IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3266/2019

In the matter between:

DHRAMALINGUM MOONISAMI	**1st Applicant**
DHRAMALINGUM MOONISAMI N.O	**2nd Applicant**

and

MANIVASAN PALANI	**1st Respondent**
MANIVASAN PALANI N.O	**2nd Respondent**
BLENDRITE CHEMICALS (PTY) LTD	**3rd Respondent**
ABSA BANK LIMITED	**4th Respondent**

ORDER

Having considered the matter and after hearing counsel, the following order is made:

1. The application for leave to appeal is dismissed with costs including the costs occasioned by the adjournment of 6 December 2019.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Delivered on: 7 February 2020

Masipa J:

Introduction

[1] This is an application for leave to appeal against the order ("main order") handed down on 24 April 2019. Leave to appeal is sought to the Full Court of the KwaZulu-Natal Division. Pursuant to the granting of the main order, which had a return date of 17 May 2019, the applicants filed an application for leave to appeal on 25 April 2019 without first requesting and obtaining reasons for the main order. On the return date of the main order, being 17 May 2019, the matter was adjourned and a request for reasons was subsequently made. Prior to receiving the reasons for the main order, another urgent application was launched by the first to the third respondents herein in terms of s 18 of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"), seeking an order that the main order not be suspended by the filing of the application for leave to appeal. That application was under the same case number and was opposed by the applicants herein. After hearing that application, the court, per Lopes J granted another order dated 30 May 2019 ("the second order").

The test for granting leave to appeal

[2] Leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have reasonable prospects of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[3] In *S v Smith* 2012 (1) SACR 567 (SCA) para 7, the test was postulated as being that the court on appeal could reasonably arrive at a different conclusion. More is required than just the mere 'possibility' that another court might arrive at a different conclusion. In deciding whether leave to appeal should be granted, focus will then be on whether another court would arrive at a different conclusion and not whether it may do

so. The prospects should not be remote but must be realistic. See *S v Kruger* 2014 (1) SACR 647 (SCA) para 2. The threshold for granting leave to appeal is also now higher. See *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) para 6. In *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) para 34, the court stated that leave to appeal should be granted only when there is a sound/rational basis to conclude that there are reasonable prospects of success on appeal.

The merits

[4] The grounds upon which the leave to appeal are sought appear in the notice of application for leave to appeal. In so far as may be necessary, they are set out hereinafter.

[5] It is necessary to mention that the main order, against which the applicants seek to be granted leave to appeal, arises from an urgent application, which was brought in the form of a rule nisi. When the main order was made, an interim relief was granted with the return date being 17 May 2019, which was approximately three weeks later. The main order granted and which the applicants seek to appeal against is the following:

'(i) The first respondent is interdicted and directed to forthwith uplift the suspension of and render fully operational the third applicant's banking account held with the first respondent bearing account number 4061420623 at its Amanzimtoti branch ('the bank account'), and the first respondent is directed to forthwith take all steps necessary for and to give the first applicant full electronic access (including administrative access) to be exercised by employees of the third applicant appointed by the first applicant.

(ii) The first and/or second applicants are forthwith granted leave to institute this application and to prosecute such to finality for and on behalf of the third applicant.

(iii) Any party opposing this application is directed to pay costs of this application.'

[6] The applicants contend that the main order, although interim, is final in nature as it gave the first and second respondents unfettered access to control the abovementioned bank account. The applicants argued that since the main order is final in nature, its application is suspended pending appeal as set out in s 18(1) of the Superior Courts Act. It is trite that an appeal only lies against a final order and not an

interim order. The question is therefore whether the main order granted on 24 April 2019 is final and therefore appealable.

The main order

[7] An interim interdict is appealable if it is final in effect and not susceptible to alteration by the court of first instance. See *Metlika Trading Ltd & others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA). Whether the main order of 24 April 2019 was altered by the subsequent order of Lopes J, an issue raised by Mr *Aboobaker SC* for the first, second and third respondents, is still to be decided in this judgment. The main order, which was granted to the respondents, was to allow the third respondent to continue to operate and pay its creditors for the benefit of the Kenti's Financial Trust, ('the Trust'), being the owner of the third respondent and its employees. Since it was close to the end of the month, the third respondent had to pay rental and other service providers together with its employees.

[8] Mr *Aboobaker* submitted that in order for the applicants to succeed in their application, they must show that the main order is final in effect and not susceptible to alteration by the court of first instance. See *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation & others* 2018 (6) SA 440 (SCA) paras 37-38; *Cloete & another v S and A Similar Application* 2019 (4) SA 268 (CC) paras 39-40 and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A). I will revert to this issue later on in the judgment when I deal with the subsequent order by Lopes J of 30 May 2019. For a decision or order to be final, it must also be definitive of the rights of the other party and must dispose of a substantial portion of the relief claimed. The law is clear in this respect. Mr *Aboobaker* submitted that the main order which the applicants seek to appeal was interim pending the application and was subject to confirmation or discharge on a return date. The main order is therefore not definitive of the rights of the parties and does not dispose of any substantial relief claimed in the main proceedings.

[9] The applicants contends that there were disputes of fact but fails to set out those facts, which they suggest created the factual disputes to substantiate the submission that this court ignored the *Plascon–Evans* rule. It was incumbent on the applicants to

set out in their grounds of appeal the specific disputes of fact in order that this court could consider them and decide whether another court would have arrived at a different decision. It is insufficient for the applicants to make a vague statement alleging there were disputes of fact. The applicants' failure to identify these disputed facts is fatal to their case since the court cannot determine the issue.

[10] The applicants contend further that in granting the main interim order, this court erred since the order had the effect of re-writing the agreement between parties to the agreement. Mr *Aboobaker* argued that the effect of the main order was to restore the status quo and therefore the court did not re-write the agreement between the parties. I agree with Mr *Aboobaker* in this regard since the effect of the main order was to allow the first respondent (who was the first applicant in the main application) to continue to operate the third respondent's(the third applicant in the main application) bank account and allow the third respondent to continue to trade, as was the case before. As argued by Mr *Aboobaker*, the first to third respondents satisfied the requirements of an interdict and consequently were granted the order in the form of interim relief.

[11] The distinction between a final order and interim interdictory relief is that an interim order can be reconsidered by the court, which granted it. See *Cipla* above para 45; *Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (A) at 359J-360B. The subsequent order by Lopes J considered below, confirms that this main order could not have been final since it was materially altered by the second order granted.

The second order

[12] On 30 May 2019, the parties in this matter appeared before Lopes J. A draft order similar to the second order granted, was submitted as an order taken by consent and after consideration of the matter, the second order was granted. The second order reads as follows:

'1. Order is made without prejudice to either the 1st applicant and second respondent's right to any of their respective contention in any litigation made in the subject matter before court or which may come before this court in relation to this dispute.

2. An order directing the first respondent to forthwith take all steps necessary to allow the existing authorised employees of the third applicant, namely Sasha Khan and Msizi Wiseman

Ngcobo (“the authorised employees”) to operate and transact on the third applicant’s banking account limited to the following payments:

2.1 Payment of staff salaries for May 2019 in the sum of R427 073 073.48 as set forth in the schedule of salaries marked “MP14”annexed to the founding affidavit;

2.2 Payment to creditors in the sum of R7 270 957,43 as set forth in the schedule of creditors marked “MP13”annexed to the founding affidavit;

2.3 Payment of further staff salaries and creditors certified by the financial manager, Msizi Wiseman Ngcobo, as and when same falls due for payment for each successive month.

3. The second respondent is entitled to be paid his salary in the sum of R37 447.82 per month, for the month of April and May and those amounts are to be paid to him.

4. This order is to operate pending the confirmation or discharge of the interim order granted by Masipa J in the main application and extended from time to time.

5. Costs are reserved for decision for the court in the main application.’

[13] For purposes of determining this application for leave to appeal, it is necessary to determine the status of the second order. Can it be said to be an interim order putting into operation the main order, or is it a substitution order?

[14] On a consideration of the second order, it is apparent that it differs materially to the main order. It therefore cannot be said to be interim aimed at operationalising the main order. I agree with Mr *Aboobaker* that the effect of this is that there is now an interim order which has substituted the main order in its totality. The second order determines the rights of the parties. It is interesting that what was before Lopes J was an application in terms of s 18(3) of the Superior Courts Act and that the order arrived at had nothing to do with that application but instead, the parties agreed to an order along the terms of the second order.

[15] The main order, which the applicants seek to appeal against, has been substituted alternatively superseded by the second order. Consequently, the appeal, which the applicants seek to institute against the main order, is academic/moot. It is trite that courts are not there to deal with issues that are moot. See *Minister of Justice & others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA).

Application to lead further evidence

[16] Mr *Dayal* on behalf of the applicants submitted that it was the applicants' intention to lead further evidence before the appeal court. This he submitted was provided for in s 19 of the Superior Courts Act. According to Mr *Dayal*, the basis for this further evidence was aimed at showing that the first respondent used the main court order to remove large sums of money from the third respondent's bank account and transfer it to the respondents' attorneys' trust account. This was done during December 2019 long after the main order was granted and, in my view, substituted by the subsequent order of Lopes J. It was done in conjunction with Ngcobo, the third respondent's financial manager. The exercise of such powers by the financial manager would have been as was provided for in the second order by Lopes J since this was not in accordance with the main order.

[17] Mr *Aboobaker* argued that this court is *functus officio* and has no powers to expand the record by the introduction of new evidence. This was eloquently set out in *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd & others* 1992 (2) SA 489 (A) at 507A-D. In that judgment, the court set out that as a rule generally, an appeal court, decides the wrongfulness or correctness of the judgment/order according to the facts, which existed at the time the judgment/order was made and not according to new circumstances which arose afterwards.

[18] The application to lead further evidence, which Mr *Dayal* sought to introduce as part of the leave to appeal, was misplaced. This is because the provisions of s 19 of the Superior Courts Act, which he relies on, deals with powers of the appeal court. It was therefore incorrect that he sought to introduce the evidence at this stage. I agree with Mr *Aboobaker* that the new facts, which Mr *Dayal* placed before court, are in general irrelevant.

[19] A further issue relating to the leading of further evidence, in so far as it may be necessary, is that the main order made specific reference to the bank account which was relevant for purposes of that application. From the affidavit provided in support of the leading of further evidence, it is clear that the transactions complained of, which were carried out during December 2019, were in respect of a different account. It therefore cannot be said that the conduct complained of by the applicant was that which was sanctioned by the main court order.

[20] I am therefore not persuaded that another court would find that the applicants have reasonable prospects of success. I do not find that there are any prospects of success in the appeal.

Order

[21] In the premises, the following order is made:

1. The application for leave to appeal is dismissed with costs including the costs occasioned by the adjournment of 6 December 2019.

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Masipa J

Details of the Hearing

Heard:	6 and 13 December 2019
Delivered:	7 February 2020

Appearances:

For the Applicants:	Mr S Dayal
Instructed by:	Maharaj Attorneys
For the 1st to 3rd Respondents:	Mr T N Aboobaker SC with Mr M Manikam
Instructed by:	Jay Reddy Attorneys