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Procedure for application for leave to appeal

Rules regarding leave to appeal

In terms of *section 16* of the Superior Courts Act 10 of 2013 (SCA), an appeal against a judgment of a court of a provincial or local division of the High Court will be heard by the full court of that division, or the Supreme Court of Appeal.

This section applies to the High Court where it is sitting as a court of appeal from the decision of a single Judge or a Magistrate's decision. If leave to appeal is granted, the court must direct that the appeal be heard by a full court, or by the Supreme Court of Appeal where questions of law and fact are considered to require the attention of the Supreme Court of Appeal, such as novel or conflicting issues of law.

A party may appeal the court's refusal of leave, by way of petition to the Supreme Court of Appeal in terms of *section 17(2)(b)* of the SCA.

In Zweni v Minister of Law and Order [1993] 1 All SA 365 (A) at page 366 following, it was held that a judgment is appealable if the decision was final in effect, definitive of the rights of the parties, and disposed of a substantial portion of the relief claimed. In other words, a court's mere ruling or an interlocutory order is not appealable.

It would appear as if this remains the position under *section 16* of the SCA, which now governs appeals from the High Court. See Cilliers NO and others v Ellis and another [2017] JOL 37555 (SCA) at para 16. The three attributes for an appealable decision in *Zweni's* case above, namely:

- it must be final in effect and not susceptible to alteration by the court of the first instance;
- it must be definitive of the rights of the parties, ie it must grant definitive and distinct relief; and
- it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

Whilst the above list is persuasive, it is not exhaustive. See Absa Bank Limited v Mkhize and others and related matters [2014] 1 All SA 1 (SCA) at para 22 – 23. Ultimately, in deciding whether a decision is appealable, the interests of justice are of paramount importance. See Nova Property Group Holdings Ltd and others v Cobbett and another (MandG Centre for Investigative Journalism NPC as amicus curiae) [2016] 3 All SA 32 (SCA)

Section 16(3) of the SCA expressly provides that no appeal will lie in respect of orders given under the Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa *(HCR) 43* dealing with interim relief in pending matrimonial matters. In accordance with the Supreme Court of Appeal's decision in Van Niekerk & Another v Van Niekerk & Another [2008] 1 All SA 96 (SCA) at page 105, an appeal also does not lie against Anton Piller orders.

Application

The appeal process is burdensome in terms of time frames, and the filing and preparation of documents and records. Although there is room for condonation for non-compliance, certain elements need to be strictly complied with. A litigant should therefore be attentive to complying with the applicable time limits in all courts.

In terms of certain statutes, and especially those that create their own forums, an appeal does not lie to the High Court. Example of such tribunals are the Land Claims Court, the Labour Court and the Competition Tribunal.

In deciding whether to launch an appeal, the starting point for a practitioner is to assess the Appellant's prospects of success with his/her appeal. The test for leave to appeal is whether there are reasonable prospects of success on appeal. See *section 16* of the SCA. Therefore, the application should focus on meeting the threshold of this test. The wording of the papers should not be to the effect that the court was wrong, but that another court could reasonably have come to a different conclusion.

In terms of *HCR 49(1),* a litigant may apply for leave to appeal in two ways.

- Firstly, leave to appeal may be requested at the time of judgment, in which case the grounds of appeal are stated verbally in court.
- Secondly, and more commonly, leave to appeal is formally applied for in writing in terms of *HCR 49(1)(b).* This application must be filed within 15 days of the date of judgment, unless the court only gives it reasons at a later date, in which case the application for leave to appeal must be made within 15 days of the date of delivery of reasons. In terms of *HCR 49(1)(b),* these periods may be extended by the court if good cause is demonstrated by the Appellant. Sometimes a Judge will state in the order that reasons will only be furnished to the parties on application, in which case such an application must be made within ten days of the date of the order.

As a matter of practice, the application is made on notice only, with the grounds of the application being set out in

the body of the notice. Only rarely will an affidavit be required.

The application should set out:

- whether the whole or only part of the judgment is being appealed against;
- the finding of fact and/or law which is being appealed; and
- the grounds of the appeal.

See Forms and precedents: High Court application for leave to appeal

Note that an application for leave to appeal to the Constitutional Court must satisfy two requirements:

- the Applicant must raise a constitutional issue; and
- it must be in interests of justice to grant leave to appeal.

The requirement that the grounds are stated in the application in clear and unambiguous terms is peremptory.

The Applicant will be confined to the grounds specified in the application, when it comes to arguing the appeal in the event that leave is granted. The Respondent, on the other hand, is not confined in this manner.

Where a cross appeal is made, *HCR 49(4)* will apply. The same principles apply in respect of an application for leave.

Appeals to the Supreme Court of Appeal

Where the High Court refuses leave to appeal, it is possible to apply to the Supreme Court of Appeal by means of a petition (application) for leave. See *rule 6* of GNR.1523 of 27 November 1998: Rules of Court – Supreme Court of Appeal of South Africa (SCA Rules). This application (in triplicate) must be filed within one month after refusal of leave to appeal by the High Court. See *section 17(2)(b)* of the SCA.

The application to the Supreme Court of Appeal must be accompanied by:

- a copy of the order of the court appealed against;
- where leave has been refused, a copy of the order refusing such leave;
- a copy of the judgment delivered by the court of first instance; and
- a copy of the judgment refusing leave to appeal.

The answering papers, ie affidavits must be lodged in triplicate one month after service of the original application. See *rule 6(3)* of the SCA Rules. Ten days after service of the answering papers, the replying affidavits must be filed. See *rule 6(4)* of the SCA Rules.

The papers in an application for leave to appeal to the SCA must be clear and succinct and to the point and must fairly furnish all such information as may be necessary to enable the court to decide the application. See *rule 6(5)(a)* of the SCA Rules.

The record must not accompany any of the papers and neither may the papers traverse any extraneous matters. See *rule 6(5)(b)* of the SCA Rules. The founding and answering affidavits may not exceed 30 pages each, and the reply may not exceed 10 pages.

When leave to appeal to the Supreme Court of Appeal is granted, a notice of appeal must be lodged with the Registrar of the Supreme Court of Appeal within one month after the granting of leave. See *rule 7(1)* of the SCA Rules. The same applies to a cross-appeal. See *rule 7(2)* of the SCA Rules.

The notice of appeal (and cross-appeal) must state what part of the judgment or order is appealed against, and it must state the particular aspect which the variation of the judgment or order is sought. See *rule 7(3)* of the SCA Rules.

Within 3 months of the lodging of the notice of appeal, the Appellant is obliged to deliver six copies of the record of proceedings in the court of first instance to the Supreme Court of Appeal and the Respondent. See *rule 8(1)* of the SCA Rules.

Failure to lodge copies of the record timeously, or within any extended time period, results in the appeal lapsing. See *rule 8(3)* of the SCA Rules.

Six weeks after the record has been lodged with the Registrar of the Supreme Court of Appeal, six copies of the Appellant's heads of argument must be lodged. Thereafter, the Respondent has one month to lodge his/her heads of argument. A failure by the Appellant to lodge his/her heads within the prescribed (or extended) time period, will result in the appeal lapsing. See *rule 10(2A)(a)* of the SCA Rules.

Heads of argument in the Supreme Court of Appeal

The SCA Rules contain very distinct and clear prescriptions as to what the heads of argument must, and must not, contain. That is:

- the heads must be clear, succinct and without unnecessary elaboration, see *rule 10(3)(a)(i);*
- each point must be numbered and concisely stated and must be followed by a reference to the record or a supporting authority, see *rule 10(3)(a)(ii);*
- the heads must not contain lengthy quotations from the record or authorities, see *rule 10(3)(b)(i);*
- references to cases and authorities must be specific pages and paragraphs;
- the heads of argument of the Appellant must be chronological numbered, duly cross-referenced and without argument;
- the heads of argument must be accompanied by a list of authorities to be quoted in support of each party's case, and must indicate by means of an asterisk, which authorities will particularly be referred to, see *rule 10(3)(e)(i);*
- the heads of argument must define the form of order sought by the court, see *rule 10(3)(e)(iii);*
- neither the heads of argument of the Appellant nor the Respondent may be more than 40 pages in length. This may be varied by a judge after a request to that effect, see *rule 10(3)(g);* and
- the physical appearance and content of the heads of argument is also clearly prescribed, right down to the spacing of the typing (double), the quality and paper size ("stout" A4 paper), the ink colour (black), the binding of annexures (all separately), the nature of the binding (plastic comb binders and hard covers, white for the Appellant and blue for the Respondent. See *rule 10(4)(a) – (c).*

Rule 10A of the SCA Rules stipulates that the heads of argument of each party must be accompanied by a brief note indicating:

- the name and number of the matter;
- the nature of the appeal;
- a concise statement of the basis of the court's jurisdiction;
- the nature and details of any constitutional point sought to be raised;
- the issues on appeal succinctly stated;
- an estimate of the duration of the argument, and if more than one day is required, the reasons therefore;
- which portions of the record are not in English;
- in counsel's opinion, which portions of the record are necessary to decide the appeal;
- a summary of the argument, not exceeding 100 words;
- if a core bundle is not appropriate, why this is so;
- that there has been due compliance with *rules 8(8) and 8(9)* of the SCA Rules; and
- a certificate by the legal practitioner responsible for the heads, verifying that they have been drafted and submitted in accordance with the SCA Rules.

Finally, it is worth noting that the condonation for any non-compliance with the rules may be sought and granted in appropriate circumstances, see *rule 12* of the SCA Rules.

Order

The court may refuse leave to appeal, or may grant leave to appeal to the full court of a provincial or local division, or directly to the Supreme Court of Appeal.

The Appellant, in the event he/she is granted leave to appeal, will then need to apply to the Registrar for date for the hearing of an appeal, in terms of *HCR 49(6)(a).* A litigant must have regard to the onerous requirements in *HCR 49(7)* to *47(9)* regarding providing copies of the record for the purposes of preparing for the appeal.

See Forms and precedents: High Court application to the Registrar for date of appeal

Suspension

Following the common law, *HCR 49(11)* provides that the operation and execution of a judgment against which leave to appeal has been sought, is automatically suspended pending the outcome of the application. This prevents irreparable harm to the Appellant in the event of the successful litigant executing against the judgment whilst an appeal, which is ultimately successful, is pending. The suspension will lapse in the event that the Appellant fails to comply with any of the time frames specified in *HCR 49.*

It is important to note that the court may direct otherwise and allow execution of its judgment pending the decision of the appeal. A court may exercise its discretion in this fashion where there will be no irreparable prejudice to the Appellant and especially where the appeal is frivolous. A Respondent seeking to uplift the automatic suspension will generally be required to put up security in accordance with *HCR 49(12).*

Note further that *HCR 45A* allows a court to suspend the execution of any order for such period as it may deem fit. This provision may be useful for a litigant seeking to cover the intervening period between the handing down of judgment and the filing of an application for leave to appeal.

Section 18 of the SCA states that unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

Magistrates' Court

In terms of *section 83* of the Magistrates Court Act 32 of 1944 (MCA), the appeal of a Magistrate's decision is heard by the High Court within its area of jurisdiction. Where there is a provincial and a local division, the provincial division has concurrent jurisdiction over any Magistrates' Court within the jurisdiction of the local division.

Section 36 of the MCA should be borne in mind, as certain judgments of the Magistrates Court may be rescinded or varied by the Magistrate concerned.

As in the High Court, only decisions with final effect, including in respect of costs are appealable. *Section 83(c),* provides that a decision overruling an exception may be appealed against in three circumstances:

- where parties consent to an appeal;
- where the exception is appealed in conjunction with a principal case; or
- where the exception includes an order as to costs.

Where the issues of the merits and quantum have been separated, the Supreme Court of Appeal held in Steenkamp v South African Broadcasting Corporation [2002] 2 All SA 180 (A) at page 635, that the Magistrates' decision on liability only is not appealable.

An Appellant in the Magistrates' Court notes an appeal, rather than applies for leave to appeal as in the High Court. *Section 84* of the MCA, read with the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa *(MCR) 51,* regulates the time and manner of the noting of an appeal, which notice is lodged in the Magistrates' Court. An attorney authorised by client may note an appeal.

The notice of appeal must be delivered within 20 days of the Appellant receiving the Magistrate's written judgment.

The Magistrate's written judgment may be requested prior to filing a notice of appeal, alternatively the Magistrate concerned will be required to provide a written judgment after the filing of the notice.

A notice of appeal in respect of an appeal from a Magistrates' Court should enable the Magistrate to frame his/her reasons for judgment, give a Respondent an opportunity to abandon the judgment, inform the Respondent of the case to be met, and finally notify the appeal court of the points of appeal to be raised.

MCR 51(9), read with *HCR 50(1),* requires that, within 60 days of noting the appeal, the Appellant must prosecute his/her appeal in the High Court, by way of applying to the Registrar for a date for the hearing of the appeal, failing which it will be deemed that the appeal has lapsed.

See Forms and precedents: High Court application for leave to appeal and High Court notice of appeal

Relevant practice directives

In the Eastern Cape, the date for the appeal hearing is to be arranged by the lawyers with the Judge, in accordance with rule 10(a) of the Joint rules of practice in the Eastern Cape.

See Practice directives: Joint Rules of Practice for the High Courts of the Eastern Cape Province (The Provincial Divisions currently known as the Ciskei Division, The Eastern Cape Division and the Transkei Division), Practice note 10(a).

In the Western Cape, the application for leave should also be delivered to the Judge in person and the date for the application should be arranged with the judge within ten days of delivery of the application, in consultation with the Respondent. In other words, the date for the hearing of the application for leave to appeal must be arranged by agreement. Failing agreement, the court must appoint a day. In most divisions applications for leave to appeal are heard before the start of the regular court day in that division. Consequently, advocates are permitted, as an

exception to the general rule against appearing in more than one court a day, to appear in an application for leave to appeal and another trial on the same day.

This is in accordance with practice note 45 in the Western Cape. If the Appellant does not approach the Judge within ten days for a date for the hearing of the application for leave, the Respondent may do so within fifteen days of the lodging of the application, failing which the Judge may make the appropriate arrangements.

See Practice_directives:_Practice_Manual_of_the_Western_Cape_High_Court_Cape_Town,_Practice_note_45.

See Practice_directives:_Practice_Manual_of_the_North_Gauteng_High_Court,_chapters_11(4)_to_(5) of the North Gauteng practice manual provides that the applicant must apply to the Registrar within seven days for a date for the hearing of the application for leave.

See Practice_Directives:_Practice_Manual_of_the_Gauteng_Local_Division_of_the_High_Court_of_South_Africa,_chapter_7 on Civil appeals and chapter_11 on Leave to appeal in civil matters.