REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: **09023/2019**

APPEAL CASE NO: **A5022/2019**

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

28.6.19

Date: **WHG VAN DER LINDE**

In the matter between:

Transasia Minerals (Pty) Ltd	First appellant
11 Miles Investments (Pty) Ltd	Second appellant
Phezukomkhono Community Property Association	Third appellant
and	
Umsobomvu Coal (Pty) Ltd	First respondent
Minister of Police	Second respondent
Phillip Levinsohn, NO	Third respondent

Judgment

Van der Linde, J:

Introduction

[1] This is an automatic appeal brought under section 18 of the Superior Courts Act 10 of 2013 ("the Act"), a section which is concerned with the suspension of a decision pending an appeal against it. Two decisions are pertinent. The first is the decision which is potentially affected by a suspension under section of the Act, which was given by Modiba, J on 29 March 2019 in favour of the present first respondent (simply "the respondent" here) to make an arbitral award an order of court. The second is the subsequent decision by Modiba, J on 3 June 2019 when she not only refused the first and second appellants' (the "appellants") application for leave to appeal her March 2019 decision, but also granted the respondent's decision to lift the suspension of her March 2019 decision, pending any appeal that the appellants might bring to the Supreme Court of Appeal. I will refer to the second decision as the "June 2019 decision."

[2] Best to start with section 18 reproduced:

"18. Suspension of decision pending appeal
(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.
(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
(4) If a court orders otherwise, as contemplated in subsection (1)—
(i) the court must immediately record its reasons for doing so;
(ii) the aggrieved party has an automatic right of appeal to the next highest court;
(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[3] Since, according to the June 2019 decision, the appellants' filing of their application for leave to appeal the March 2019 decision suspended the operation and execution of the March 2019 decision without more in terms of section 18 (1) of the Act, the learned judge heard the respondent's application under section 18(3) that the operation and suspension of the March 2019 decision not be suspended under section 18(1), at the same time.

[4] As seen, section 18 (4)(iv) provides for an appeal against an order uplifting the suspension in terms which describe the appeal as *"automatic"*, and which proclaim that *"... the court hearing such an appeal must deal with it as a matter of extreme urgency; ..."*. And in terms of section 18(4)(iv) a suspension applies anyway pending our judgment. Hence the matter comes before us in those circumstances. The current second respondent, the Minister of police, abides the decision and so too does the third respondent, an arbitrator, to whom I shall refer more fully below.

Background

[5] The question whether the March 2019 decision had the effect of a final judgment (section 18(1)), or was merely an interlocutory order not having that effect (section 18(2)), featured in the exchanges before us, and its resolution clearly has a pronounced effect on this appeal. If the decision fell under section 18(2), as the respondent – despite its own contrary earlier stance – accepted when it was raised but the appellants disputed, then the appeal before us must fail without further ado, because there was no application before the court *a quo* by the appellants for an order that the (then interlocutory) order be suspended pending their intended appeal. But it is unavoidable to trawl through the background of the matter to arrive at a resolution of this issue.

The initial application

[6] The application that led to the March 2019 decision took off when the respondent applied urgently on 11 March 2019 for an order that an arbitral award by the third respondent dated 2 March 2019 and published the following day, be made an order of court. That award concluded in paragraph 20 that the respondent had established all the requirements for the grant of an interim interdict, and proceeded to make such an award. The award directed the first appellant to afford the respondent and its authorised representatives, *"access to all the immovable properties which comprise the Malonjeni Mining Right."* The access was expressly limited to a period of 48 hours only. The founding affidavit in that application discloses that when pursuant to the arbitral award the respondent sought access to the properties, it was refused access by means of guards armed with automatic rifles.

[7] The background to the arbitration itself is set out in the founding affidavit. It is that the respondent had sold prospecting rights to the appellants in June 2010, and that the sale agreement was subsequently varied by two addenda. In material part these provided for the respondent to convert the prospecting rights into mining rights, and the sale therefore became one of the mining rights, subject to the provisions of section 11 of the Mineral and Petroleum Resources Development Act, 2002 ("the MPRDA"). This included obtaining ministerial consent for the transfer of the mining rights.

[8] The affidavit goes on to assert *"many instances of breach and repudiation of the sale agreement"* by the appellants, resulting ultimately in the respondent cancelling the sale agreement. The respondent consequently demanded that the appellants vacate the properties. They refused. Instead, they instituted application proceedings against the respondent in the High Court, KwaZulu-Natal Provincial Division, for a declaration that the sale agreement was not lawfully cancelled by the respondent.

[9] That application has as yet not progressed beyond the founding papers. The respondent contends that it is doomed to fail for irresoluble factual disputes. More pertinently, the sale

agreement contains an arbitration clause, and the respondent referred the dispute between the parties to the arbitration there envisaged.

[10]The arbitration proceedings were potentially wobbled initially when the first and second appellants unsuccessfully applied to interdict them in an urgent application to this Division. Leave to appeal was refused. Ultimately however the first and second appellants agreed to submit to the arbitration, such agreement being evidenced by a minute of a pre-arbitration meeting of 22 November 2018 at which were present the arbitrator (retired judge P Levinsohn), counsel and attorneys for the respondent, and counsel (including senior counsel) for the appellants, as well as their instructing attorney.

[11]According to the minute, *"Counsel for the defendants recorded that the defendants are now prepared to participate in the present arbitration and accordingly they accept that the arbitration tribunal has been properly constituted and that the arbitrator will be entitled to determine the disputes as defined in the pleadings. However notwithstanding this, in the event that their KZN litigation is successful, they reserve the right to contend that the said arbitration proceedings were ab initio of no force and effect."*

[12]At the pre-arbitration meeting the parties agreed to the exchange of pleadings, a further pre-arbitration meeting, and for the arbitration hearing to take place from 3 to 14 June 2014. In paragraph 9 of the minute the appellants are recorded as having indicated that they wished to introduce an appeal process following the arbitrator's award. The respondent did not agree. The minute goes on to record: *"Given that the entire arbitration process is a creature of the parties' consensus, the arbitrator recorded that there could be no appeal. Adv Mpofu, SC stated in view of the lack of consensus on the issue his side accepts that it would only be able to invoke review proceedings following the award."*

[13]The exchange of pleadings followed. The statement of claim assert the sale agreement, its material terms, the addenda, the alleged breaches, the cancellation of the sale agreement by

the respondent (claimant), and the failure of the appellants consequently to vacate the sites. The relief claimed is an award directing the appellants to vacate the sites.

[14] The appellants filed not only a statement of defence but also a statement of counterclaim. In the statement of defence the appellants expressly admitted the arbitration agreement (paragraph 5), and asked that the respondent's claim either be dismissed with costs, or that any award in respect of that claim be considered in conjunction with the appellants' counterclaim. In the counterclaim the appellants claim an award declaring that the respondent's purported cancellation of the agreement is unlawful and should be set aside. They ask that the respondent be directed to take all steps that may be necessary to transfer the mining rights concerned to them. In the alternative they ask for payment of R880 500 000. This amount is made up amongst others of damages amounting to R418 000 000.

[15] An unexpected urgent approach to the arbitrator by the respondent preceded the agreed hearing dates in June 2019. The background to this urgent approach is explained in the respondent's application of March 2019 to make the subsequent arbitral award an order of court. It contends there that on either version of the cancellation it was currently the registered holder of the mining rights in question, and so remained statutorily responsible for the compliance with the environmental legislation and the conditions contained in the mining rights.

[16]It asserts a risk of losing its mining rights if there are any violations either of the relevant legislation or the conditions contained in the rights themselves. In this regard there is the obligation statutorily resting upon the holder of the rights from time to time to revise the existing social and labour plan ("SLP"), for which the respondent requires access to the properties concerned, *"in order to commence the relevant consultations for the revision of the SLP."*

[17] The persistent refusal by the appellants to permit the respondent access to the sites for this limited purpose, on the one hand, and the statutory obligation of the respondent to revise

the SLP, on the other hand, led to the following (emphasis supplied, here and subsequently in quotes below): *"It was in those circumstances that the applicant approached the arbitrator for an interim order for access to the Malonjeni properties, pending the finalisation of the arbitration proceedings (which are not likely to be finalised in June)."*

[18] This urgent application for an interim award by the arbitrator took the form of an exchange of written submissions without any oral hearing. In an email by the arbitrator dated 1 February 2019, he invited the parties in these terms: *"The parties are requested to particularly focus on the issue as (to) whether the arbitrator has the necessary jurisdiction to grant relief which is fundamentally interdictory in nature."*

[19]The respondent argued in its written submissions before the arbitrator, in terms which it described as *"in the relation to the interim relief"*, that it is not controversial that pending determination by the arbitrator as to the lawfulness of the respondent's cancellation, the respondent remained the registered holder of the rights in question. It contended that certainly as far as the Department of Mineral Resources was concerned, the respondent is the responsible party concerning the mining rights in every respect.

[20]The respondent contended that *"pending the finalisation of the arbitration"*, it sought access to the mine, *"for the purposes of attending to various compliance matters concerning the rights. Specifically, the claimant requires access to the mine site in order to commence the process of resubmitting the social and labour plan (SLP) associated with the Malonjeni mining right."* The respondent contended that failing such access, *"it is not only possible but likely that the DMR will cancel the rights, thus rendering the arbitration process between the parties nugatory."*

[21]In this regard the respondent contended that on 11 June 2018 that DMR conducted a compliance audit, resulting in the issue of an order requiring the respondent as owner of the mining right to *"take immediate rectifying steps"* and submit various documents to the DMR, including the implementation plan with timelines aligned to the remaining period of the SLP

cycle, ending in November 2019. The respondent concluded by submitting that it is not possible for it simply to await *the finalisation of the arbitration proceedings* before it is given the opportunity to enter upon the mine site, to take stock of what is occurring, and to commence with the revision of the SLP for the purposes of the next SLP cycle.

[22]As it was specifically requested to do by the arbitrator, the respondent made submissions concerning the arbitrator's powers to make an order, *"for the interim relief sought."* Referring to the parties' agreement that the AFSA Expedited Rules apply, the respondent quoted and relied on rule 7 which *"deals with interlocutory matters and temporary orders."* According to that rule, *"should the need arise for any party to seek interim or temporary relief before the arbitration is finalised, that party may apply to the arbitrator to grant such interlocutory order or to give the required temporary relief ..."*.

[23]Continuing, the respondent argued that the order which it sought was *"incidental to the main relief sought in the arbitration"*, and submitted that *"an interim award in terms of which the claimant is entitled to enter upon the mine site and undertake such activities as may be necessary in order to protect the mining rights it owns is a necessary order and one ancillary and incidental to the existing jurisdiction of the arbitrator."*

[24]The appellants, in filing their written submissions in relation to the respondent's document styled *"urgent interim relief"*, also dealt with the jurisdiction of the arbitrator as the latter had requested. They submitted however that: *"The respondents are of the view that the arbitrator in this matter lacks the requisite jurisdiction to determine the dispute in respect of access to the Malonjeni mine site, pending the finalisation of the arbitration proceedings."*

[25]Their reasoning proceeded as follows. The arbitration is governed by the AFSA Expedited Rules. There are three sources that would ordinarily have conferred powers on an arbitrator to grant interim relief *"that is interdictory in nature"*, *"pending the finalisation of the arbitration proceedings."*

[26]The first is section 26 of The Arbitration Act 42 of 1965, which provides that unless the arbitration agreement provides otherwise, an arbitration tribunal may make an interim award at any time within the period allowed for making an award. The appellants submitted however that section 26 does not avail the respondent, because such an interim award would *"relate specifically to the issues defined in the pleadings and not extend to a new and stand-alone dispute which has not been referred to arbitration."*

[27]The second source identified by the appellants is clause 11 of the written sale agreement. Clause 11.1 refers *"any and all disputes"* to arbitration, and clause 11.2 then provides: *"The provisions of clause 11.1 shall not preclude any party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator."* The appellants opted for this source of power. They submitted that *"the dispute concerning access to premises falls under clause 11.2 of the contract and not clause 11.1."*

[28]The third source of power of an arbitrator to grant an interim interdict (the issue raised specifically by the arbitrator), is according to the appellants rule 7 of the AFSA Expedited Rules. They submitted however that this rule does not apply because the access sought is not conferred upon an arbitrator in terms of section 14 of the Arbitration Act; and also that *"the relief sought also does not qualify to be defined as 'interlocutory' to the main dispute, which is 'incidental' thereto."*

[29]Their reference to *"interlocutory"* and *"incidental"* derives from the said rule 7: *"Should the need arise for any party to seek interim or temporary relief before the arbitration is finalised, that party may apply to the arbitrator to grant such interlocutory order or to give the required temporary relief and the arbitrator shall have the same power to do so as if the matter were to one heard by a judge of the High Court."*

[30]The appellants concluded their written submissions by arguing that the respondent *"bears the onus to demonstrate that the arbitrator has jurisdiction to grant an urgent interim mandatory interdict in respect of the access dispute, which onus has not been discharged. For the reasons*

outlined above, the respondent's hold the view that the arbitrator lacks the jurisdiction to determine the dispute in respect of access ... . The application or to be dismissed on this ground alone."

[31]The respondent filed a reply and responded to the appellants' submissions concerning jurisdiction. In these they submitted that the access relief *"is obviously interim and incidental to the main relief... So much so that the main dispute may become entirely moot in the event that the mining rights in question had withdrawn."* The respondent also points out that the appellants conceded in paragraph 5 of their submissions that the arbitrator is entitled to make an interim award, but their argument was that the interim award should relate *"specifically"* to the issues defined in the pleadings. The respondent then submits that the issues defined in the pleadings squarely concern access to the sites.

[32]In his award, that which was sought to be made an order of court before Modiba, J, the arbitrator summarised the respondent's contention as being that as the holder of the rights it cannot produce the SLP without the ability to enter upon the mine site. The arbitrator went on to consider the submissions of the appellants and referred to in clause 11 of the written sale agreement; rule 7 of the AFSA rules; and section 26 of the Arbitration Act. He recorded that at the very arbitration meeting of 22 November 2018 the appellants accepted that the matter had properly been referred to arbitration and that the arbitrator will be entitled to determine the disputes as defined in the pleadings.

[33]The arbitrator agreed with the submission of the respondent that the dispute falls under clause 11 of the written sale agreement, and he proceeded to conclude: *"In summary it follows that the claimant has established all the requirements for the grant of an interim interdict, namely a prima facie right, apprehension of irreparable harm if an interdict is not granted, a clear balance of convenience in its favour and finally, the existence of no other remedy."*

[34]In their answering affidavit in the urgent application to make this arbitral award an order of court, the appellants disputed the urgency of the matter in some considerable detail. As to

the respondent's need to access the property, the appellants said that they have a reasonable apprehension that the true motives for demanding access to the site relate to the respondent's ongoing attempts to undo the sale and to find a new buyer for the mining rights. They deal also with the merits of the main dispute, again in considerable detail, and they draw attention to the dispute between the two protagonists in this regard, stressing that that dispute is currently unresolved but still pending before AFSA in arbitration.

[35]As regards the award sought to be made an order of court, the appellants indicated their intention to review the award for three reasons: that it is defective for vagueness; that the arbitrator exceeded his powers since he lacked the jurisdiction to hear the matter; and that if he did have jurisdiction, he committed gross irregularities, *"in that he effectively decided the main dispute (or at the very least delivered an award with a clear impact on the rights of the respondents in relation to the main dispute)."*

[36]After a replying affidavit by the respondent the matter was argued before Modiba, J. In her written judgement of 29 March 2019, the learned judge commenced by stating, with reference to the arbitral award sought to be made an order of court, that *"the award is interim in nature"*. She recorded that in the main dispute the respondent seeks an order evicting the appellants. She recorded also that the appellants have counter applied for an urgent stay and the review of the arbitral award, as well as an interdict against the respondent from sending the holdership of the mining rights.

[37]The papers in the counter-application are not before us, presumably because there was, in the event, no subsequent application under section 18 of the Act by the appellants, pursuant to the dismissal by Modiba, J of that counter-application. It is only the respondent who has applied for relief in terms of section 18(3), pursuant to the notice of application for leave to appeal filed on 29 March 2019 by the appellants.

[38]Reverting to the judgement on the merits of the March 2019 urgent application, the learned judge found that both applications were urgent; she discussed the counter-application for a

review based on the three grounds alluded to above; but she concluded that the arbitrator derived his jurisdiction to make the interim award from three sources, being clause 11 of the arbitration agreement, rule 7 of the AFSA Expedited Rules; and the terms of the arbitration dispute. She concluded that the arbitrator committed no irregularity.

[39]Importantly, however, the learned judge held: *"[21] In the interim award, the arbitrator made no pronouncement on whether the applicant is entitled to evict the respondents based on its cancellation of the sale agreement or whether the respondents are entitled to specific performance, alternatively damages. Pronouncing on the applicant's holdership rights as a prima facie finding to determine the requirements for interim relief has no bearing on the issues the arbitrator is required to determine in the main dispute."*

Was the March 2019 decision making the arbitral award an order of court, final or interlocutory?

[40]With this rather lengthy introduction and background, one can now turn to consider the substance of the application brought by the respondent for relief under section 18 of the superior courts act. Section 18 has been quoted above.

[41]The respondent's notice of motion in the June 2019 application asked that it be directed, *"As contemplated in section 18 (1) and (3) of the Superior Courts Act 10 of 2013, that the judgement of the Honourable Madam Justice Modiba on 29 March 2019 under case number 09023/2019 is not suspended pending finalisation of applications for leave to appeal, appeal petitions, applications for reconsideration by the judge President of the SCA and/or appeals instituted by the first and second respondents' against the judgement."*

[42]It appears that the court *a quo* also approached the matter on the basis that sections 18 (1) and (3) applied to the March 2019 decision. Whether that approach is correct must now be considered. Self-evidently, as alluded to above, the significance of the issue is apparent from the duty resting upon an applicant for relief under that section. In particular, if the effect of

the decision concerned is that of a final judgement, then only is its operation and execution suspended without more pending the appeal.

[43]And it is only then that the winner would want to apply to the court to order otherwise, as envisaged in section 18(3) and has the duty to show the existence of *"exceptional circumstances"*, and in addition, on a balance of probabilities, that it will suffer irreparable harm if the automatic suspension were not lifted, and that the loser (who would be the party appealing) will not suffer irreparable harm if the court orders the lifting of the automatic suspension.

[44]Of course, section 18(2) turns these rules on their head when the judgement *"is an interlocutory order not having the effect of a final judgement."* Then, even if the loser appeals, the judgement and order are not suspended, unless the loser applies to court and shows the existence of exceptional circumstances, and in addition proves, on a balance of probabilities, that it will suffer irreparable harm if the court does not suspend the operation and execution of the decision, and that the winner will not suffer irreparable harm if the court were to suspend the operation and execution of the decision.

[45]There can be little doubt, as I see it, that at least the award of the arbitrator was in the nature of an interlocutory award. Certainly the parties regarded it as such, and so did the court a quo, as appears from the passages quoted and underscored above. This approach also fits the distinction between interlocutory orders, and judgements having final effect. Regard may be had to the discussion by Van Loggerenberg in Erasmus, Superior Court Practice.[1]

[46]The author discusses the background to the present legislative position, in the course of which courts were called upon to, and did, distinguish between so-called "simple " interlocutory orders, and interlocutory orders having a final effect on the main action.[2] That distinction was necessary to determine whether the decision concerned was a "judgment or order" for

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[1] Second edition, volume 1, page A2-36 and following.
[2] Page A2-36B.

purposes of section 20 of the now repealed Supreme Court Act 59 of 1959. A "simple" interlocutory order was not appealable, as a result of the amendment of section 7 of the Appeals Amendment Act 105 of 1982. That enquiry is no longer pertinent, but the body of case-law has left us with being able to distinguish between interlocutory orders having a final effect, and those that were regarded as "simple".

[47]One example of what was held to be a "simple" interlocutory order, was the granting of an interdict *pendente lite*.[3] Interlocutory orders that had a final and definitive effect on the main action was to be distinguished (footnotes omitted):[4]

"An interlocutory order with a final and definitive effect on the main action is a 'judgment or order' because that is the attribute that typifies all 'judgments and orders'. In other words, unless an interlocutory order has a final and definitive effect it is not, for the purposes of s 20, a judgment or order. Simple interlocutory orders are, therefore, not appealable under the section and there is no distinction between simple interlocutory orders and rulings. The fact that there was a right of appeal (with leave) in respect of simple interlocutory orders by virtue of a special provision in the old s 20(2)(b) does not mean that those decisions were deemed to be true 'judgments or orders'."

[48]In this case the 48 hours access award of the arbitrator will have no effect at all on the main arbitration. There is no part of the relief ultimately claimed, whether in convention or in reconvention, that could be impacted by the 48 hours access.

[49]It may be asked whether the making of the interim award an order of court under section 31 of the Arbitration Act 42 of 1965 changes this conclusion. But I do not believe that interim arbitral awards become final court orders by that process. This topic has enjoyed the attention of our courts in a slightly different context, being whether a court has the power under section 31 of the Act to make an interim award an order of court.

[50]Our courts have no difficulty making interim arbitral awards orders of court, without changing the intrinsic characteristic of the arbitral award, particularly without changing the

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[3] Erasmus, op cit, page A2-39, ft 14.
[4] Erasmus, op cit, page A2-38.

interlocutory feature of the award. Although it was first thought to have been held differently in Blue Circle Projects (Pty) Ltd v Klerksdorp Municipality,[5] the subsequent judgement in Stocks and Stocks (Cape) (Pty) Ltd v Gordon and Others NNO[6]confirmed the principle that even an interim order by an arbitrator (in that case a mediator) can be made an order of court. In reaching that conclusion, the court held that Blue Circle Projects was clearly wrong and that where parties have agreed to be bound by a conclusion of a mediator, even if interim and subject to an appeal structure, the opinion of the mediator may be made an order of court.

[51]To the same effect is the judgement in Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd[7]. In that case the court was concerned with a clause in a building contract which required disputes first to be referred to a dispute adjudication board, from which an appeal to an arbitration was available to the dissatisfied party. The contract provided that the decision of the DAB *"shall be binding on both parties shall promptly give effect to it unless and until it shall be revised."* Despite the fact that both parties gave notice of dissatisfaction with the decision, referring it to arbitration, the court gave effect to the determination by the DAB by making an order in terms of it.

[52]It is accordingly suggested that when a court makes an arbitral award an order of court under the Arbitration Act 42 of 1965, it lends the enforcement infrastructure available in respect of court orders, also to the particular arbitral award. But since it merely makes the particular award an order of court, and does not add any contents of a substantive nature to the award, it cannot change the characteristic of the award being interim/interlocutory as opposed to final.

[53]In the present matter, of course, the parties' arbitral agreement resides in the written sale agreement, in terms of which their disputes are agreed to be referred to arbitration in terms of the AFSA Expedited Rules. That self-evidently they do not agree in advance to the outcome

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[5] 1990 (1) SA 469 (TPD).
[6] 1993 (1) SA 156 (TPD).
[7] 2014 (1) SA 244 (GSJ).

of the determination of an arbitrator, is irrelevant; their prior agreement to subject their disputes for determination by an arbitrator, provides sufficient jurisdictional consensus, also in respect of lawful arbitral awards of an interim nature, provided of course they are made in terms of the rules to which the parties have agreed.

[54]Whether the arbitrator had jurisdiction to decide an interim issue is a matter in respect of which the parties were not agreed. As pointed out, the appellants counter applied for an urgent stay and the review of the arbitral award on the basis, amongst others, that the arbitrator had no jurisdiction to make the interim award. Modiba, J dismissed that application.

[55]Assuming in favour of the appellants that the dismissal of that counter application was a *"final judgment"* for purposes of section 18, then any pending appeal against that dismissal would in principle have suspended the operation and execution of the dismissal decision. But since it was a dismissal decision, the suspension would have no effect relevant to the appeal before us.

[56]The conclusion reached here is at odds with the approach taken by the court *a quo*. In law, the respondent had operating in its favour a decision which was an interlocutory decision not having the effect of a final judgement, the operation and execution of which was therefore not suspended under section 18(1) of the Act. The respondent therefore had no business applying for relief under that section; if the appellants had wished to suspend the operation and execution of the March 2019 decision, it was up to them to have applied for relief under section 18 (3) of the Act.

[57]It was up to them to have shown the existence of *"exceptional circumstances"* as envisaged in section 18 (1) of Act, and it was up to them to have proved on a balance of probabilities that they would suffer irreparable harm if the court did not suspend the operation of the March 2019 decision; and it was up to them to show that the respondent would not suffer irreparable harm if the March 2019 decision was suspended (with the effect that the respondent could not access the sites for 48 hours). They did not do so.

Appropriate relief

[58]The appellants come before us appealing the order of Modiba J of 3 June 2019. I deal below with the possession of the third appellant, the community. In paragraph 8 of the order of Modiba, J, she declared that the order of 29 March 2019 was not suspended pending the finalisation of applications for leave to appeal, and similar procedural devices. Despite the fact that the reasoning adopted above is different from that followed by Modiba, J, the declaration that the operation and execution of the March 2019 decision was not suspended, is an order that I too would have proposed.

[59]Yet there is a fundamental difference. Modiba, J granted relief on a section 18 application that was ill-founded. It should have been dismissed. In view of the conclusion reached above, the appropriate order is to set aside paragraphs 7, 8 and 9 of that order. The powers of a court exercising appeal jurisdiction are wide:

"19. Powers of court on hearing of appeals
The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—
(a) dispose of an appeal without the hearing of oral argument;
(b) receive further evidence;
(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or
(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

[60]Acting under these powers it seems to be appropriate that we should declare the correct legal position as we see it, set aside the orders of the court a quo affected by that declaration, and dismiss the appeal. Costs should follow the event in each instance.

The position of the third appellant

[61]On 15 May 2019 the third appellant applied for leave to intervene in the proceedings in terms of section 18 (1) of the Act; for an order rescinding the judgement of Modiba, J of 29 March 2019; and for an order interdicting the respondent from accessing the premises. The

application was ruled urgent by the court *a quo* and the intervention was granted. The court *a quo* dealt with the third appellant's rescission application and concluded that it had failed to establish that the order making the arbitration award an order of court was, in terms of rule 42 (1) (a), erroneously sought and granted in its absence. It held: *"It has not established that it has an interest in the dispute between Transasia and Umsobomvu that warrants that it ought to have been joined in the application to make the arbitration award an order of court."*

[62]That being so, if the third appellant is aggrieved by that judgement, it must apply for leave to appeal that judgement. But the fact that its application for rescission was dismissed, does not without more grant it *locus standi* to apply for or resist relief under section 18 in the dispute between the appellants and the respondent. The same considerations apply in respect of the third appellant's failed application for an interdict.

[63]The third appellant argued however that since Modiba, J granted it leave to intervene, therefore it had *locus standi* to support the appellants in their current appeal. Even if that were so, an issue in respect of which no view is expressed, then the success or failure of the third appellants' participation in the appeal is tied to the success or failure of that of the appellants.

The order

[64]Having regard to the aforegoing, I propose the following order:

(a) The appeal is dismissed with costs, including the costs of two counsel one of whom is senior counsel.

(b) Paragraphs 7, 8 and 9 of the order of the court a quo dated 3 June 2019 is set aside, and there is substituted for them the following order:

"The application to declare the operation and execution of the decision of 29 March 2019 not suspended pending any appeals against it, is dismissed with costs."

(c) It is declared that the order of the court a quo dated 29 March 2019 is an interlocutory order not having the effect of a final judgment, as envisaged in section 18(2) of The Superior Courts Act, 10 of 2013, and was not suspended pending applications for leave to appeal, or appeals, against it.

WHG van der Linde
Judge, High Court
Johannesburg

I agree.

D Fisher
Judge, High Court
Johannesburg

I agree.

DN Unterhalter
Judge, High Court
Johannesburg

Date argued: 13 June 2019

Date judgement: 28 June 2019

For the first and second appellants:
Adv D Mpofu, DC
Instructed by:
Mabuza Attorneys
First and second appellants' attorneys
1st floor
83 Central Street
Houghton
Johannesburg
011-4832387/4830476
eric@mabuza.co.za
Ref: Mr ET Mabuza

For the third appellant:
Adv T Ramogale
Instructed by:
Mathebula & Jona, Inc
Third appellant's attorneys
Office 506, 5th floor
Works@market Building
Albertina & Von Brandis Streets

Johannesburg
011-3330250
mathebula@mjinccorporated.co.za
Ref: Mr W Mathebula

For the first respondent:
Adv. CDA Loxton, SC
Adv. A Milovanovic-Bitter
Instructed by:
ENSafrica
Attorneys for first respondent
The Marc/Tower 1
129 Rivonia Road
Sandton
011-2697600
smbatha@ensafrica.com; tmodubu@ensafrica.com
Ref: Mr S Mbatha/Ms T Modubu/0441771