CASE NO.: SA 01/2003

IN THE SUPREME COURT OF NAMIBIA

In the appeal of

ROBERT DOUGLAS WIRTZ APPELLANT

And

HUMPHREY JOHN LEASK ORFORD FIRST RESPONDENT

OMDRAAI (PTY) LTD SECOND RESPONDENT

CORAM: STRYDOM, ACJ, et O'LINN, AJA.

HEARD ON: 2004/04/06

DELIVERED ON: 2005/05/11

APPEAL JUDGMENT

STRYDOM, ACJ: The respondents, styled as the first and second applicants, applied to the Court *a quo* for an order in the following terms:

1. Interdicting and restraining the first and second respondents and their employees or persons acting on their behalf from using the private road and deproclaimed road, formerly designated as 1455 on the farm Omdraai No 114 and having access to the farm Omdraai no. 114 in the District of

Windhoek.

2. Interdicting and restraining the first and second respondents and their employees from damaging or removing the applicants' locks, chains, gates or fences preventing access on to the farm Omdraai No. 114.

3. Interdicting and restraining the first and second respondents from permitting or authorising or instructing their employees to use the portion of the de-proclaimed road 1455 on the farm Omdraai No 114.

4. Interdicting and restraining the first and second respondents from permitting or authorising or instructing the employees from damaging or removing the applicants' locks, chains, gates or fences preventing access onto the farm Omdraai No. 114 placed at the entrances to the farm Omdraai No 114 on the de-proclaimed road formerly known as No. 1455.

5. Directing that the first respondent pay the costs of this application on the scale as between practitioner and client, alternatively in the event of opposition by the second or third respondents, directing that such further respondents who oppose the application, pay such costs jointly and severally with the first respondent.

6. Granting the applicants such further and/or alternative relief as the Honourable Court deems fit."

An order, substantially in the form asked for by the respondents, was issued by the Court on 13 December 2002. Only the appellant defended the application and he was ordered by the Court to pay the costs of the application, as well as that of his counter application, which was also dismissed, on a practitioner and client scale. A Notice of Appeal against the whole judgment and the order of costs was filed on the 16th January 2003.

Mr. Frank, SC, appeared before us on behalf of the appellant, whereas Mr. Smuts, SC, appeared on behalf of the respondents.

The case concerns the right of the appellant to use a private road, road 1455, which crosses the respondent farm, Omdraai, but which was, on application by the first respondent, already de-proclaimed and closed by the Roads Board during 1997. At this time the farm Hillside, which is linked with this road, was farmed by the father of the present appellant.

This case was affected by two unfortunate occurrences over which neither of the parties had any control. After argument in the Court *a quo* judgment was reserved by the learned Judge. Instead of pronouncing its judgment or order in open Court, the learned Judge, without any notice to the parties, had the order of the Court filed in pigeon holes in the public office of the Registrar of the Court. These pigeon holes are each allocated to a practitioner and are meant for notices issued by the Registrar's office to the practitioners or, where process was issued by the Registrar, it is placed in the pigeon hole of the particular practitioner who can then lift and serve it. This had the unfortunate but foreseeable effect that the parties involved only became aware of the

handing down of the order at different times and to complicate matters further the order was handed down shortly before the December recess with the result that the respondents only knew about the order early in January.

In terms of Supreme Court Rule 5(5)(b) an appellant is required to file four copies of the record of appeal within three months of the date of the judgment or order appealed against. Sub-rule (6)(b) further provides if there is not compliance with this rule, and the record is not filed in time, the appeal shall be deemed to have been withdrawn. The appellant did not file copies of the record within three months of the date of the order and when this did not happen the respondents took action and finally fenced off road 1455 whereby the appellant was denied access via this road.

This action by the respondents sparked off an urgent application by the appellant in which he asked the Court to declare that the judgment or order given constituted an irregularity and that the appellant be granted leave to use the said road pending the pronouncement of a proper and valid order. In the alternative the Court was asked to declare that the appeal was not withdrawn and further in the alternative the appellant prayed for condonation if the Court should find that the appeal had indeed lapsed as a result of non-compliance with rule 5(5)(b).

This application was argued before Gibson, J. and was summarily dismissed by the learned Judge. The appellant also appealed against the dismissal of this order. This appeal was heard simultaneously with the appeal in the main application and I shall further herein refer to it as the interim application.

The second issue which affected the appeals in this matter came about in the following manner. When the appeal was argued the Court was properly constituted with three Judges, the third Judge being Teek, JA. After argument was heard the Court, also consisting of Teek, JA, reserved judgment and Teek, JA, was designated by me, the presiding Judge, to write the judgment of the Court. However, before judgment was written and handed down, Teek, JA, was, on the recommendation of the Judicial Service Commission, suspended by His Excellency, the President of the Republic of Namibia, following upon allegations of criminal conduct by the Judge and after charges were brought against him. Teek, JA, is still so suspended, pending the outcome of an investigation by the Judicial Service Commission and the charges preferred against him. Judgment in this matter is long overdue and the question is now whether the remaining two Judges, who are *ad idem* as to the outcome of the appeal, can properly and validly deal with the matter and pronounce judgment.

The second aspect, which concerns the suspension of Teek, JA, has nothing to do with the appeal in question as the alleged cause thereof only arose during the beginning of this year.

Whether the remaining two Judges can validly deal with the judgment in this appeal depends on the provisions of the Supreme Court Act, Act 15 of 1990 (the Act.) Section 13(1) of the Act provides that a quorum of the Court in civil as well as criminal matters shall be three Judges. It further provides that the Chief Justice, or senior Judge in his absence, may increase the number of Judges to as many Judges of an uneven number as he or she may determine. Of importance in regard to the quorum of the Court is ss (4) which provides as follows:

> "If at any stage during the hearing of any matter in the Supreme Court one or more judges of the court die or retire or become otherwise incapable of acting or are absent, the hearing shall, if two or more judges remain, proceed before such remaining judges and, if only one judge remains, be adjourned and the matter shall, subject to the provisions of subsection (1), be heard *de novo* by a freshly constituted court: Provided that if the hearing proceeds before two judges and they, or where there is more than two judges, the majority, do not agree on judgment, the matter shall be heard *de novo."*

The first issue which must be considered is whether, after the suspension of Teek, JA, two or more judges remained as required by the subsection. This is relevant because I retired at the end of June 2003 and was then appointed in an acting capacity until the end of September 2004. When the appeal was heard I had already retired but was then acting but at this stage, when the judgment is written, I am no longer acting. It seems therefore that my situation is not covered by section 13(4) of the Act. However, in my opinion my situation is covered by sec. 7 of the Act which provides that any appointment of a person as an acting judge "shall be regarded to be also in respect of any period during which such person is necessarily engaged in connection with the disposal of any proceedings in which he or she had taken part as such a judge and which have not been disposed of at the termination of the period for which he or she has so been appointed….."

I am therefore of the opinion that I may still act in this matter and that, as required by sec. 13(4) of the Act, two judges remained after the suspension of Teek, JA. Whether the two remaining judges can validly deal with this matter depends further on the interpretation of sec. 13(4).

As set out above sec 13(4) requires that the absence of, in this case, one of the judges, must occur during "any stage of the hearing of any matter…." and the question is whether the absence or incapacity of Teek, JA, arose during any stage of the hearing of the matter. A more or less similar situation arose in an appeal before the Full Bench of the Transvaal division of the Supreme Court of South Africa when one of the judges became incapacitated after argument was heard and judgment was reserved but before the judgment was written and handed down by the Court. Dealing with sec. 17(2) of the Supreme Court Act of South Africa, the relevant parts of which are substantially the same as our sec 13(4), Ackermann, J, interpreted the section as follows in the matter of *Automated Business Systems (Pty) Ltd v Commissioner for Inland Revenue,* 1986 (2) SA 645 (TPD), page 655H-I:

> "According to the wording of ss 17(2), the incapacity or absence of the Judge is related to 'any stage during the hearing' of any matter by a Full Court, and provision is made, in the circumstances detailed, for the 'hearing' to 'proceed'. A narrow and literal construction of the word 'hearing' could, possibly, mean that the subsection does not apply to a situation such as the present where the Judge has become incapacitated after conclusion of argument and after judgment has been reserved. Such a construction would, in my view, be patently absurd. It would mean that the hearing could proceed if the incapacitation occurs at the beginning of the hearing but not after argument has been concluded. I can see no reason for drawing such a distinction and the Legislature could not have intended such a consequence."

The Appellate Division of the Supreme Court of South Africa, previously dealt with a similar problem in its decision in Kempton van Lines (Edms) Bpk v M.S. van Rensburg, 16/11/1982, not reported.

In that case three judges heard an appeal from the then South West Africa Division of

the Supreme Court. The appeal was heard by Muller, Kotzé and Trengrove. The judge of appeal, Kotze, who wrote the judgment of the Appellate Divison concurred in by Trengrove, J.A., commented as follows:

> "My brother Muller became indisposed after judgment was reserved. He is to our regret still indisposed to further participate in this appeal. This judgment thus became, in terms of article 12(3) of Act 59 of 1959, the judgment of the Court." (My free translation from the Afrikaans.)

Art. 12(3) of the said Act also corresponds to the Namibian legislation and reads as follows:

> "If at any stage during the hearing of an appeal one or more of the judges die or become otherwise incapable of acting or are absent, the hearing shall, where the remaining judges constitute a majority of the judges before whom the hearing was commenced, proceed before such remaining judges, and the judgments of a majority of such remaining judges which are in agreement shall, if that majority is also a majority of judges before whom the hearing commenced, be the judgment of the Court, and in any other case the appeal shall be heard *de novo*."

In the case of *Ex parte Chief Immigration Officer, Zimbabwe,* 1994 (1) SA 370 ZSC, Gubbay, CJ, came to the conclusion that the words ‘during the hearing’ contained in sec. 4(3) of the Zimbabwe Supreme Court Act are limited to the actual session of the Court and does not extend beyond such hearing where for instance judgment was reserved and one of the circumstances, detailed by the Act, occurred. However a reading of the section showed that this section differs significantly from the provisions in the South African and Namibian Acts.

I agree with the reasoning and findings in the *Kempton van Lines* case and that of

Ackermann, J, in the *Automated Business Systems* case. In a Court of Appeal where the majority of the hearings seldom go beyond a day or two but where judgment is mostly reserved and only delivered at a later date a narrowing down of the meaning of the words 'hearing' and 'during the hearing' to something which must happen whilst the Court is actually in session would limit the application of the section to such an extent as to make it almost of no help in the particular circumstances to which the section applies. As was pointed out by the learned Judge it would mean that the hearing could proceed provided the incapacitation or otherwise, occurred at the beginning of the hearing but not after argument was concluded and judgment reserved.

The next issue to be decided is whether the fact that Teek, JA, was suspended from sitting as a Judge by the President of Namibia on the recommendation of the Judicial Service Commission, (See Article 84(5) of the Constitution), brings this matter within the scope of the provisions of sec. 13(4) of the Act. It is a notorious fact that this suspension continues pending further investigation of the allegations levelled at the Judge and the charges brought against him, and it follows that a decision by the Commission may be a recommendation to the President to uplift the suspension or to terminate the appointment of the Judge. It is also a notorious fact that, at the time of the writing of this judgment, the matter has not yet been finalised.

In my opinion words such as 'become otherwise incapable of acting' and 'absent' are wide and would include a situation such as the present. As a result of the suspension of the Judge he has become incapable of acting in this matter and any other matter. There is no limitation to be extracted from the words of the subsection, or its context, which would limit the meaning thereof or to support a conclusion that these words

could not mean incapability brought about as a result of a suspension of a Judge.

In the result I have come to the conclusion that my brother O'Linn and I can validly and properly give judgment in this matter provided that we are in agreement concerning the issues of this appeal

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As regards the first issue mentioned, namely the handing down of the judgment or order of the Court, and because of the conclusion to which I have come, it would be more convenient and appropriate to deal therewith at the time when I discuss the appeal on the interim application.

Turning now to the merits of the appeals I will first deal with the appeal against the granting of the interdict by the Court *a quo* in the main application in favour of the respondents, then the counter application by the Appellant, and then the appeal against the dismissal by Gibson, J, of the interim application for a declaratory order and other relief by the appellant as well as the application for condonation.

In regard to the appeal against the main application by the respondents Mr. Frank, on behalf of the appellant, conceded, correctly in my view, that the appellant did not put up any defence to the application and that the appeal against this part of the order cannot succeed. I will nevertheless deal shortly with the facts of the application and the appellant's defence thereto.

The first respondent stated that he acquired the farm Omdraai on behalf of the second respondent in September 1990. Up to the time of the application the first respondent

could only recall two instances where road 1455, a road which traversed the farm Omdraai, was used by farmers of that region. The road however gave access to the area by persons who used it for stock theft purposes and to slip past roadblocks set up by the police. As a result of an application by the respondents the Roads Board recommended to the Minister of Works and Transportation to de-proclaim the road and to close it. This recommendation was followed up by a notice in the Official Gazette, by the Minister, de-proclaiming such road and closing it. First respondent said that since then the road became a private road which could only be used with his permission.

When the application was heard by the Roads Board in November 1997, there was only one objector to the proposed closure of the road, and that was Mr. Wirtz Snr., the father of the present appellant, since deceased, who farmed on an adjoining farm, Hillside. At the time the first respondent offered to Mr. Wirtz Snr. the use of the road under certain conditions but this offer was rejected outright by Mr. Wirtz Snr.

After the death of Mr. Wirtz Snr. the present appellant started farming operations on the farm Hillside and approached the first respondent for permission to use road 1455. This permission was granted under strict conditions one of which was that it would be for his personal use only. After various instances where the road was used by persons other than the appellant and the chain and padlock put on the gate to the entrance of the road was cut by employees of the appellant, the first respondent revoked his permission to use the road, granted to the appellant. This did not bring an end to the use of the road by the appellant or his employees and the cutting of the padlocks and chains continued unabated. As a result thereof respondents brought the present application.

The appellant was the only respondent who disputed the application. He denied that the road was a private road and stated that after the closure thereof it became a minor road in terms of the provisions of the Roads Ordinance, Ordinance 17 of 1972. The appellant further stated that as a result of the fact that he caused boreholes to be drilled on the farm Hillside, and because water was found, the farm could now be utilised for extensive cattle farming, something which was not possible during the time his father was on Hillside. He was further offered an option to sell grazing to Meatco which necessitated him to buy equipment to the value of N$1 000 000.00.

Furthermore the appellant said that it was well known that an alternative abattoir was opened in Witvlei during the beginning of 2002 which was a much more accessible market for his cattle than Windhoek because it was much closer. The deponent stated that the closure of the road by the Roads Board was conditional upon his father being given a right to use the said road. The right was therefore not personal but a right *in rem*.

The appellant stated that it was a necessity for his farming operations to be able to use road 1455 as the alternative road over the farm Bitterwasser was inaccessible to heavy trucks for six months of the year due to the rainy season which turns part of the road into a marsh. It was also alleged by the appellant that road 1455 was never regarded as a private road because signs, as required by the Road Ordinance, were never erected and maintained whereby possible uninformed users of the road would have been alerted to the fact that the road was closed. The appellant denied that the road was infrequently used prior to its closure and stated that his father used the road even after it was closed.

The defences set out to meet the application by the respondents are therefore threefold namely, that the appellant had a right *in rem* to use the road as it was a condition by the Roads Board on de-proclaiming and closing the road, that the road was not a private road as it became a minor road on its closure and therefore open to the appellant to use and, thirdly, because the respondents neglected to put up signs indicating that the road was a private road, as required by the Ordinance, the road remained a public road to which the public, and consequently the appellant, had at all times access.

As far as the first defence is concerned the first respondent explained that this was never a condition on which the Board made its recommendation to the Minister. This is clear from a copy of the record of the proceedings before the Board which was attached to the application. The first applicant was asked whether the road would be available to Mr. Wirtz Snr, should it be closed, and he replied that he would hand a key to Mr.Wirtz Snr. if so requested. When Mr. Wirtz Snr. put his case before the Board he was asked by the Board whether it would be acceptable if keys, to open the gates, were given to him and he replied in the negative. No such condition, as claimed by the appellant, appears from the Government Notice whereby the de-proclamation and closing of road was gazetted nor does it form part of the recommendation of the Board to the Minister. In my opinion an offer was made to Mr. Wirtz Snr. personally to have the use of the said road but he rejected the offer and that was the end of the matter. No *jus in rem* was created in favour of successors in title to the farm Hillside.

The defence based on the submission that the road on closure became a minor road to which the appellant had access, is also without merit. Sec. 64(8) of Ordinance 17 of

1972 provides that where such road is closed either by erecting a fence across it, or by any other means whatsoever, road traffic signs shall be erected by the person closing the road to inform would be users that the road has been closed to traffic. The section clearly spells out that such road can be closed in a way which would not permit further traffic using the road. Reliance was initially placed on the definition of a minor road, in sec. 1 of the Ordinance, which provides that a minor road is a road which is not a proclaimed road and which links two or more proclaimed roads or crosses the boundaries of two or more farms and to *which the public has rightful access.* In the present instance the road was not only de-proclaimed by the Roads Board but was in fact closed so that the public no longer had rightful access thereto.

The third defence was based on the fact that the appellant did not comply with the provisions of the same subsec. (8) by not erecting road traffic signs, at the time of closure of the road, which would have indicated to would be users that the road was closed and which were to be maintained for a period of at least six months. It was admitted by the first respondent that he did not comply with this provision.

In terms of subsec. (9)(b) a person who failed to comply with the provisions of subsec. (8) by not erecting and maintaining such road signs for a period of at least six months, after closure of the road, was guilty of an offence. No specific penalty is provided and one will have to look at the general penalty clause. In terms of sec. 68 of Ordinance 17 of 1972 the penalty for non-compliance with the provisions of the Ordinance, where no penalty is expressly provided, is a fine not exceeding two hundred Namibian dollar or imprisonment not exceeding six months.

It is correct that criminalizing non-compliance with the provisions of a statute is a factor to consider whether it was the intention of the Legislator to visit such non-compliance with invalidity. Whether this is the case a number of factors must be considered. Of importance is the wording and context of the section and the mischief which the Legislator wanted to address. The penalty itself would give an indication of how serious the Legislator regarded non-compliance with such provisions.

The purpose of subsec. (8) seems to me to give notice to a would-be user of the particular road that it was closed and not open for use by the general public. It would also serve to avoid inconvenience to such user who may follow such road only to find that it is barricaded at some point which need not be the point where the closure starts. In the present instance the road was barricaded at its very beginning by a chain and padlock being placed on the gate that gave access to the road. The evidence was further that this road was very seldom used. The denial by the appellant of this infrequent use is not much more than a bare denial as no indication was given, and none springs to mind, on which this could have been based. His allegation that the road was frequently used by his father is clearly hearsay as no foundation was laid to substantiate such claim. Furthermore the penalty in this instance is such that no intention can be gathered from that, and the other relevant factors, that it was the intention of the Legislator to visit non-compliance of the subsection with invalidity. It seems to me, bearing also in mind the mischief that the Legislator wanted to address, that conviction of an offender plus possible payment of a small fine was regarded as sufficient punishment without invalidating the de-proclamation and closure of the road by the Minister. (See in general *Eland Boerdery (Edms.) Bpk. v Anderson*, 1966 (4) SA 400 (T) and *Standard Bank v Estate Van Rhyn*, 1925 AD 266.)

The appellant concluded his answering affidavit as follows:

> "38. In the premises I humbly pray for an order in the following terms:
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> 38.1 that this application be dismissed with costs;
>
> 38.2 that the applicant be ordered to allow me interim access to road FR 1455 pending an action to be instituted within 21 days claiming a right of way across farm Omdraai to the farm Hillside;
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> 38.3 that I be granted a *via necessitate* to utilise road FR 1455 pending an application to the roads board to have road FR 1455 reproclaimed;
>
> alternatively
>
> to have road FR 1455 declared to be a minor road."

Mr. Frank, conceding that no valid defence was raised by the appellant to the interdict sought by the respondents, submitted that the question which arose in terms of the counterclaim was whether a temporary right of way over respondent's property Omdraai should have been granted by the Court *a quo.*

In regard to the interim relief both Counsel were agreed as to the law applicable in such instance and it is accepted that the onus was on the appellant to show:

1. a *prima facie* right;

2. a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

3. that the balance of convenience favours the granting of an interim interdict; and

4. the first respondent has no other satisfactory remedy;

(See in this regard *Hix Networking Technologies v System Publishers (Pty) Ltd*, 1997 (1) SA 391(A) at 398 – 399; The Law of South Africa (Ed. Joubert), Vol 11 (first re-issue) at 291 -292 and also Prest: The Law and Practice of Interdicts (1996) at 65).

As to the approach of the Court to establish whether an applicant has acquitted himself of this onus the Court was again referred to the above volume of The Law of South Africa, p 292, by both Counsel. I agree that the law is correctly set out as follows:

> "The proper approach is to consider the facts as set out by the applicant together with the facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts then set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case, he cannot succeed."

The only *prima facie* right which the appellant attempted to establish was that of a *via necessitate* and in this regard the following was stated by the Court in the matter of *Van Rensburg v Coetzee*, 1979 (4) SA 655(AD) at 457 E - F and the principle is correctly summarized in English in the head note as follows:

> "A claim to a way of necessity arises when a piece of land is geographically enclosed and has no way out, or, if a way out is available, it is however inadequate and the position amounts to this that the owner 'has

> no reasonably sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry on his farming operations'. Without an order of court this claim does not make the registration of a right of way of necessity in respect of another person's land possible; and, further, before such order is obtained, entry on the other person's land will apparently be unlawful."

Bearing in mind all the evidence that was put before the Court *a quo* I agree with Mr. Smuts that the case of the appellant flounders already on the first requisite for interim relief, namely the onus on the appellant to show that he has a *prima facie* right.

It is clear from the allegations set out in the various affidavits that road 1455 is not the only link the appellant has from his farm to a main road, but that a proclaimed road over the farm Bitterwasser is also available to the appellant. However, although not denying that this is so, the appellant stated that, due to thick sand and marshy conditions during the rainy season, this road could not be used for about six months per year by heavy trucks. Various other reasons were also given by the appellant as to why he should be given access via road 1455.

In his answering affidavit the appellant stated that an abattoir had opened in Witvlei which was an alternative market for his cattle and if permitted to use road 1455 would give him a shorter route to this market. Appellant alleged that the road via the farm Bitterwasser would be approximately 50 kilometres longer when approached from the Witvlei/Gobabis side and 20 kilometres longer when approached from Windhoek which affected the viability of such alternative market. Furthermore the appellant was offered the option to sell grazing to Meatco which necessitated him to buy equipment to the value of N$1 million dollar which was due to arrive during June 2002 and which

needed to be transported by trucks to the farm. Heavy trucks would also be needed to transport the grazing once this operation is started.

In his replying affidavit the first respondent was able to refute most of the allegations by the appellant either because what was stated by the appellant was proved not to be correct or was shown to be an exaggeration which was not supported by the facts. Another strange feature was the fact that the appellant did not avail himself of the right to reply to the replying affidavit of the first respondent in so far as it put in issue facts which supported the counter application of the appellant. Could it perhaps be that it would have been difficult and embarrassing for the appellant to reply to the issue of the Witvlei Abattoir when it was shown by an affidavit of the investor in the abattoir that it was not open and was not operational? The first respondent also called in question the difference in distances alleged by the appellant if he was not allowed access via road 1455. According to the first respondent the route over Bitterwasser to Witvlei would be 25 kilometres further and not 50 kilometres whereas using this route to reach Windhoek would be15 kilometres further.

Mr. Smuts further pointed out that also in regard to the option of providing grazing to Meatco there is no certainty whether this in fact materialized. To me it seems that this was an instance which should have been covered by the appellant in a replying affidavit more specifically because the appellant stated that he expected the equipment to arrive in June 2002, and the replying affidavit of the first respondent was only signed on the 14th of June 2002 which would have allowed the appellant to deal with this situation in his replying affidavit. From his silence in this regard one must infer either that he had no problem transporting the equipment via the alternative route over Bitterwasser or the

option did not materialize. The first respondent also took issue with the allegation that the road was impassable for a period of six months every year and he pointed out that the rainy season in Namibia was far shorter.

It was furthermore alleged by the first respondent that road 1455 was also not suitable, during certain times of the year, to carry cattle trucks and in his replying affidavit photographs were attached showing trucks of the appellant on this road stuck in the sand. Although it was accepted by the respondents that the road over Bitterwasser was impassable during part of the year, more particularly during the rainy season, it was alleged by the first respondent that that was also the case in regard to road 1455 and that for that reason the first respondent himself did not use road 1455 but trekked over-land with his cattle to a neighbouring farm where the cattle were then loaded on trucks and taken to the market. The first respondent suggested that that was also what the appellant should do and it was alleged that this was in fact done by Mr. Wirtz Snr.

By electing not to reply to these allegations the appellant's duty to show that he has a *prima facie* right in the form of a *via necessitate* is left in serious doubt, not to mention the other requisites for a temporary interdict. Bearing in mind the approach of a Court to the evidence it seems to me that the facts set out by the first respondent in contradiction to those set out by the appellant, many of which were, in this instance, not refuted by the appellant, are such that the appellant cannot succeed.

The appellant was satisfied to base his counter application on general allegations and it lacks in my opinion specific and particular detailed facts which could have put a much fuller picture before the Court for it to consider the question whether this was an

appropriate instance to grant the interim relief to the appellant. Lack of specificity coupled with an election not to reply to the allegations of the respondent, as far as they concerned the counter application, were factors which certainly affected the outcome of the counter application. Under the circumstances I am satisfied that the Court *a quo* was correct when it dismissed the counter application.

The appellant also appealed against the dismissal of the urgent interim application when he found that road 1455 was fenced off and thereby denying him access from the farm Hillside. This was done when the successor in title to the farm Omdraai concluded that records of the appeal were not timeously filed and that the appeal had lapsed. By Notice of Motion the appellant then applied for the following order:

> "2. For an order declaring that the order and/or judgement so given by this Honourable Court on dates unknown but during December 2002 and June 2003 respectively constitutes an irregularity as same was not pronounced in open court as is required by Section 13 of the High Court Act 16 of 1990.
>
> 3. That the Applicants be granted leave to use Road 1455 pending a proper and valid pronouncement of the court order and/or judgement so given during December 2002 and June 2003 respectively.
>
> Alternatively to the above and in the event of it being found that the Court order and judgement was properly pronounced in open court during December 2002 and June 2003 respectively, for an order declaring that the Appeal so noted by the Applicant on 16 January 2003 has not been withdrawn and/or has not lapsed as contemplated by Rule 5(6)(a) of the rules of the Supreme Court.
>
> Alternatively to the above and in the event of it being found that the Appeal so noted had indeed been withdrawn and/or lapsed as envisaged in Rule 5(6)(a) of the rules of the Supreme Court, that condonation be granted to the Applicant for the late prosecution of the Appeal as provided for in Rule 5(5)(b) of the Rules of the Supreme Court.
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> 4. That the Appeal so noted on 16 January 2003 is effective and

> pending alternatively, be reinstated and that Applicant be afforded leave to prosecute such Appeal and for leave to obtain a date for the hearing of the appeal."

This application was heard by Gibson, J, and was dismissed by the learned Judge with costs. In her judgement the learned Judge, in my opinion correctly, pointed out that the alternative prayers in paragraph 3 of the Notice whereby the appellant prayed for an order to reinstate the appeal and prayed, in the alternative, for condonation of the late filing of the record in terms of the Rules of the Supreme Court, could only be sought from the Supreme Court itself and being rules of that Court only that Court had the power to grant such orders.

As far as the other prayers were concerned these were dismissed on the basis of Rule 30(1) of the High Court Rules. This Rule provides that any party to a cause in which an irregular step or proceedings has been taken can apply, within l5 days after becoming aware of the irregularity, to set it aside, provided that no further steps have been taken after the party became aware of the irregularity. Because the appellant took further steps, e.g. by filing a Notice of Appeal, after having become aware of the irregularity, he was barred from claiming the further relief. However, Mr. Frank pointed out that Rule 30 was not applicable to the situation as it refers to irregularities committed by one or other of the parties to the cause and the irregularity complained of in this instance, if it were such, was committed by the Court itself. Mr. Smuts agreed with this submission and in my view correctly so.

Mr. Smuts, *in limine*, submitted that the appeal against the order of the Court *a quo* was not properly before us as it was an interlocutory proceeding which could only come

before us after leave was granted by the Court *a quo*, or if leave was refused, by special leave of the Chief Justice. (See High Court Act No 16 of 1990, Section 18(3).)

Mr. Frank submitted that the appellant sought, by means of the interim application, a declaratory order, which was appealable as of right as the dismissal of the application was final. It was common cause that the appellant did not apply for leave to appeal.

Mr. Frank referred the Court to the cases of *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*, 1987 (4) SA 569(A) at 582H – 583B and *Marsay v Dilley*, 1992 (3) SA 944(A) at 962 B - E. Counsel also submitted that it has long been accepted that the refusal of a temporary interdict is appealable as being of final effect. Reference in this regard was made to Herbstein and Van Winsen: The Civil Practice of the Superior Courts in South Africa; 3rd ed. p 740 where the following is stated:

> "Such an order is appealable … on the ground that … the refusal *may* result in plaintiff being unable, if successful in his action, to obtain the relief he seeks, i.e. it will *preclude some of the relief which might have been given at the hearing.*" (my emphasis).

The cases referred to by Counsel dealt primarily with the issue of when a pronouncement by the Court of first instance is a 'judgment' or 'order' which would be appealable. (See sec. 20(1) of Act 59 of l959, the Supreme Court Act of South Africa). Our sec. 18(1) of Act 16 of 1990 is to that extent similar in that it provides for a right of appeal in regard to judgments or orders pronounced by a Court of first instance. The meaning given to the words 'judgment' or 'order' in these cases are therefore relevant

also to the meaning of those words as used in our sec. 18(1). This was decided by this Court in the matter of *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another,* unreported judgment of this Court, delivered on 5/03/2003).

To be a 'judgment' or 'order', as those words are understood in sec. 18(1) of Act 16 of 1990, it must have the following three attributes, namely:

1. Where the judgment or order made has the effect of being a final decision (i.e. one which cannot be corrected or altered or set aside by the trial Judge at a later stage of the trial);

2. Where the decision is definitive of the rights of the parties; and

3. Where the decision has the effect of disposing of a substantial portion of the relief claimed by the plaintiff in the main action.

(See in this regard *Zweni v Minister of Law and Order,* 1993 (1) SA 523 (A). This was also decided in the cases to which the Court was referred to by Mr. Frank, namely the *Van Streepen-case* and the *Marsay-case*, and in my opinion is also reflected in the passage quoted from Herbstein and Van Winsen, emphasised by me. The refusal of the interim application did not preclude any relief which might be given at the hearing.)

The issue in the cases referred to by Mr. Frank was not whether the orders made by the Court *a quo* were appealable with or without leave but whether, a particular

order made by the Court, was a 'judgment' or 'order' which was appealable whether leave was granted or not.. It was in this regard, namely whether an order was appealable and when not, that the Courts in South Africa, and notably the Appeal Court, have adopted a more flexible approach over the years. It was pointed out by Corbett, JA, as he then was, in the *Van Streepen*-case, that there was much to be said for the view that some of the orders, referred to in previous cases, would now have been appealable with leave in terms of section 20(1), read with sec. 20(2) (b) of Act 59 of 1959, before the amendments introduced by Act 105 of 1982. However, in terms of the amendments, introduced by this Act, leave to appeal is now required in all appeals in civil proceedings except in terms of certain particular statutes which provide for a direct appeal to the Appellate Division.

Section 18(3) of Act 16 of 1990 requires that leave to appeal must be obtained in all interlocutory matters and in appeals against an order for costs only, which was in the discretion of the Court. In the context of our statutory provision the issue to be decided is therefore not whether the interim order was appealable or not but whether it was appealable as of right or whether leave to appeal should have been obtained.

The answer to this question depends on whether it can be said that the order made by the Court *a quo* was a 'judgment' or 'order'. Bearing in mind the attributes for a 'judgment' or 'order' set out herein before I agree with Mr. Frank that the dismissal of the interim relief was final in the sense that it could not subsequently be changed by the Court. However that is only one of the attributes of a 'judgment' or 'order'. In my opinion the order of the Court *a quo* was not decisive of any of the rights of the parties nor did it dispose of a substantial, or for that matter, any

portion of the relief claimed by the applicant in the main application. The relief claimed by the appellant in the interim order was procedural in nature which, by itself, is a strong indication that the relief claimed was interlocutory.

I have therefore come to the conclusion that the appeal against the dismissal of the interim order is not properly before us and must be struck from the roll with costs.

It is, in my opinion, still necessary to deal with the submissions made in connection with the way in which the Court *a quo* handed down the order and reasons for its judgment in this matter by putting it in the pigeon holes of the respective parties' legal practitioners in the office of the Registrar, instead of delivering it in open Court as required by Article 12 of the Constitution and section 13 of the High Court Act, Act No. 16 of 1990. If, as was submitted by Mr. Frank, in the alternative, that this amounts to a nullity, then it follows that there is no proper appeal for us to deal with. This issue is further also relevant to the application which was launched in this Court by the appellant in which the Court was asked to declare that the appeal was not withdrawn as provided for in Supreme Court Rule 5(6) or, alternatively, to grant condonation if Rule 5(6) applied.

From what was set out in the case of *Financial Mail (Pty) Ltd v Registrar of Insurance*, 1966 (2) SA 219 (WLD) at p 220E – 221D it is clear that from early times Courts in South Africa were, in terms of various statutes, required to conduct hearings and to deliver their judgments and orders in open Court. As far as civil law is concerned the Constitution provides the instances where the Court could conduct its hearing behind closed doors and it is common cause that these do not

apply to the present situation.

The reason why this is so is that the public at large has an interest in the conduct of hearings by a Court of Law and in the judgments and orders handed down by it. Furthermore the dealings of the Court is open to scrutiny at all times and by anyone and this can mostly only be achieved if those proceedings are carried out in open Court, except for those instances provided for in our Constitution where public interest must make way for the interest of the individual or the security of the State. Does this mean that where a Court misdirected itself and allowed evidence of a witness, or part thereof, to be *in camera* where it should not have done so, that such evidence, or the trial itself, becomes a nullity? I do not think that that is so *per se,* and it would in my opinion depend on the degree by which the public and/or the parties were deprived of their right to an open hearing and the seriousness of the irregularity

It was stated in the case of *Nkisimane & Others v Santam Insurance Co* 1978 (2) SA 430(A) at 433H -434A that –

> "…..statutory requirements are often categorised as 'peremptory' or 'directory'. They are well-known, concise and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope and purpose of the enactment as a whole."

The same sentiments were expressed in the case of *Weenen Transitional Local Council v Van Dyk*, 2000 (3) SA 435 (N) at p442E – G as follows:

> "Whether a given provision is peremptory or directory is determined, inter alia, with reference to the language of the provision, the scope and purpose of the statute and the context within which the relevant provision appears in relation thereto and the consequences to convenience and propriety if the measure were to be held to be peremptory (the rationale being that in certain circumstances a declaration of nullity might well produce greater inconvenience and more undesirable results than the non-compliance itself - *Leibrandt v South African Railways*, 1941 AD 9 at p 12 -13.)"

The above cases were cited by Mr. Frank and it was submitted by him that this was clear authority that the irregular handing down of the order in this instance caused it to be a nullity. I do not agree. In this instance the hearing of the matter, i.e. the argument by Counsel, was in open Court. Although the public has an interest in the outcome of the matter it does not follow that thereby the public in general will not in time have such access where and if necessary. I think that in this regard it is important to determine why, in this case, the reasons and order were not handed down in open Court. I have no doubt that the Honourable Judge who handed down the reasons and order of the Court acted *bona fide*, albeit incorrectly, and that there was never an intention to deprive the public or the parties from having insight into the reasons or the order. This action must be distinguished from a situation where the Court or Judge acted *mala fide* with the intention of keeping his actions secret or to limit publication thereof by acting surreptitiously or by making an order to that effect. Of importance is the fact that eventually both parties were informed of the outcome, as was no doubt the intention of the Judge, and could arrange their

further process accordingly. This is evidenced by the fact that the appellant, in time, gave notice of his intention to appeal against the judgment. If Counsel is correct that the order is a nullity it would mean that there is no appeal before us and, at least as far as the appeal is concerned, the process will have to start all over again. That was perhaps why this argument was only raised in the alternative by Counsel. Generally where a nullity occurred the process, up to the commission thereof, is affected thereby. It is therefore questionable whether the subsequent handing down of the order in open Court would cure the defect. The effect of such a declaration will further inconvenience the parties and saddle them with additional and unnecessary costs.

For the above reasons and bearing in mind the purpose, scope and language of the lawgiver, I have come to the conclusion that this is not an instance where the irregular handing down of the order of the Court should be visited with invalidity. It is so that the inadvertent action by the Judge was wholly unnecessary and should never have occurred. It put the parties to extra costs, and time and energy were wasted in dealing with this unprecedented and irregular handing down of the order. It led to some confusion and uncertainty as to the further application of the rules of this Court and resulted in further litigation which may not have been necessary if the order was handed down in open Court whereby a specific date would have been fixed and from where the parties could with certainty arrange any further steps they intended to take in terms of those rules.

Lastly there is the issue whether the appeal has lapsed, and if so, whether condonation should be granted and the appeal re-instated. Supreme Court Rule 5

provides for the procedure to be followed on appeal. In so far as it is relevant to this case, ss. (1) provides that a notice of appeal, where there is a right of appeal, should be lodged with the Registrar of the Court within 21 days after the judgment or order appealed against has been pronounced. Sub-rule 5(b) requires an appellant, with a right to appeal, to lodge four copies of the record with the Registrar of the Court within three months of the date of the judgment or order appealed against. Non-compliance with the provisions of this rule caries with it the sanction that the appeal shall be deemed to have been withdrawn. (Sub-rule (6)(b).)

In the case of *Administrator, Cape, and* Another *v Ntshwagela and Others,* 1990 (1) SA 705 (AD) at p 715B – D, Nicholas, AJA, explained the distinction between the words judgment and order, as follows::

> "In *Dickinson and Another v Fisher's Executors,* 1914 AD 424, it was explained at 427 that the distinction between a judgment and an order would probably be found to be this,
>
> > '……..that the term judgment is used to describe a decision of a court of law upon relief claimed in an action, whilst by an order is understood a similar decision upon relief claimed not by action but by motion, petition or other machinery recognised in practice.'
>
> When a judgment has been delivered in Court, whether in writing or orally, the Registrar draws up a formal order of Court which is embodied in a separate document signed by him. It is a copy of this which is served by the Sheriff. There can be an appeal only against the substantive order made by a Court, not against the reasons for judgment."
>
> (See also the case of *Van Streepen, supra,* at page 580D – E.)

It seems to me that the use of the words ‘judgment’ or ‘order’ in rule 5 is intended to refer to this technical meaning Notice of appeal should therefore be given within 21 days after handing down the order of the Court and the records must be lodged and served within three months of that date. Although the order in this matter was dated 13th December 2002 it only came to the notice of the legal representative of the appellant on 6th January 2003. Notice of appeal was lodged on 16th January 2003. Because of the peculiar way in which the learned Judge dealt with the order, the 21 days within which notice of appeal must be given in terms of the rules, could only start to run once the order came to the notice of the appellant or his legal representative. The notice of appeal was therefore lodged well within time.

The reasons for judgment were dealt with in the same peculiar way. These reasons were dated the 19th May 2003. As far as the reasons are concerned it was always the practice that when these were made available, after an order was already made by the Court, that these were not handed down in open court but was filed with the Registrar of the Court upon proper notice to the respective parties. An appeal lies against the order of the Court and not its reasons and, provided proper notice is given, the parties are well informed and will be able to take any further steps they regard necessary. In terms of rule 5(2) of the Supreme Court rules a party who wishes to appeal need only state whether he appeals against the whole order, and if not, then to state against what part of the order.

It was stated by the appellant that the reasons only came to the notice of his legal representative during the beginning of June 2003 but that the latter could no longer

remember the exact date. Copies of the record were lodged on the 29th August 2003 by the appellant. If the delivery of the reasons for judgment only came to the notice of the appellant or his legal representative during the beginning of June 2003 it would follow that the lodging of the records on 29th August was still within the 3 months period since the reasons were handed down. An issue which I need not decide is whether, in terms of the rule the period of 3 months should be calculated from the time, in this instance, when the order came to the knowledge of the appellant, or whether the rule required such calculation to be made from the date the reasons were handed down, as the Supreme Court rule only refers to the judgment or order. I shall accept, in favour of the appellant, that the latter date is the date from which the 3 months period should be calculated.

Although it is stated by the appellant that the reasons for judgment only came to the knowledge of his legal representative on an unspecified date in June this is gainsaid by a letter addressed by the legal practitioner to respondent's legal practitioner dated the 27th August 2003. This letter reads as follows:

> "Dear Sir,
>
> RE: DR. ORFORD // R.D. WIRTZ
>
> The above matter has reference.
>
> As you are undoubtedly aware the Appeal in the aforesaid matter has lapsed. The reason therefore is that we were waiting for a response to the application we submitted to the Roads Board.
>
> Kindly indicate whether you would be prepared to consent to the re-

instatement of the appeal failing which we shall have to bring an application for re-instatement.

Your assistance herein will be greatly appreciated."

The issue dealt with in this letter is clear, namely the lapsing of the appeal. There is even a reason given why this happened. Bearing in mind the rules of the Supreme Court and that the writer of the letter was someone expert in the law this lapse could only have been caused by the record of the proceedings not having been lodged in time. This letter was written on the initiative of the legal practitioner himself without any pressure brought to bear upon him and it could only be that, after a simple calculation was made, it became clear that that was indeed the case. If that was not so and if the legal practitioner made a mistake or wrongly thought that the date of the reasons was the date from which a calculation had to be made, I would have expected an explanation to that extent. However no such explanation was given. The explanation given by the appellant in paragraph 21 of the condonation application, namely that the letter was written if, and in the event that the appeal had lapsed, bears no relevance to the first sentence of the letter nor to the fact that it was correctly stated in the letter that it would therefore be necessary to re-instate the appeal. I therefore conclude that the appellant, or his legal representative, became aware that the reasons were filed on a date which required them to file the record before the letter was written on 29th August 2003. Under the circumstances the appeal had lapsed and it was necessary for the appellant to apply for condonation for its re-instatement.

The finding above therefore requires consideration of the issue of condonation and re-instatement of the appeal should the application succeed. I am inclined to grant condonation and to re-instate the appeal. The matter is obviously one of importance to both parties. To this must be added the uncertainty and confusion caused by the unprecedented handing down of the Court's order and the reasons. Neither party could provide this Court with any authority regarding the effect of such handing down and nor could I find any. The neglect was clearly not motivated by an intentional disregard of the rules of this Court and was not of any long duration. Under the circumstances it would in my opinion not be fair to penalise the appellant and to dismiss the appeal for non-compliance with the rules of the Court because of something which was not solely to be blamed on the appellant or his legal practitioner. Because of the conclusion to which I have come on the appeal this is not of much assistance to the appellant but it may be of some comfort that the appeal was not dismissed on a mere technicality.

As far as the respondents are concerned their opposition to the application was not unreasonable and there is therefore no basis to order them to pay the costs of the application notwithstanding the fact that the application was successful. What remains is to decide whether the appellant should be ordered to pay the costs of the application for condonation. For the reasons set out when I discussed the issue whether to grant condonation or not, I am of the opinion that it would be fair to make no order of costs.

In the result the following order is made.

1. The appellant's application for condonation succeeds and the appeals are re-instated.

2. The appeal against the main application and the dismissal of appellant's counter claim is dismissed with costs.

3. The appeal against the refusal of the interim application is struck from the role with costs.

_____
STRYDOM, ACJ

I agree.

_____
O'LINN, AJA

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