REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 12450/16

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

..... 27 NOVEMBER 2023

In the matter between:

SENECA CIVILS (PTY) LIMITED Plaintiff

and

CENTRIQ INSURANCE COMPANY Defendant

JUDGMENT

MALUNGANA AJ

[1] The present case concerns the appealability of the interlocutory order. On 17 April 2023 I granted an *ex tempore* interlocutory order for the plaintiff compelling the defendant's expert to: (i) sign the joint expert's minute arising out of the meeting held with the plaintiff's expert on 21 February 2020; alternatively (ii) to produce his own minute of what transpired at the meeting, failing compliance therewith, I granted leave for the plaintiff (iii) to bring an application to strike out the defendant's defence.

[2] Following the above order, the defendant requested reasons for the above decision which I duly provided on 22 September 2023.[1] It is not necessary for the purposes of this judgment to regurgitate the background facts underlying the decision. Suffice to state that the decision is the result of the application brought by the plaintiff in the interlocutory court, in which it sought to compel the defendant's expert to sign the joint minute arising of the meeting held on 21 February 2020. It was not in dispute during the hearing of the main application that the said meeting of experts was convened, however, there was a dispute as to whether the draft minute provided by the plaintiff's expert reflects what had transpired at the meeting. It is against this background that the decision in question ensued. Now the defendant has launched an application for leave to appeal against the order.[2]

[3] The relevant grounds for the defendant's application for leave to appeal can be briefly stated:

(a) the Court erred in failing to consider all the evidence placed before it;

(b) in particular the Court erred in failing to consider that there were no facts justifying an order directing the expert to sign a report which such expert was not satisfied with;

(c). the Court failed to consider that compelling the expert order to sign an expert report in circumstances where the said expert was not in agreement with the contents thereof infringed upon the impartiality and objectivity of the expert in question;

(d) the Court failed to consider that an order in question infringed upon the applicant's right to a fair trial;

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(e) the Court ought to have directed that the experts hold a further meeting , or meetings, in order to allow the Applicant's expert to be satisfied with the accuracy of the joint expert report before signing same;

(f) the Court erred in failing to apply the provisions of Rule 36(9A) of the Uniform Rules of Court

(g) the Court erred in directing the defendant's expert who is not a party to the action to sign a joint minute which the defendant's expert disagreed with;

(h) the Court erred in failing to take into consideration that the defendant's expert has called for the a further meeting to canvass all aspects of the experts' report.

[4] The plaintiff has filed written submissions in response to the defendant's application in which it raised a point *in limine* concerning the appealability of the order in question. Although the parties were agreed that the point *in limine* will be dealt with first, I allowed the parties to also argue the merits application as I held the view that issues were factually bound to each other.

[5] It is apposite to have regard to the legal principles appertaining to issues raised above. Section 17 of the Superior Court Act 10 of 2013 ("the Act") regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

'(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.'

[6] What is required of the Court is to consider, objectively and dispassionately, whether there are reasonable prospects that another court will find merits in the arguments advancing by the losing party.[3]

[7] In *National Treasury and Others v Opposition to Urban Tolling Alliance*[4] the Constitutional Court remarked as follows:

"[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 or always decisive consideration. It is just as important to assess whether the harm that flows from it is serious, immediate, ongoing and irreparable."

[8] In *Zweni v Minister of Law and Order*[5] the SCA laid down the principle as follows: *Firstly* the decision must be final effect and not be susceptible to alteration by court of first instance; *Secondly* it must be definite of the right of the parties, and *Thirdly* it must have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings.

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[3] *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Maya International* [2016] 137 (ZAECGHC) 137 (10 November 2016) at para 4.
[4] *National Treasury and Others v Opposition to Urban Tolling Alliance* (CCT 38/12) [2012] ZACC 18.
[5] *Zweni v Minister of Law and Order* 1993 (1) SA 523

[9] The rational underlying the non-appealability of interim orders was succinctly dealt with in *Machele and Others v Mailula and Ohers*[6] in which the Constitutional Court stated in paragraph 21 as follows:

"The effect of granting leave to appeal against an order of interim execution will defeat the very purpose of that order. The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be subject of an appeal, that, in turn, would suspend the order."

[10] In paragraph 27 of *Machele* judgment, *supra* the Court held:

"In *Tac 1* this Court further stated:

> 'If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in application for leave to appeal) may suffer were the interim execution order to be overturned."

[11] The common law test for appealability has since been denuded of its somewhat inflexible nature. Unlike before, appealability no longer depends largely on whether the interim order appealed against has the final effect or dispositive of a portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard.[7]

[12] It was contended on behalf of the plaintiff that even if the order in question is final in effect, the decision thereof is not definitive of the rights of parties and does not dispose of a substantial portion of the relief in the main proceedings. Counsel further argued that the defendant seeks to repudiate what the

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[6] *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC)

[7] *United Democratic Movement and Another v Lebashe Investments Group (Pty) Ltd and Others* (1032/2019) [2021]ZASCA 4 [2021] 2 All SA 90 (SCA) (13 January 2021) at para [4].

experts have agreed at meeting of experts on 21 February 2022. I am in agreement with the plaintiff's submission in this regard. In my reasons for judgment, I made it clear that despite the disagreement the parties can still file their joint minute, and are not barred from convening a further meeting for purpose of complying with the provisions of Rule 36(9A) of the Uniform Rule of Court. The current decision does not dispose of any of any portion of the relief sought in the main proceedings. It is simply a procedural interlocutory order which is not definitive of the rights of the parties.

[13] On the merits of the appeal, counsel for the plaintiff submitted that the appeal lacks the prospects of success in that the Court had given the defendant's expert a latitude to prepare his own minute, if he disagrees with that of the plaintiff's expert.

[14] On behalf of the defendant it was contended that the experts have not concluded their joint minute because of outstanding information that needed to be provided before the minute could be finalized. The court should instead have directed the parties to hold a further meeting to canvass the outstanding issues. It was further contended that the decision to force the defendant's expert to sign the incorrect minute infringes upon the expert's rights to impartiality in line with the applicable rule.

[15] There is no substance in this argument. I have already stated in the order that the defendant's experts is allowed to produce his own minute to contradict or agree with the minute already produced by the plaintiff's expert. In so doing I do not see any basis upon which the order in question can affect the defendant's expert impartiality.

[16] I am therefore not persuaded that the order against which leave to appeal is sought meet the requirements set out in *Zweni* above. "An order that met the three *Zweni* requirements would be an appealable decision. In accordance with the general rule against piecemeal entertainment of appeals, an order that did not have all the *Zweni* attributes would generally not be appealable decision.

Such an order would nevertheless qualify as an appealable decision if it had a final and definitive effect on the proceedings, or if the interests of justice required it to be regarded as an appealable decision."[8] The impugned decision is neither definitive of the rights of the parties nor bears the features of disposing any substantial portion of the relief sought. In assessing the characteristics of the order I have also taken into consideration whether either of the parties will suffer irreparable harm if the order is allowed to stand. I could not find that any harm or prejudice would emanate from the order. As in *Machele* judgment above, there are no demonstrable facts placed before the Court to suggest that the granting of the application for leave to appeal will serve the interests of justice. In the circumstances I hold that the plaintiff's point *in limine* on the appealability of the above order is well taken, and should be upheld.

[17] Having reached the above conclusions there is no point in considering the merits of the application for leave to appeal in the context of section 17 of the Act.

Order

1. The plaintiff's point in lime relating to appealability is upheld;

2. The application for leave to appeal is dismissed with costs including costs occasioned by the employment of counsel.

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PH MALUNGANA
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 09 November 2023
Judgment: 27 November 2023.

[8] *Drdgold Ltd and Another v Nkala and Others* 2023 (3) SA 461 SCA, at para 24.

APPEARANCES

For the Applicant:	BD Stevens
Instructed by:	Jurgens Bekker Attorneys
For the Respondent:	D Watson
Instructed by:	Tugendhaft Wapnick Banchetti & Partners