THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 334/2019

In the matter between:

ABRAHAM JOHANNES VAN HUYSSTEEN	**FIRST APPELLANT**
BERNARD EUGENE MOSTERT	**SECOND APPELLANT**
MICHAEL BROWN	**THIRD APPELLANT**
GERT CHRISTOFFEL CLAASSENS	**FOURTH APPELLANT**
DAVID VAN NIEKERK	**FIFTH APPELLANT**

and

PEPKOR SPECIALITY (PTY) LTD	**FIRST RESPONDENT**
PEPKOR HOLDINGS LIMITED	**SECOND RESPONDENT**

Neutral citation:	*Van Huyssteen and Others v Pepkor Speciality (Pty) Ltd and Another* (334/2019) [2020] ZASCA 78 (30 June 2020)
Coram:	PETSE DP and CACHALIA, VAN DER MERWE, MAKGOKA and MBATHA JJA
Heard:	14 May 2020
Delivered:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 30 June 2020.

Summary: Appeal – whether interests of justice require determination of appeal against interim order – absence of envisaged annexure to order – interpretation and effect of order – order sufficiently clear – not meaningless or unjust – matter struck from the roll.

ORDER

On appeal from: Western Cape Division of the High Court (Baartman J sitting as court of first instance):

The matter is struck from the roll with costs, including the costs of two counsel.

JUDGMENT

Van der Merwe JA (Petse DP and Cachalia, Makgoka and Mbatha JJA concurring)

[1] What is the consequence of the absence of an envisaged annexure to the order of the court below?[1] That is the issue that the parties presented to this court for determination on appeal. As shall presently become apparent, however, the anterior question is whether this court should entertain the appeal. This question must be answered against the background set out below.

[2] The first appellant, Mr Abraham Johannes van Huyssteen, was the founder of a business known as Tekkie Town (the Tekkie Town business). It was owned by Tekkie Town (Pty) Ltd. It mainly sold branded footwear. The Tekkie Town business was particularly successful and by the middle of 2016 it operated more than 300 retail stores. By then, the appellants had for some time formed the core management team of Tekkie Town (Pty) Ltd. Mr Van Huyssteen was its chairman and the second appellant, Mr Bernard Eugene Mostert, was its chief executive officer. The third appellant, Mr Michael Brown, was the chief procurement officer, the fourth appellant, Mr Gert Christoffel Claassens, its head of store merchandise and development and the fifth appellant, Mr David van Niekerk, its chief operating officer.

[3] The shares in Tekkie Town (Pty) Ltd were held by various companies (the former shareholders). The former shareholders were largely controlled by Messrs Van

[1] The order is fully set out in para 13 below.

Huyssteen, Claassens and Van Niekerk. On 29 August 2016, the former shareholders entered into an agreement (the exchange agreement) with Steinhoff International Holdings NV (Steinhoff), a company incorporated in accordance with the laws of the Netherlands. In terms of this agreement, the former shareholders, in essence, exchanged all their shares in and claims against Tekkie Town (Pty) Ltd for 43 million shares in Steinhoff, valued at R3 257 250 000.

[4] The appellants were collectively referred to in the exchange agreement as the key management of Tekkie Town (Pty) Ltd. It was a suspensive condition of the exchange agreement that each of the appellants conclude a written service agreement with Tekkie Town (Pty) Ltd, for a minimum employment term of five years. In terms of the condition these agreements had to include confidentiality and restraint provisions that had to subsist during the employment of the appellants as well as for a period of three years from the date of cessation thereof. As each of the appellants had existing employment agreements with Tekkie Town (Pty) Ltd, the suspensive condition was fulfilled by them entering into addenda to their employment agreements.

[5] Each addendum, entered into on 14 September 2016, *inter alia* provided as follows:

'Your contract of employment will be amended to a Fixed Term Contract effective 1 September 2016 to 30 September 2021. Your one month notice period as per your current employment contract will no longer apply.

In addition, it is agreed that there will be a 3 (three) year Restraint of Trade from the last day of your employment (be it through dismissal or your contract expiring.) The restraint is as defined in the Steinhoff Sale of Shares and Claims agreement and covers any retail or commercial activities in which Steinhoff may have a direct or indirect interest.'

The addenda referred to clause 16 of the exchange agreement. This clause contained an extensive covenant in restraint of trade. In this manner each appellant, in essence, undertook not to be interested in or concerned with any business in South Africa or Namibia which is competitive with or similar to the Tekkie Town business, for a period of three years following on the last day of his employment.

[6] Subsequent to the execution of the exchange agreement, Steinhoff transferred the shares in Tekkie Town (Pty) Ltd to the second respondent, Pepkor Holdings Limited

(Pepkor). Tekkie Town (Pty) Ltd therefore became a wholly owned subsidiary of Pepkor. With effect from 1 October 2017, Tekkie Town (Pty) Ltd sold and transferred the Tekkie Town business to the first respondent, Pepkor Speciality (Pty) Ltd (Speciality), as a going concern. The Tekkie Town business thus became a division of Speciality, which apparently rendered Tekkie Town (Pty) Ltd an empty shell. As a result of these developments, the employment contracts of the appellants were transferred to Speciality in terms of s 197 of the Labour Relations Act 66 of 1995.

[7] On 11 May 2018 the former shareholders issued summons in the Western Cape Division of the High Court of South Africa (the high court) against Steinhoff. They essentially alleged that the exchange agreement had been induced by the misrepresentations of the chief executive officer of Steinhoff which, to his knowledge, were false. They claimed redelivery of the shares in and claims to Tekkie Town (Pty) Ltd, alternatively the value thereof.

[8] The appellants remained in charge of the management of the Tekkie Town business within Speciality until approximately the middle of 2018. Mr Van Huyssteen's employment with Speciality was terminated on 24 May 2018. On 25 June 2018 the rest of the appellants, together with many other former employees of Tekkie Town (Pty) Ltd, resigned from their employment with Speciality.

[9] It is common cause that the appellants have since been involved in the operation of a business under the name of Mr Tekkie. The respondents' case is that Mr Tekkie competes directly with the Tekkie Town business. As a result, they approached the high court during September 2018 for an order enforcing the restraint of trade covenants, pending an action for final relief to be instituted by the respondents.

[10] In terms of the notice of motion the respondents sought extensive relief. During argument in the court a quo (Baartman J), however, the respondents claimed the relief set out in a draft order that they had presented to the court. The draft order envisaged that the appellants would be interdicted and restrained from being interested in or concerned with any business that stocks, or offers for sale, the footwear that the respondents proposed would be listed in annexure A thereto. In terms of the draft order, the parties would also be directed to treat annexure A thereto as confidential.

[11] Such a list did not form part of the papers in the application, nor was it annexed to the draft order. In order to explain this, the respondents placed a transcript of the oral argument in the court a quo before this court, without objection from the appellants. It appears from the transcript that the respondents initially intended that annexure A to the draft order would constitute a list of the footwear that the Tekkie Town business stocked, or offered for sale, at the time of the argument in the court a quo. This took place on 30-31 October 2018. During the respondents' reply, the court a quo directed that the proposed list be made available to the appellants by 15h00 on that day (31 October 2018), with the understanding that the appellants had until 10h00 on the following day to respond thereto. During further argument the court a quo directed the respondents to provide two lists, that is, the list that the respondents had proposed, as well as a list of the footwear that the Tekkie Town business had stocked, or offered for sale, on the effective date of the exchange agreement, namely 1 October 2016. Counsel for the respondents indicated that it might not be possible to provide the second proposed list by 15h00.

[12] Whether such lists were made available to the appellants does not appear from the record and this question is apparently in serious dispute. They were not, however, provided to the court a quo. The reason for this appeared from what counsel for the respondents had said towards the end of his reply. He submitted that there were three proposed lists that could constitute annexure A to the draft order, depending on what the findings of the court a quo would be. These were, first, a list of the footwear that had been stocked, or offered for sale, by the Tekkie Town business on 31 October 2018, second, a list of the footwear that the Tekkie Town business would, according to its order book, stock, or offer for sale, during June 2019 and, third, a list of the footwear that it had stocked, or offered for sale, on 1 October 2016. He concluded as follows:

'And then the Annexure A will be what M'Ladyship may order is the appropriate date. So it's not annexed, but we will deliver it in response to M'Ladyship's order if any be made.'

This statement did not elicit comment from the court a quo nor objection from the appellants.

[13] On 7 November 2018 the court a quo handed down its judgment. It held that the respondents had made a proper case for an interim interdict pending an action to be

instituted for a final interdict. It made an order in accordance with the draft order of the respondents in the following terms:

'(a) The non-compliance by Applicants with the Rules relating to form and service is condoned, and this application is heard as one of urgency in terms of Uniform Rule 6(12).

(b) The trial of the action to be instituted shall be heard as an expedited trial on dates to be agreed between the parties in consultation with the Judge President.

(c) Until the conclusion of the trial, or until any further Order by a Court, the First to Fifth Respondents, and each of them, are interdicted and restrained from being interested in, or concerned with, any business which, anywhere within South Africa or Namibia, stocks, or offers for sale, the footwear listed on annexure "A" hereto. [footwear that existed as at 1 October 2016 and before]

(d) The parties are directed to keep annexure "A" confidential as between them.

(e) Costs of 30 October 2018, including the costs of two counsel.'

[14] As I have indicated, no annexure was attached to the order. The action referred to in para (b) thereof, had in the meantime been instituted on 5 November 2018. The costs order in para (e) was made in favour of the respondents, the court having concluded that each party should pay its own costs in respect of the hearing on 31 October 2018.[2]

[15] In their application for leave to appeal filed on 19 November 2018, the appellants mainly relied thereon that no list had been made available to them or to the court. In its judgment on the application for leave to appeal, the court a quo gave a full exposition of what had been said in respect of the proposed lists (as set out in paras 11 and 12 above) and stated:

'I did not hear from the parties in respect of the arrangement with the list. I accepted, erroneously so, that the list had been exchanged and that the respondents were satisfied that it contained the shoes relevant to each period.'

It is quite clear that the court a quo accepted the proposal of the respondents and contemplated that it would subsequent to the delivery of the judgment be provided with the appropriate list, depending on its findings in respect thereof, but on the understanding that the lists had been made available to the appellants.

[2] No order was made as to the costs of the application; it did not appear from the judgment whether this was by design or inadvertently.

[16] On 4 March 2019 the court a quo granted leave to the appellants to appeal to this court. We were informed from the bar that in the meantime, on 11 December 2018, the respondents had launched an application in terms of Uniform Rule 42 in the high court. The notice of motion in that application was placed before us with the leave of my brother presiding, Petse DP. It included the following prayer:

'That the ambiguity in paragraph (c) of the order be cured by a declaration that the Annexure "A" referred to therein is the document annexed thereto marked "X", being a detailed list of the footwear items stocked and/or offered for sale by Tekkie Town as at 1 October 2016 and before.'

We were also informed from the bar that this application had been dismissed by Baartman J, but that is the full extent of our knowledge in this regard.

[17] As I have said, the first order of business is to determine whether the order of the court a quo is susceptible to appeal. In an oft-quoted passage, Harms AJA, writing for the court, stated in *Zweni v Minister of Law and Order* [1993] (1) All SA 365 (A); 1993 (1) SA 523 (A) at 532I-533A:

'A "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.

As is apparent from this passage, it did not purport to be exhaustive of the matter. See also *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F.

[18] In *S v Western Areas Ltd and Others* [2005] 3 All SA 541 (SCA); 2005 (5) SA 214 (SCA), this court had occasion to consider the issue of appealability in accordance with the prescripts of s 39(2) of the Constitution.[3] Howie P concluded as follows at para 28:

'I am accordingly of the view that it would accord with the obligation imposed by s 39(2) of the Constitution to construe the word "decision" in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings. The scope which this extended meaning could have in civil

[3] Section 39(2) of the Constitution of the Republic of South Africa, 1996:
'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

proceedings is unnecessary to decide. It need hardly be said that what the interests of justice require depends on the facts of each particular case.'

This *dictum* clearly applies with equal force to the word 'decision' in the successor to s 21(1) of the Supreme Court Act 59 of 1959, namely s 16(1) of the Superior Courts Act 10 of 2013.[4]

[19] In *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; [2011] 1 All SA 459 (SCA); 2010 (2) SA 573 (SCA) para 20, this court further developed the law in this regard by applying the reasoning in *Western Areas* to a civil matter. It said that 'what is of paramount importance in deciding whether a judgment is appealable is the interests of justice'. It bears emphasis that what the interests of justice require is not determined by a closed list of considerations and depends on the relevant facts and circumstances of each individual case.

[20] The appellants rightly accepted that the matter is not appealable under the *Zweni* test. It is an interim order that did not finally determine rights nor any portion of the relief claimed in the action. It follows that the question is whether the interests of justice nevertheless require the intervention of this court on appeal.

[21] The appellants confined their argument in this regard to the contention that the absence of annexure A rendered the order of the court a quo meaningless and unjust. The appellants referred us to the judgments of this court in *Minister of Home Affairs and Others v Scalabrini Centre and Others* [2013] ZASCA 134; [2013] 4 All SA 571; 2013 (6) SA 421 (SCA) para 77 and *Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) para 13. In *Scalabrini* Nugent JA said:

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[4] Section 16(1) of the Superior Courts Act 10 of 2013:
'**16. Appeals generally**
(1) Subject to section 15(1), the Constitution and any other law –
(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted –
(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17 (6); or
(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;
(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal; and
(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.'

'Moreover, litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with clarity what is required of them.'

The appellants relied heavily on the apparent recognition by the respondents in the rule 42 application that the order was ambiguous. Their further lament was that it would be manifestly unjust for the appellants to face proceedings for contempt of court in respect of obligations that are uncertain and unclear.

[22] Whether the order of the court a quo is sufficiently clear, depends on an interpretation thereof. It is trite that the court's intention is to be ascertained by a construction of the order in accordance with the usual well-known rules. See *Firestone South Africa (Pty) Ltd v Gentiruco AG* [1977] 4 All SA 600 (A); 1977 (4) SA 298 (A) at 304D-E. This entails giving meaning to the words used within the context in which they were used, including the apparent purpose of the order. The reasons for the order provide the essential context thereof. It follows that the view reflected in the notice of motion in the rule 42 application, is of no moment.

[23] After having dealt with all the arguments that had been raised, the court a quo in its judgment clearly held that the appellants should be interdicted and restrained from being interested in or concerned with any business that stocks, or offers for sale, the footwear that the Tekkie Town business stocked or offered for sale on 1 October 2016. With reference to para (c) of the draft order and the provisions of the exchange agreement, the judgment concluded:

'[47] The draft order, paragraph C, provides for a list containing the footwear subject to the restraint. Various dates were canvassed. The relevant section provides:

"*16.1.4 …utilise or directly or indirectly divulge or disclose or make available to any person, any of the intellectual property, know-how or confidential information of the Business existing as at the effective Date or prior thereto.*"

[48] The effective date is 1 October 2016. I have considered that prior to that date, the respondents have employed entrepreneurial skill, talent and have achieved much success. They provide much needed employment. They should not be hampered in their economic activity beyond the effective date.'

[24] In the judgment granting leave to appeal, the court a quo rightly said:

'I finalised judgment and made an order restraining the respondents from "being interested in, …footwear that existed as at 1 October 2016 and before." As indicated above, that list of

footwear was available. It is apparent from the judgment that the respondents, who had set up Tekkie Town and managed it after it was sold to the applicants would have had intimate knowledge of the shoes that Tekkie Town sold in October 2016.'

As a matter of logic and in its context, para (c) of the order could not relate to footwear that the Tekkie Town business had discontinued prior to 1 October 2016 and all references to the list during argument and in the judgments were made on this basis.

[25] In context, para (c) of the order conveys with sufficient clarity what it requires of the appellants, namely to refrain from being interested in or concerned with any business that stocks, or offers for sale, the footwear that the Tekkie Town business stocked or offered for sale on 1 October 2016. The addition of annexure A could not alter this meaning, it would only provide greater specificity.

[26] It is trite that civil contempt of court consists of wilful and *mala fide* disobedience of a court order. Even though proof of non-compliance with an order places an evidential burden on a respondent in respect of the elements of wilfulness and *mala fides*, the applicant must prove all the requirements of contempt of court beyond reasonable doubt. See *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 42.

[27] In this case the first requirement for a committal of the appellants for contempt of the order of the court a quo, would be proof beyond reasonable doubt that the appellants caused Mr Tekkie to stock, or offer for sale, the footwear that the Tekkie Town business had stocked or offered for sale on 1 October 2016. Annexure A to the order could have facilitated such proof. In its absence, the respondents would bear the full onus of proving this beyond reasonable doubt. As the appellants would probably be in a better position than the respondents to determine this, I can see no real possibility of injustice.

[28] In the result the order of the court a quo is neither meaningless nor unjust. It follows that the appellants' reliance on the interests of justice was without foundation.

[29] There is a further consideration that illustrates that the interests of justice do not favour the determination of an appeal against the interim order. During argument

counsel for the appellants was asked to formulate the order that the appellants would seek in the event of the appeal succeeding on this point. He responsibly found himself unable to suggest that in that event the respondents' application had to be dismissed. Instead, he proposed that para (c) of the order be set aside and the matter be left at that, alternatively that it be referred to the court a quo for reconsideration of para (c). But the primary proposal would result in an inchoate order and, in respect of the alternative proposal, the interests of justice would clearly be better served by the determination of this issue at the expedited trial.

[30] One final matter remains. I do not think that it would be unfair to say that the court a quo granted leave to appeal because it was unable to find a solution for the apparent or alleged failure of the respondents to make the proposed lists available to the appellants. In granting leave to appeal to this court, the court a quo referred to para 48 of the judgment on the merits (quoted in para 23 above) and concluded:

'It is unclear whether that purpose will be achieved amid the current confusion. In the circumstances of this matter, it must be in the interest of justice to grant leave to appeal.'

[31] But that was no reason to grant leave to appeal, let alone to this court. Leave to appeal could only have been granted in terms of s 17(1) of the Superior Courts Act.[5] In the absence of a determination in terms of s 17(6) of the Superior Courts Act that the matter required the attention of this court, leave to appeal had in any event to be given to the full court. Despite the difficulties presented by the conduct of the parties, these provisions had to be applied.

[32] In this case, as I have said, the court a quo contemplated the supplementation of its order with the appropriate list. There was accordingly no reason for it not to do so, after hearing further argument if that was required, on the basis of the exception to the *functus officio* principle set out in *Firestone South Africa (Pty) Ltd v Gentiruco AG*, supra

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[5] Section 17(1) of the Superior Courts Act:

'**17. Leave to appeal**

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)*(a)*; and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

at 306H, namely that an order may be supplemented in respect of accessory or consequential matters. If that proved not to be possible, the court a quo had to grasp the nettle and interpret its order in the manner set out in this judgment.

[33] For these reasons this court should decline to determine the appeal. Even though the respondents employed three counsel, they sought the costs of two counsel only.

[34] The matter is struck from the roll with costs, including the costs of two counsel.

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C H G VAN DER MERWE

JUDGE OF APPEAL

APPEARANCES

For appellants:	W R E Duminy SC and N Traverso (heads prepared by D F Irish SC, W R E Duminy SC and N Traverso)
Instructed by:	Webber Wentzel Attorneys, Cape Town Symington De Kok Attorneys, Bloemfontein
For respondents:	L Kuschke SC, A M Smalberger SC and R M G Fitzgerald
Instructed by:	Bowman Gilfillan Attorneys, Cape Town Matsepes Inc, Bloemfontein