IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: **00014/2023**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
24/04 /2023

DATE SIGNATURE

In the matter between:

MERCURY FITTINGS CC **APPLICANT**

AND

DOORWARE CC **RESPONDENT**

Neutral Citation: *Mercury Fittings CC v Doorware CC* (Case No: 00014/2023) [2023] ZAGPJHC 366 (24 April 2023)

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

OOSTHUIZEN-SENEKAL CSP AJ:

[1] This is an application for leave to appeal against my judgment delivered on 22 February 2023. The matter came before me as an urgent application. The applicant sought final relief to interdict and restrain the respondent from breaching the terms of an agreement relating to the agreed geographical split in South Africa with regards to the supply of certain ironmongery products known as QS Products.

[2] After listening to the submissions by counsel acting on behalf of the respective parties, this Court granted an order in the following terms:

1. The dispute relating to the existence of an agreement between the parties, the nature thereof and the authority provided to Ms Rebecca Humphry on 27 June 2013 is referred to oral evidence.

2. It is ordered that the notice of motion stand as simple summons and the answering affidavit as a notice of intention to defend.

3. The declaration shall be delivered within 15 days of this order and the Uniform Rules dealing with further pleadings, discovery and conduct of trials shall thereafter apply.

4. Pending the outcome of the trial:

   4.1 The respondent be and hereby is interdicted and restrained from selling and/or offering to sell and/or making available to sell under fulfilling orders and/or supplying, whether directly or indirectly, any product in the QS Product range within the geographical areas of:

      4.1.1 The Province of Western Cape,
      4.1.2 The Province of Eastern Cape, and
      4.1.3 The Province of Northern Cape.

   4.2 The respondent be and hereby is interdicted and restrained from selling and/or offering to sell and/or making available to sell and/or fulfilling orders and/or supplying, whether directly or indirectly, any product in the QS Product range to the entities, as set out in Annexure “A” hereto, in Namibia.

4.3 The respondent be and hereby is interdicted and restrained from making contact with and/or approaching any of the applicant's customers, whether directly or indirectly, as listed in Annexure "B" hereto, within the geographical areas as set out in paragraph 4.1 hereof in respect of any aspect relating to any product in the QS Product range.

4.4 The respondent be and hereby is interdicted and restrained from selling and/or offering to sell and/or making available to sell and/or fulfilling orders and/or supplying, whether directly or indirectly, any product in the QS Product range from its office opened in Cape Town, Western Cape, currently situated at Unit C9, Boulevard Way, Capricorn Business Park, Muizenberg.

4.5 The respondent be and hereby is interdicted and restrained from opening offices within the geographical areas set out in paragraph 4.1 hereof.

4.6 The respondent be and hereby is ordered, within 30 (thirty) days of the granting of this order, to furnish to the applicant with a list of all customers or potential customers, including the names of the relevant person(s) in authority and contact details, the respondent made contact with, within the geographical areas as set out in paragraph 4.1 hereof in respect of any product in the QS Product range.

5. Costs in the cause.

[3] This order forms the subject matter of the application for leave to appeal, which is opposed.

[4] For convenience's sake, I will refer to the parties as they were referred to in the urgent application.

[5] The consequential grounds for the application for leave to appeal relied upon by the respondent are the following;

1. The referral of the matter for oral evidence is not supported by the facts and legal position applicable in the matter and the application should have been dismissed.

2. The applicant did not establish the first requirement for final relief namely, a clear right, because the application was based on hearsay evidence of Mr Laubscher, the executive officer and managing director of the applicant, who has no knowledge of the subsistence of the agreement concluded by the parties. Furthermore, the sole member of the applicant, Mr Andrew Osborne-Young passed away on 7 July 2021 and therefore, in referring the matter to trial is a futile exercise because Mr Osborne-Young, the only witness to testify on behalf of the applicant is deceased.

3. The Court failed to take into account that granting an interim order would cause ongoing irreparable harm to the respondent and such would not be in the interests of justice.

[6] At the onset of the hearing, the applicant raised a point *in limine*, which related to rule 4 of the Uniform Rules of Court. Mr Thompson on behalf of the applicant argued that the application for leave to appeal was not served in terms of the rules and therefore the application should be struck from the roll. The applicant based its objection on the contents of an email relating to this application wherein the respondent's attorney of record required an acknowledgment of receipt, which was not complied with by the applicant.

[7] Mr Jackson on behalf of the respondent argued that the applicant had full knowledge of the application and there was no reason for the application not to proceed. He further contended that the parties since the commencement of the urgent application communicated via email and no challenges were experienced, as matter-of-fact communication channels were sufficiently utilized throughout.

[8] I agree with the contentions made by Mr Jackson on behalf of the respondent. It was evident that Mr Thompson was prepared and ready to argue the matter. Both parties conceded that no prejudice would be suffered if arguments were heard. For the reasons there is no need to ponder on this point any further.

[9] On the other hand, Mr Jackson referred to the applicant's conditional application for leave to appeal filed in the matter. The argument was raised that rule 49 made no provision for the filing of a conditional application for leave to appeal and the respondent argued that the filing of such is an irregular step.

[10] Counsel for the applicant conceded that the rules made no provision for filing a conditional application for leave to appeal.

[11] It is clear that the rules make no provision for such and therefore I need not to consider this point any further.

[12] The application for leave to appeal is opposed on the basis that the aforementioned order is not appealable because it is a provisional order. Secondly, the applicant argued that leave to appeal in any event cannot be granted as application does not comply with the prescripts of section 17(1) of the Superior Courts Act, Act 10 of 2013 in that another court would not come to a different decision.

[13] The first question that needs to be addressed, is whether the order granted by me on 22 February 2023 is appealable or not.

[14] Unlike an ordinary appeal, the respondent is appealing an interim order. Interim orders are generally not appealable. That is settled law. But the bar to their appealability is not absolute. However, the issue of appealability of an interim order is well traversed and its settled. There is an array of decisions emanating from the Supreme Court of Appeal and the Constitutional Court regarding this issue.

[15] In the *City of Tshwane Metropolitan Municipality v Afriforum and Another*[1] the Constitutional Court said:

> "[39] The appealability of interim orders in terms of the common law depends on whether they are final in effect. . .

[1] *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19, para [39] and [40].

[40] The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability. The principle was set out in *OUTA*[2] by Moseneke DCJ in these terms:

> '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.'[3]

[16] The controversy as to whether an order was appealable or not was also referred to in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,[4] and in that matter the Constitutional Court remarked that;

> "In this sense, the jurisprudence of the Supreme Court of Appeal on whether a "judgment or order" is appealable remains an important consideration in assessing where the interests of justice lie. An authoritative restatement of the jurisprudence is to be found in *Zweni v Minister of Law and Order* which has laid down that the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. On these general principles the Supreme Court of Appeal has often held that the grant of an interim interdict is not susceptible to an appeal.

[2] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*)
[3] Ibid at para [25].
[4] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2010 (5) BCLR 457 (CC); 2012 (4) SA 618 (CC) -paras [49] and [50].

> The "policy considerations" that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes." [my emphasis]

[17] When deciding on the nature and appealability of the order granted in the present matter, I have to consider the circumstances that led to the urgent application. The applicant and respondent import, sell and distribute stainless-steel ironmongery and door controls from China in terms of an oral agreement concluded as far back as 2010. Subsequent to the passing of the sole member of the applicant in 2021, the respondent conducted business in the geographical areas of the applicant. The conduct of the respondent in this regard was the basis for the relief sought by the applicant.

[18] The sole purpose for the interim order was to restore the *status quo* which existed for over a decade. Furthermore, it was evident that a *bona fide* dispute of fact was raised regarding the existence and nature of the oral agreement concluded and therefore the dispute was referred to trial. There can be no prejudice whatsoever if oral evidence is produced to enable the court to determine what the true intentions of the parties were at the time of conclusion of the oral agreement. The fact that the respondent might suffer irreparable prejudice while the interim order operated, do not cognisably derogate from its interlocutory character. Furthermore, the respondent still has the opportunity to put its side before the trial court inline of the *audi alterem partem* rule.

[19] An important fact for consideration when deciding whether the interest and justice necessitates the granting of this application due the prejudice suffered by the respondent, one has to keep in mind that prior to January 2023 the respondent did not conduct business in the geographical areas of the applicant. The respondent opened up office in Western Cape in January 2023 and that was the sole reason for the applicant to launch the urgent application. The question has to be raised, why would the respondent be prejudiced, if one takes cognisance of the fact that it prior to January 2023 never conducted business in the geographical area of the applicant. The respondent is the author of its own misfortune.

[20] I am therefore of the view, that the order does not have the effect of disposing at least a substantial portion of the relief claimed in the case. The order, because of the material dispute of fact that exist, simply regulate what steps needed to be taken in order to assist the court to arrive at a just decision. The order as it stands does not dispose of the entire matter and is a provisional order, which is not appealable.

[21] In terms of the interim order, I have referred the dispute relating to the nature and existence of the oral agreement between the parties for oral evidence as provided for in rule 6(5)(g).

[22] In *Pfizer Inc v South African Druggists Ltd*[5] the following was stated:

> "... The Rule 6(5)(g) application was purely interlocutory, and the order given is no more than a ruling. It is true that the order is specific and contains elements of finality. It is, however, no less interlocutory than many other orders of a like nature which are frequently granted by our Courts and by the Court of the Commissioner of Patents in the course of a hearing and which have been held to be no more than rulings and consequently to be unappealable, such as for instance an order directing a litigant to supply further particulars (cf *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A)); a temporary interdict (cf *Frank & Hirsch (Pty) Ltd v Rodi & Wienenberger Aktiengesellschaft* 1958 (1) SA 1 (T) (1958 BP 399)); a commission *de bene esse* (cf *Bell v Bell* 1908 TS 887; or an order for security for costs (*Zipotowski v Anglo American Corporation of South Africa* 1972 BP 374). [my emphasis]

[23] In *Wallach v Lew Geffen Estates CC*[6] the following was said:

> "It is plain that the order referring the matter for the hearing of oral evidence was an interlocutory order and that it was a simple interlocutory order of the kind referred to in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948(1) SA 839 (A) at 870A*. Furthermore this is not a case where
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> '... the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed ...'

[5] 1987 (1) SA 259 (t) at 263 F-H.
[6] 1993 (3) SA 258 (AD).

as in *Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration 1987(4) 569 (A) at 585 F-G*. The 'order' given by Coetzee J did not decide the merits. It was merely a direction that further evidence be given before deciding on the merits. It was no more than a ruling. This is clear from a long line of cases decided in this Court and in the provincial divisions."

[24] In *The Civil Practice of the High Courts of South Africa*[7] the following is stated:

> "The question whether or not the court may *mero motu* direct oral evidence to be heard is one regarding which there was until fairly recently scant authority. That this is possible was laid down on appeal in both the former Orange Free State and the former Transvaal. It has, however, been held that, for various reasons, it is a bold step for a presiding judge in an opposed application to refer the matter to evidence or trial *mero motu*."

[25] In terms of rule 6(5)(g) of the Uniform Rules, a court has a wide discretion with regard to referring matters to oral evidence where application proceedings cannot be properly decided by way of affidavit. In certain circumstances (and exceptional cases), the court may decide that a matter should be referred to oral evidence even where no application for such referral had been made.[8]

[26] In this matter I was unable to decide the application on paper. The argument was raised that the application should have been dismissed and not referred to oral evidence. It is important to note that a court is required to adopt a process that is best calculated to ensure that justice is done with the very least delay on the merits of the case. That is what I considered and as a result I was of the view that the dispute relating to the agreement should be canvassed further.

[27] I also considered whether in exercising my discretion would it be in the interest of justice to refer the issue to trial. I found that in view of the duration of the agreement between the parties and the fact that there was uncertainty as to the nature and existence of the agreement it would be in the interest of both parties that the issue be brought to finality and that can only be achieved by oral evidence after which a court can make a final ruling on the matter. A final order would result in finality of the dispute between the parties and as such be in the interest of justice.

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[7] Fifth Edition, Herbstein & Van Winsen edited by Cilliers, Loots & Nel

[8] *Pahad Shipping CC v Commissioner, SARS* [2010] 2 All SA 246 (SCA) at para [20]; see also *Tryzone Fourteen (Pty) Ltd v Batchelor N.O and Others* (3535/2013) [2016] ZAECPEHC 9 (4 March 2016) at para [38].

[28] Therefore, in my view referring the matter to oral evidence would ensure a just and expeditious decision. The issue to be determined is simple and discrete. After hearing oral evidence, the court will then be in a better position to determine whether or not an agreement exists.

[29] An application for leave to appeal is regulated by section 17(1) of the Superior Courts Act 10 of 2013 which provides:

> "(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."

[30] Hendricks DJP (as he then was) in *Doorewaard v S*[9] explained the general principle for the granting leave to appeal as following;

> "The test to be applied is now higher than what it used to be. It is no longer whether another court **may** (might) come to a different decision than what the trial court arrived at. It is now whether another court, sitting as court of appeal, **would** come to a different decision."

[31] Furthermore, it is not desirable that the matter be dealt with in a piecemeal manner. This matter should be finalized and either party who may not be happy with this court's decision after oral evidence has been lead, has the right to appeal. To entertain an appeal at this juncture would be to do so in a piecemeal fashion.

[9] [2019] ZANWHC 25.

[32] After considering all the facts in the matter as well as the test provided for when an applicant for leave to appeal is considered, I conclude that there are no reasonable prospects of success that another court will not come to a different conclusion in the matter.

[33] As for the question of costs, the applicant argued that the application for leave to appeal is an abuse of court process and it sought a cost on attorney and client scale. The respondent on the other hand, argued that a litigant has the right to appeal a decision of any court and the respondent did not apply for leave to appeal for any other reason than that.

[34] It is a trite principle of our law that a court considering an order of costs exercises a discretion which must be exercised judicially.[10] The scale of attorney and client sought by the applicant against the respondent is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner.[11]

[35] Considering the facts of this matter and its circumstances, I am of the view that the applicant is entitled to costs, however I can find no exceptional circumstances which justify a punitive cost order.

[36] I therefore make following order:

1. Leave to appeal to either the Full Court of this division or to the Supreme Court of Appeal is refused.

2. The respondent is ordered to pay the costs of this application for leave to appeal on the scale as between party-and-party.

[10] *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC); *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A.
[11] *Plastic Converters Association of South Africa on behalf of members v National Union of Metalworkers of SA* [2016] 37 2815 (LAC) at para [46].

CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 24 April 2023.

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