

DISPUTE RESOLUTION ALERT

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KIETI LAW LLP, KENYA

IN THIS ISSUE

Piecemeal adjudication of an interim order undesirable unless dismissal thereof is a threat to interests of justice

The question relating to whether an interim order can be subject to an appeal and the circumstances under which an interim order is appealable has resurfaced in the recent Supreme Court of Appeal (SCA) decision in *The City of Cape Town v The South African Human Rights Commission* (Case no 144/2021) [2021] ZASCA 182 (22 December 2021).



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In this judgment the SCA was called upon to hear an appeal against an interim order granted by the Western Cape Division of the High Court, Cape Town, in favour of the South African Human Rights Commission (SAHRC), following an urgent application brought by SAHRC preventing the City of Cape Town from evicting persons and demolishing structures during the national state of disaster without a court order.

As set out by the SCA in *Zweni vs Minister of Law and Order* 1993 (1) SA 523 (a) it is trite that for an order to be susceptible to appeal, *"the decision must be final in effect and not susceptible to alteration by a court of first instance, it must be definitive of the right of the parties, and it must have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings."* To this, the SCA has held that in determining whether to grant leave to appeal, the courts must consider whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation leading to the wasteful use of judicial resources.

An interim order prima facie fails on all grounds to satisfy the test set out in *Zweni vs Minister of Law and Order* 1993 (1) SA 523 (a). However, the court in the *Zweni vs Minister of Law and Order* 1993 (1) SA 523 (a), rightly considered further the decision in *National Treasury and Others vs Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) 223 (CC) where the Constitutional Court confirmed that the interests of justice are paramount in assessing the appealability of an interim order. The Constitutional Court held that although it is important to consider whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review, it is just as important to consider whether 'the harm that flows from the interim order is serious, immediate, ongoing, and irreparable.'

The court in the *Zweni vs Minister of Law and Order* 1993 (1) SA 523 (a) found that the appeal in regard to payment of compensation by the City of Cape Town to persons who suffered loss of personal belongings

a result of the eviction and the demolishing of their informal dwelling succeeds.

However, the court considered the appeal against the interim orders preventing the City of Cape Town from evicting persons and demolishing structures, whether occupied or unoccupied, during the national state of disaster, without a court order. The court found that there could be no irreparable harm if the City of Cape Town is compelled to seek a court order before evicting persons during the national state of disaster. The court found that the relief sought in the interim orders were not final in effect, nor was any irreparable harm or grave injustice likely to occur should the interim orders remain unaltered until the final relief is determined. The interests of justice would not be served by allowing the appeal of the interim orders and the appeal against the interim orders were therefore dismissed.

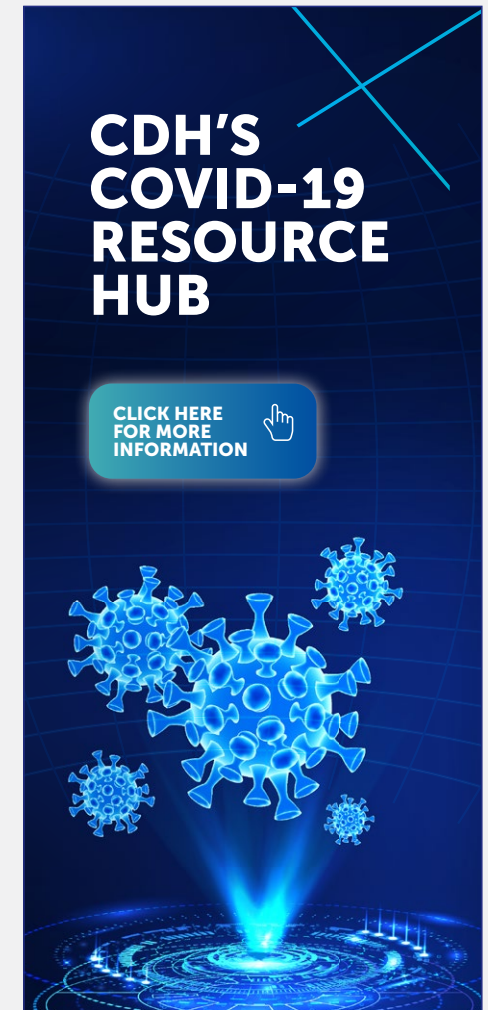
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Generally, our courts have held that the court will only interfere in pending proceedings in the lower courts in cases of great rarity, where grave injustice threatens, and where intervention is necessary to attain justice. The 'interests of justice' standard will inevitably involve a consideration of irreparable harm. As was held in *Machele and Others vs Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC), to appeal an interim order successfully an applicant will have to show that it will suffer irreparable harm if the interim appeal is not granted.

It appears that the common law test for appealability has been stripped of its inflexible nature. Appealability no longer depends primarily on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief sought in the main application. The test now is the constitutional 'interest of justice' standard.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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