants under the interim order.

28. The applicants, in their now customary haughty attitude towards the law and the respondents that endeavoured to help them; did not rely on the interim order's existence or required of the first respondent to seek other relief. The applicants merely replied by indicating that they did not agree with the legal conclusion.

29. The Registrar of Deeds was, correctly so, satisfied, having been appraised of all the documents that transfer could be effected and did so.

30. On the 7th of October 2021 the applicants sought an interim order to halt the transfer of the property but the application was dismissed with costs. This order is now the subject of the application for leave to appeal.

31. The applicants did eventually file an application for leave to appeal in this matter, but late. In the affidavit in support of the application for condonation the applicants in essence avers that they were aware of the relevant time limits but do not really explain why a notice of application for leave to appeal was not filed.

32. Apparently, the applicants did not receive advice from their counsel at the time that there were prospects of success on appeal. They sought the advice of senior counsel later that advised them that there were good prospects of success on appeal.

33. This is not correct. It would appear that senior counsel ostensibly gave the advice without having considered the *ex-tempore* judgment dismissing the application. It would appear that the transcription of the *ex-tempore* judgment was only received on the 1st of December 2021.

34. It was not suggested (or seriously contended) that the Learned Judge hearing the interim application against which leave is now sought, made any factual errors. As stated by the applicants, the Trial Court having heard the application and arguments gave a comprehensive judgment.

35. The first respondent, *ex abundante cautela,* had a letter addressed to the applicants informing them that the transfer would be proceeded with and the property could not lay idle without all the related expenses simply because the applicants had a different view. The letter was written to appraise the applicants of the situation proving the first respondent's *bona fides*.

[24] Once the action was dismissed it was finalised and most definitely directly after dismissing the action, there was nothing pending. In *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and others* 2017 (6) SA 90 (SCA) page 125 at paragraph [71] the Supreme Court of Appeal stated the unmistakable *status quo*:

> The bottom line being that where the interim order has lapsed as *in casu*, it cannot be revived out of its own even by the later filing of a notice of application for leave to appeal. It lapsed the moment that the action was dismissed.

[25] In the main action, the Court found that the applicants were not misled and the judgment in *ABSA Bank Limited v Moore* 2016 (3) SA 97 (SCA) at paragraph [7] expressly stated:

> Where a transaction pursuant to which property is to be transferred is simulated – where all parties intend to disguise the true nature of the transaction", the transferor and transferee may well intend to transfer ownership and since a valid transaction is not required for a transfer to be effected, the transfer itself may not be impeached.

[26] The Court in the application for an interim interdict, was aware and adhered to this principle. The applicants in allowing the transfer to take place realised or should have realized that the appeal that were intended became academic.

[27] They knew and should have known that the appeal would constitute an academical exercise having regard to the particulars of claim. A Court will not entertain a moot appeal. The Kopas cannot transfer the property to the applicants anymore as sought in the main action and it would become irrelevant whether the agreements between the applicants and C&D were unlawful.

[28] It was aptly submitted by the first respondent in this the application for leave to appeal, that on the applicants' own version the balance of convenience simply does not favour them. On their own version they could not afford the house.

[29] The prejudice to the first respondent is clear. To egoistically put a restraint on the present respondent pending an appeal, and then further action to be instituted whilst the respondent has paid the purchase price, the transfer costs and all the associated costs therewith; is prejudicial to first respondent. The prejudice is caused by the applicants with their inexplicable conduct to assume that other people must pay for their financial misfortune. It is common cause that whilst the Kopas were the owners of the property, they had to bear all the expenses and was financially destroyed.

[30] Based on the aforesaid, is it clear that the appeal will not succeed and the administration of justice is being ridiculed. No sufficient explanation has been given for the late filing of the application for leave to appeal and where there are poor prospects of success on appeal, condonation should not be granted and must be dismissed with costs.

[31] ORDER

The application for leave to appeal is dismissed with costs.

[12]

M OPPERMAN, J

APPEARANCES

For the applicants

Advocate R van der Merwe
Chambers Bloemfontein

Van Aardt & Van Der Walt Attorneys
Bethlehem
c/o Maree & Partners Attorneys
GD Hoffman
46 Donald Murray Avenue
Park West Bloemfontein
Ref: GD HOFFMAN/HV0420
gawie@mareeprok.co.za

For the first respondent

Advocate C Reinders
Chambers, Bloemfontein

Van Wyk & Preller Incorporated
67 President Paul Kruger Avenue
Universitas
Bloemfontein
Ref: AHRENS/RS/RA3460
riana@vwpbfn.co.za

[12] Original and signed document is available on file.