Dispute Resolution

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Appealability of a High Court order

In the recent case of *MEC for Economic Development, Gauteng and Another v Sibongile Vilakazi and Others* (783/2023) [2024] ZASCA 126, the issue of appealability of a High Court order was debated.

The case involved an appeal against the judgment of the Gauteng Division of the High Court, Pretoria (High Court) granting the respondents interim relief pending the finalisation of a review application. The respondents were members of the Gauteng Growth and Development Agency's (the second appellant) board of directors until 24 March 2023, when the MEC for Economic Development, Gauteng (the first appellant), being of the view that the relationship between her and the board members had irretrievably broken down, terminated their directorship and dissolved the board. Aggrieved by the first appellant's decision, the respondents brought an application, among other things, for an order reviewing and setting aside the decision. The notice of motion was structured in two parts, with Part A, among other things, seeking the suspension of the first appellant's decision pending the finalisation of the relief sought in Part B, which was the review application.

The High Court found in favour of the respondents and ordered that the first appellant's decision to terminate their directorships be suspended with effect from 24 March 2023; that the respondents be reinstated as board members with effect from the same date; and that the first appellant be interdicted from appointing any board members in substitution of the respondents. The High Court also ordered the appellants to pay the respondents' costs on the attorney and client scale. This punitive costs order was based on a finding that, in dissolving the board, the first appellant was motivated by ulterior purposes.

The appellants contend that the High Court failed to properly consider whether the respondents had established the legal requirements for interim relief and had impermissibly purported to pronounce finally on issues which fell for decision in the review application. They appealed against the order with leave of the High Court.

Before the Supreme Court of Appeal

It was against this backdrop that the Supreme Court of Appeal (SCA) had to consider, among other things, whether the order of the High Court was a "*decision*" as contemplated in terms of section 16(1)(a) of the Superior Courts Act 10 of 2013 (Superior Courts Act). In other words, whether the order of the High Court was appealable.

According to the respondents, the High Court's order was classically interlocutory and therefore not appealable. They based their reasoning on the fact that, according to them, the High Court's order was "*pending the finalisation of the review envisaged in Part B of the notice of motion*" and submitted that the first appellant's decision was merely "*suspended*" as opposed to "*set aside*". Properly construed in terms of the accepted canons of construction, the order was manifestly temporary in nature and effect, or so counsel for the respondents argued.

In considering the appealability of the order, the SCA had due regard for the already established requirements for appealability of an order: (i) that the decision must be final in effect and not open to alteration by the court of

Appealability of a High Court order

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first instance; (ii) it must be definitive of the rights of the parties; and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. The SCA also had regard for the established position in our law which states that even if an order does not meet the above requirements, a matter may still be appealable if it is in the interest of justice that it should be regarded as such.

Determining whether a decision can be appealed

Additionally, the SCA was of the view that an interim order that was interlocutory to a review application, was not necessarily decisive as to appealability. In deciding whether an order is appealable, not only the form of the order must be considered, but also, and predominantly, its effect. Thus, an order that appears in form to be purely interlocutory will be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action. By the same token, the SCA noted that an order which might appear, according to its form, to be finally definitive in the above sense may, nevertheless, be purely interlocutory in effect – the circumstances of each case will determine this.

When the above was applied to the facts of this case, the SCA said that there was little doubt that the order was appealable. According to the court, the judgment in this case purported to make final pronouncements regarding virtually all the issues that would have fallen for decision in the review application. In the SCA's opinion, these related not only to the rationality of the MEC's decision but also her bona fides. Additionally, the SCA noted that because a punitive costs order was made against the first appellant based on the findings of the High Court, the judgment had the effect of disposing of a substantial portion of the relief sought in Part B of the notice of motion. Further, the suspension of the first appellant's decision to dissolve the board and the reinstatement of the respondents as board members had immediate and substantial consequences for the second appellant. Apart from the fact that the first appellant's decision to terminate the respondents' memberships of the board had been suspended, the first appellant was also interdicted from appointing other board members in their stead.

For these reasons, the SCA was satisfied that the High Court's order met all the requisites for appealability, that the order was a "*decision*" as contemplated in section 16(1)(a) of the Superior Courts Act and, finally, that it was in the interest of justice that the appeal be heard.

In summary, an order of a High Court will only be appealable in instances where the decision is final in effect and not open to alteration by the court of first instance, where it is definitive of the rights of the parties and where it has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. In instances where an order does not meet the criteria set out above, the order may still be appealable if it is in the interest of justice. The facts of each case will have to be carefully considered before arriving at a decision regarding the appealability of an order.

Eugene Bester and Serisha Hariram

DISPUTE RESOLUTION ALERT

Does a partial acceptance of an offer constitute a counter-offer?

A valid agreement comes into existence when an offer has been accepted. As straightforward as this principle may seem, courts are often required to determine whether an offer has indeed been accepted. A party alleging that a valid agreement has been concluded must prove that the acceptance of the offer is unambiguous and corresponds with the terms of the offer. This is not always an easy task.

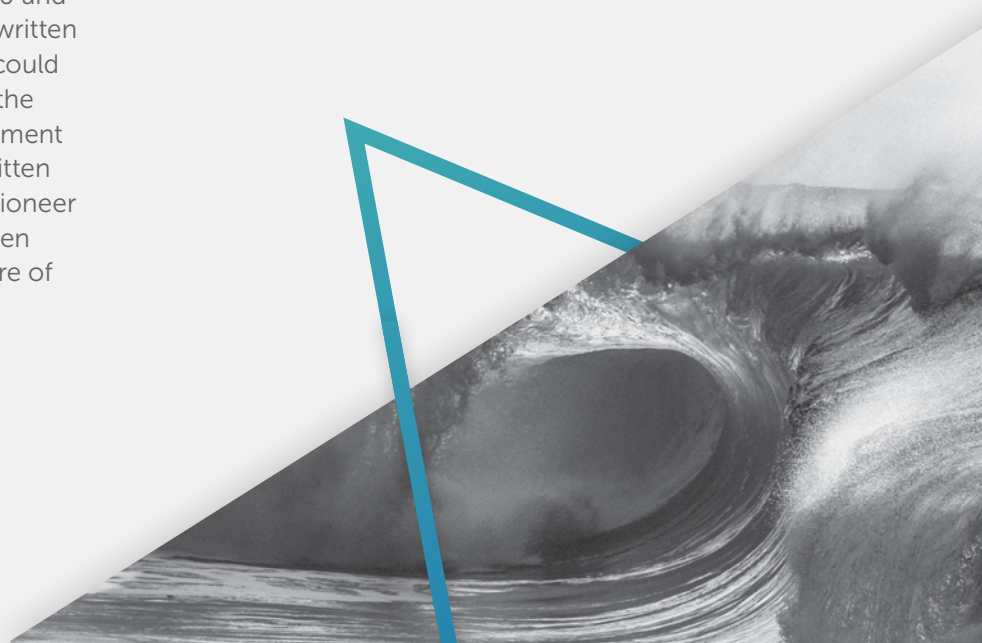
In the matter of *J Space (Pty) Ltd v O-Yes Auctions CC* (38603/2021) [2024] ZAGPJHC 32, the High Court was required to determine whether an offer made by J Space (Pty) Ltd (J Space) to purchase immovable property owned by Chris and Monica Bolsover (the sellers) was duly accepted by the sellers.

In this case, O-YES Auctions CC (auctioneer) was instructed by the sellers to place the sellers' immovable property on auction. J Space placed the highest bid of R1,850,000 and signed a written offer to purchase the property. The written offer included, among other things, that (i) the offer could not be withdrawn for three days, during which time, the sellers could accept the offer and enter into an agreement of sale, and (ii) J Space would, on signature of the written offer, make payment of the initial amount to the auctioneer (initial amount). J Space, in accordance with the written offer, made payment of the initial amount on signature of the written offer.

The counter-offer

The sellers rejected J Space's offer of R1,850,000 and requested that it make an offer of R1,950,000. On 13 October 2020, J Space made a second offer to the sellers for R1,900,000 (R50,000 less than the requested purchase price) on the same terms and conditions as the first written offer. On 16 October 2020, the sellers signed the second offer but made certain amendments to the offer by deleting two paragraphs and altering one paragraph.

J Space requested that the auctioneer refund the initial amount because its second offer was not accepted, and no valid sale agreement was concluded between the parties. The auctioneer disagreed that the second offer was not accepted and refused to refund the initial amount. J Space then instituted legal proceedings against the auctioneer, requesting repayment of the initial amount because no legal basis existed for the auctioneer to retain payment.



Does a partial acceptance of an offer constitute a counter-offer?

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In its submissions before the court, J Space argued that the first written offer was not accepted, and this was highlighted by the fact that the sellers requested a higher purchase price. In addition, the second written offer was not accepted within the three-day period provided by J Space to the sellers. As such, no valid and binding agreement was concluded between the parties.

The auctioneer disagreed with J Space's contention and argued that the sellers did accept the second offer within three days, and that when they accepted the second offer a valid agreement was concluded between the parties. Regarding the amendments made to the written offer, the auctioneer argued that the two amendments – one relating to the person that would receive occupational rental and the second to deleting the obligations on the sellers to provide a gas certificate of conformity and an electric fence system certificate of compliance – were not material changes.

The court's findings

In analysing the parties' submissions, the court found that the auctioneer did not advance any evidence to prove that the sellers accepted the first offer within three days. The sellers' request that it would accept an offer of R1,950,000 constituted a counter-offer and a rejection of J Space's first offer. As to the amendments made by the sellers to the second offer, the court found that the deletion of the clauses served to protect the sellers, and were material amendments.

The court held that J Space's second offer was not accepted by the sellers and their amendments to the second offer constituted a second counter-offer. In the circumstances, no valid sale agreement came into existence between J Space and the sellers, and the auctioneer was ordered to repay the initial amount.

In conclusion, it is unlikely that a court will declare that an offer has been accepted when the purported "*acceptance*" is conditional or unclear. In these cases, a court is likely to consider such an acceptance as constituting a counter-offer and will declare that no valid agreement has come into existence.

Neha Dhana and Raaheel Bux

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