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DISPUTE RESOLUTION ALERT

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THE POSITION OF THE APPEALABILITY OF INTERIM ORDERS

Generally interim orders are not appealable. An interim order is a temporary order of the court pending a final hearing. The reasoning is based on the fact that orders of this nature are not final and "generally, it is not in the interest of justice for interlocutory [interim] relief to be subject to appeal as this would defeat the very purpose of that relief", *Mathale v Linda and Others* 2016 (2) SA 461. See also *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC).

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While the rationale for the non-appealability of interim orders is generally sound, it does not always provide for situations where the injustice that arises falls not on the party in whose favour the interim order is granted.

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However, the courts have recognised that in some instances the general rule can result in irreparable harm to the parties involved. "While the rationale for the non-appealability of interim orders is generally sound, it does not always provide for situations where the injustice that arises falls not on the party in whose favour the interim order is granted, but on the party who [seeks] to appeal against the interim order" - *Machele*.

The court found that, "it is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts".

Both the *Machele* and *Mailua* cases dealt with interim orders of execution of eviction orders awaiting appeal. The court in *Machele* found that the interests of justice needed to drive the decision making process.

Recently, the Supreme Court of Appeal (SCA) in *Nova Property Group Holdings v Julius Cobbett* (20815/2014) [2016] ZASCA 63 had to decide the appealability of an interim order compelling the discovery of documentation.

The SCA considered various conflicting decisions previously emanating from that court, both in relation to the facts of the matter and the appealability of interim orders in general.

In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) the court ruled against the appealability of the interim order made by the court of first instance. It tested the interim order against (i) the finality of the order; (ii) the definitive rights of the parties; and (iii) the effect of disposing of a substantial portion of the relief claimed.

Subsequently, in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) the court held that the test parameters applied in *Zwane* were not exhaustive.

In *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA), the court held that the interest of justice were paramount in deciding whether orders were appealable, with each case being considered in light of its own facts.

In making its decision in *Nova*, the court found that, "it is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts". In this case those considerations included weighing up the parties' respective constitutional rights, and resolving previous conflicting decisions. The court relied extensively on s17(1) of the Superior Courts Act, No 10 of 2013, which provides for the specific circumstances in which a judge may grant leave to appeal and found that this section was tailor-made for the appeal in question for two reasons. Firstly, there were at least four conflicting judgments (including the one that was presently on appeal). In *Zweni* the court found an interim order was not appealable. Three years later in *Moch*, the SCA held that the principles which had

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The general approach by the SCA and the Constitutional Court now appears to be that interim orders are appealable if the interests of justice are best served in allowing the appeal.

been laid down in the *Zweni* case were not cast in stone. Close to a decade later in *Philani-Ma-Afrika*, the court found that an interim order can be appealable based on the interest of justice and that each case has to be considered in light of its own facts. Secondly, the appeal would lead to a just and prompt resolution of the real issues between the parties as provided for in the section 17(1).

The general approach by the SCA and the Constitutional Court now appears to be that interim orders are appealable if the interests of justice are best served in allowing the appeal. The main considerations being irreparable harm and orders having a final effect on the parties.

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Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2016 in Band 4 for dispute resolution.

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