REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 038431/2024

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

27/01/2025 [redacted]
DATE SIGNATURE

In the matter between:

NEOSPACE (PTY) LTD	Applicant
and	
F & J ENGELBRECHT FAMILIE BELLEGINGS (PTY) LTD	First Respondent
J & S ENGELBRECHT FAMILIE BELEGGINGS (PTY) LTD	Second Respondent
JOHAN ENGELBRECHT	Third Respondent
SUA ENGELBRECHT	Fourth Respondent
LUCAS CORNELELIUS McLEAN *N.O*	Fifth Respondent
MARILISE McLEAN *N.O*	Sixth Respondent
NICOLAAS JACOBUS JOOSTE *N.O*	Seventh Respondent
SUSANNE LOUISA MARIA MAREE *N.O*	Eighth Respondent
ANGELO JOSE DE ANDRADE *N.O*	Ninth Respondent
JOAC PAULO DE ANDRADE *N.O*	Tenth Respondent
MARIA FERNANDA DE ANDRADE *N.O*	Eleventh Respondent

JUDGMENT - LEAVE TO APPEAL

MAHALALELO, J

[1] This is an application for leave to appeal the order and the decision I made in this case on 10 May 2024 on the grounds set out in a notice dated 17 May 2024. In its notice, the applicant set out the grounds of appeal as follows:

(a) The learned Judge acted *ultra vires,* and contrary to the interest of justice, in concluding that the Respondents had proved that it was entitled to an interim interdict (while the original relief was for a final interdict) by virtue of the Applicant's alleged selling, and/or leasing portions of the farm...or from establishing a township thereon of such activity taking place. The learned judge erred in not taking into account that it is clear that the structures currently erected on the property are lawful and permitted, are temporary and are not intended to be permanent as they do not conform to the layout of the township, are not indicated to the township layout, township plan, and the land surveyor's diagram.

(b) The learned judge erred in not taking into account that these structures though permitted, will be removed once all approvals for development have been obtained and the property is no longer vulnerable to the land grabbing syndicate. This fact was highlighted constantly over some two years and despite threats to launch an application nothing was done. Clearly the matter could not have been urgent now. The learned judge acted capriciously in granting this very undertaking by Applicant, as relief to the Respondents, in the form of an interim interdict when Respondents claimed a final interdict.

(c) The learned judge misdirected herself in granting paragraph one of the order which relates to future actions, such as construction 'pending the outcome' and removal of the structures 'upon all final approvals' (not immediate removal), and by so doing condones and perpetuates

illegality or unlawful conduct as the order would have been granted on the basis as alleged by Respondents that Applicant has constructed these structures illegally or its conduct amounts to unlawful activity. Once again, the interest of justice would dictate that leave to appeal be granted on this basis alone.

(d) The learned Judge misdirected herself and acted *ultra vires* in actually granting a final interdict where the Applicant is directed to remove all the structures erected on its property upon all the final approvals having been granted for the development of a township in its farm. This as such relief was never sought at any stage by Respondents.

(e) The learned judge erred in granting costs to the Respondents under the above circumstances, and even though the Respondents had abandoned almost 80% of their relief. The applicant argues that it had achieved substantial success and should have been awarded costs. This is in line with the interest of justice.

(f) The learned judge erred in failing to recognise that currently the appeal to the Tribunal is pending and the Applicant awaits the outcome of the appeal. That Respondents have issued this application under false pretences with the real motive being financial extortion of the Applicant and also to abuse this process to influence the Tribunal.

[2] On 10 May 2024, I granted an interim order in terms of an application brought as one of urgency. In terms of my order, I ordered that:

> '1 The First Respondent is hereby interdicted and restrained from selling, and/or leasing portions of the farm and/or from constructing of any buildings of whatsoever nature on the farm and/or allowing occupiers to take occupation of the First Respondent's farm and/or the buildings erected and/or from establishing a township thereon in contravention of the National Building Regulations and Building Standards Act No 103 of 1997 ("the Standards Act"), the Spatial Planning and Land Use Management Act No 16 of 2013 ("SPLUMA"), the Emfuleni Local

Municipality Spatial Planning and Land Use Management SPLUMA BY - Laws, dated 2018 ("By-Laws'), the Emfuleni Land Use Scheme ("ELUS'), the National Environmental Management Act No 107 of 1998 ("NEMA"), the NEMA Regulations and the Constitution of the Republic of South Africa, pending the outcome of the NEMA appeal process and the outcome of the township application by the Fourth Respondent, including determinations on appeal or review of those decisions.

2 The first respondent is ordered to pay the applicants cost occasioned by the application on the scale party and party and the cost of senior counsel incurred from 18 April 2024 on the scales "C" in terms of Rule 67 (A)(3)(C) and Junior Counsel also on scale "C".'

[3] The reasons for the judgment were handed down on 5 August 2024. At the hearing of the application for leave to appeal the respondents abandoned the issue they had raised that the appeal had lapsed.

[4] The application for leave to appeal is opposed by the respondents. They contended firstly that the order granted on 10 May 2024 is not appealable because it is interim in nature pending the finalisation of the appeal which is before the Tribunal and that the court did not purport to dispose finally any part of the relief, or pronounce finally on any issues on the merits.

Appealability of interim orders

[5] It is not in dispute that the order granted does not finally dispose of the issues between the parties. Our courts have over time developed the law with regard to the appealability of interim or interlocutory orders. As to what would constitute an interlocutory order the court in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[1] said the following:

> 'In a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the process of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on

[1] 1977 (3) SA 534 (AD) at 549G.

the main action; and (ii) those, known as "simple (or purely interlocutory orders" or "interlocutory orders proper" which do not.'

[6] In determining whether the order that is sought to be appealed against is final in effect, the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[2] held:

> '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.'

[7] The court added at 640G to 641C:

> '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 more context-sensitive standard of the interest of justice, favoured 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 & Others v Commissioner, South Africa 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.'

[8] Furthermore, the issue was decided by the Constitutional Court in *Tshwane City v Afriforum and Another*[3] where the court dealt with appealability of interim orders. The court expressed the position as follows:

> '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

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[2] 2012 (4) SA 618 (CC) at 639F to 640A.
[3] 2016 (6) SA 279 (CC) at para 40.

constitutional interests of justice standard. The overarching 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.'

[9] The effect of the order granted by this Court is to interdicted and restrain the respondent from selling, and/or leasing portions of the farm and/or from constructing any buildings of whatsoever nature on the farm and/or allowing occupiers to take occupation of the farm and/or the buildings erected and/or from establishing a township thereon in contravention of the National Building Regulations and Building Standards Act No 103 of 1997 (the Standards Act), the Spatial Planning and Land Use Management Act No 16 of 2013 (SPLUMA), the Emfuleni Local Municipality Spatial Planning and Land Use Management SPLUMA BY - Laws, dated 2018 (By-Laws), the Emfuleni Land Use Scheme (ELUS), the National Environmental Management Act No 107 of 1998 (NEMA), the NEMA Regulations and the Constitution of the Republic of South Africa, pending the outcome of the NEMA appeal process and the outcome of the township application by the Fourth Respondent, including determinations on appeal or review of those decisions. It seems to me that the applicant misconstrued the order that was granted by this court. I agree that the order granted is interim in nature and it is not in the interest of justice that it be appealed.

[10] Even if I am wrong in my conclusion above are the reasonable prospects that the appeal would succeed?

[11] The respondents contended that there are no reasonable prospect that the applicant will succeed on appeal and there are no compelling reasons why the appeal should be heard.

Reasonable prospects of success/any other compelling reasons

[12] Section 17(1) of the Superior Court Act 10 of 2013 (the Act) deals with circumstances under which leave to appeal may be granted. The relevant parts read as follows:

'17(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.'

[13] From the case law dealing with the interpretation of the section as regards to the test for determining whether leave to appeal should be granted, it is evident that the threshold has been raised. The use of the word "*would*" in the section has been held to indicate a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[14] I have considered the grounds of appeal raised by the applicant in the application for leave to appeal. I have also listened to argument for and against such application and considered same. In deciding this application for leave to appeal, I am also guided by the dicta of the Supreme Court of Appeal where it held in *Dexgroup (Pty) Ltd v Trustco Group international (Pty) Ltd and Others*[4] that:

> '... The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.'

[15] The applicant's appeal is premised on the wrong construction of the court order. There is no merit in the grounds of appeal raised. As to costs, they are in the discretion of the court. The respondents were substantially successful. There were no reasons given why costs should not follow the result. There are no

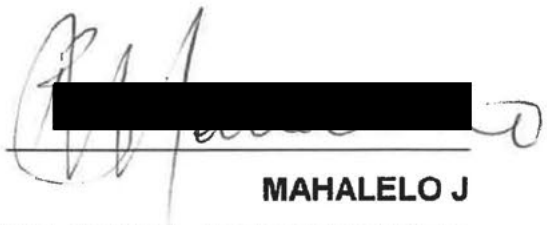
[4] 2013 (6) SA 520 (SCA) at para 24.

reasonable prospects of success on appeal and there are no compelling reasons why the appeal should be heard.

[16] In the result, the following order is made:

Order

1. Application for leave to appeal is dismissed with costs.



MAHALELO J

JUDGE OF THE HIGH COURT, JOHANNESBURG

Appearances

On behalf of the Applicants:	E. Roberts
Instructed by:	Moolman & Pienaar Incorporated
On behalf of First Respondent:	Adv. M.I.E Ismail
Instructed by:	IA LA