REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2021/40544

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

21 Jan 2022 **.....**

DATE **SIGNATURE**

In the matter between:

RICHES AND BEYOND (PTY) LTD	First Applicant
WEALTH ALLIANCE (PTY) LTD	Second Applicant
SYLVIA MILOSEVIC	Third Applicant

and

FREDDY RAMELA	First Respondent
THABO MONGOATO	Second Respondent
THATHOMO (PTY) LTD	Third Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

FLATELA A.J

[1] This is an application for leave to appeal against my judgement delivered on 14 September 2021. The matter came before me as an urgent application. The applicants sought an **interim,** and in the alternative, a **final order** enforcing certain restraint of

trade clauses contained in two consultancy agreements concluded between the applicants and the respondents respectively. I refused to grant an alternative final order. Instead, I granted prayers in terms of interim relief.

[2] For convenience's sake, I will refer to the parties as they were referred to in the urgent application. I will very briefly outline the background of the dispute between the parties.

[3] The applicants and their affiliated companies offer South African public online and in-person courses which are focused on wealth creation through property investment. They offer their clients a mentorship programme to assist them with the application of course material in property deals. Mentors are assigned to students/clients who mentors and then develop intimate business relationship with clients.

[4] The first and second respondent were employed as mentors by the first applicant company and subject to a twelve (12) months restraint of trade agreement.

[5] During August 2020 when following up on a potential client, the third applicant discovered that the first and second respondent, whilst still in the employ of the first applicants, were offering similar courses and similar services that the applicant was offering at a cheaper rate through the third respondent. The first and second respondent are the directors of the third respondent.

[6] A dispute arose between the parties. Having failed to resolve their dispute through an arbitration process as stipulated in their respective contracts, the applicants approached the court on an urgent basis for an interim order pending the arbitration, alternatively, a permanent interdict.

[7] Having considered the matter I was satisfied that the applicants satisfied the requirements for an interim interdict. For consistency in the paragraph numbering of this

judgement, the paragraph numbers of the orders I made in the 14th of September 2021 judgement are changed to conform with this judgement:

[7.1.] the first and second respondents are interdicted, restrained, and prohibited on an interim basis pending the finalisation of arbitration proceedings between the parties from:

1.1 using (whether directly or indirectly) any of the applicants' secret, proprietary and/or confidential information and/or intellectual property (hereinafter collectively referred to as the "**Proprietary Information**");

1.2 disclosing (whether directly or indirectly) to any person, firm or company, and specifically, but not limited to, the third respondent any of the applicants' Proprietary Information;

1.3 engaging (whether directly or indirectly) in any activity or obtaining or continuing engagement and/or employment with the third respondent, or with any firm, partnership, company or close corporation or commence working for their own account, if such activity, employment or endevour relates, either directly or indirectly to the supplying of goods and/or services to any customer of the applicants anywhere within South Africa (online or in person) or such other geographical area as the Court may determine fair and reasonable in the circumstances;

1.4 engaging (whether directly or indirectly) in any activity or obtaining or continuing engagement with and/or employment by the third respondent, or in any manner being involved with, interested in, engaged by or concerned with any firm, partnership, company or close corporation or commence working for their own account, if such activity, employment or endevour relates, either directly or indirectly competes with the activities and/or business of the applicants' anywhere within South Africa (online or in person) or such other geographical area as the Court may determine fair and reasonable in the circumstances;

1.5 communicating (whether directly or indirectly) with any of the customers of the applicants with a view of soliciting business from such customers, in competition with the applicants anywhere within South Africa (online or in person) or such other geographical area as the Court may determine fair and reasonable in the circumstances;

1.6 soliciting, hiring, contracting with, engaging with, taking away, contracting with, employing or endeavouring to employ (whether directly or indirectly) whether personally or in conjunction with any other person, persons, firm, company, corporation or partnership any of the employees, consultants and/or contractors hired by and/or contracted by the applicants' anywhere within South Africa (online or in person) or such other geographical area as the Court may determine fair and reasonable in the circumstances;

1.7 soliciting, conducting negotiations or concluding transactions (whether directly or indirectly) in competition with the applicants with any supplier from which the applicants' procures any goods and/or services of any other description for resale, or with which the applicants' have concluded preferential supply and/or agency agreements anywhere within South Africa (online or in person) or such other geographical area as the Court may determine fair and reasonable in the circumstances;

1.8 directly or indirectly in any manner, interested, engaged or concerned in a competitive activity, entity and/or business of any nature, in competition with the applicants' anywhere within South Africa (online or in person) or such other geographical area as the Court may determine fair and reasonable in the circumstances;

[7.2.] the first and second respondents are ordered to immediately, but in any event no later than 3 (three) days after this order is granted, return to the applicants' any written instructions, drawings, notes, lists, memorandum or records relating to the trade secrets and/or confidential information of the

applicants made by the first and second respondents or which came into the control and/or possession of the first and second respondents during the period of their engagement by and/or association with the applicants which includes, but is not limited to, any copies thereof, extracts therefrom and/or portions thereof and whether on computer, disc or otherwise and to the extent that any copies, extracts or portions of the aforegoing are on hard disc, diaries and the like, the first and second respondents are ordered to delete, alternatively destroy all such copies, extracts or portions thereof;

[7.3.] the third respondent is interdicted, restrained, and prohibited on an interim basis pending the finalisation of arbitration proceedings between the parties from:

1.9 using (whether directly or indirectly) any of the applicants Proprietary Information;

1.10 communicating (whether directly or indirectly) with any of the customers of the applicants with a view of soliciting business from such customers, in competition with the applicants anywhere within South Africa (online or in person) or such other geographical area as the Court may determine fair and reasonable in the circumstances;

[7.4.] the third respondent is ordered to immediately, but in any event no later than 3 (three) days after this order is granted, return to the applicants any written instructions, drawings, notes, lists, memorandum or records relating to the trade secrets and/or confidential information of the applicants made by the first and second respondents or which came into the control and/or possession of the third respondent during the period of the first and second respondents engagement and/or association with the applicants which includes, but is not limited to , any copies thereof, extracts therefrom and/or portions thereof and whether on computer, disc

or otherwise and to the extent that any copies, extracts or portions of the aforegoing are on hard disc, diaries and the like, the third respondent is ordered to delete, alternatively destroy all such copies, extracts or portions thereof;

[7.5.] to the extent that the respondents fail, refuse and/or neglect to proceed with arbitration proceedings as is required in terms of the consultancy agreements entered into between the first and second respondents and the first and second applicants to have this dispute finally determined on or before, but no later than, **30 October 2021**, that any interim relief herein granted against the respondents shall become final and remain in place for a period of **1 (one) year** from the date on which the consultancy agreements were terminated, being for the avoidance of doubt, **16 August 2021**;

[7.6.] that the costs of this application are to be paid by the first, second and third respondents jointly and severally on party and party scale, the one paying the others to be absolved.

Notice of Appeal and Grounds of Appeal

[8] From reading their notice to appeal, the respondents are appealing against the finding of facts and the rulings of law. The respondents dealt with the notice of leave to appeal as if they are appealing against an ordinary judgement/order. In doing so, they totally ignored to deal with the appealability of the interim order.

[9] The grounds of appeal are the following:

9.1. I did not deal with the respondent's point in *limine* regarding the misjoinder of the third respondent;

9.2. I misdirected myself in law and on facts when dealing with the enforceability of the restraint of trade first without pronouncing on its constitutionality. According to the respondents I ought to have pronounced on the constitutionality of the restraint of trade first before dealing with its reasonableness and enforceability. (Arguing from this standpoint, the respondents' invitation was that I set aside the restraint of trade agreement.)

9.4. the further ground is that I erred when I ordered the applicant to return the applicants' trade materials at the respondents' possession within three (3) of grant of the interim order, or alternatively, the same be deleted and destroyed where applicable as is so defined in terms of that order.

9.5. because of the ending phrase, 'as the Court may determine fair and reasonable in the circumstances' in part of the orders, the respondents argue that the orders are clearly not enforceable as the court still needs to determine them. The respondents are mischievous for raising this point for therein lies an obvious literal error not consequential to the spirit of the grant of the interim relief nor the reasoning behind it. The interim order is clear. It operates only pending the finalisation of arbitration proceedings.

9.6. the final ground is that order [7.5] has the effect of being a final interdict. Order [7.5] reads as follows:

> "to the extent that the respondents fail, refuse and/or neglect to proceed with arbitration proceedings as is required in terms of the consultancy agreements entered into between the first and second respondents and the first and second applicants to have this dispute finally determined on or before, but no later than, **30 October 2021**, that any interim relief herein granted against the respondents shall become final and remain in place for a period of **1 (one) year** from

the date on which the consultancy agreements were terminated, being for the avoidance of doubt **16 August 2021**"

Principles regarding notices of and leave to appeal

[10] An application for leave to appeal is regulated by s 17(1) of the Superior Courts Act 10 of 2013 which provides:

> '(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.'

[11] The respondents' notice of appeal does not comply with the general principles on appeals. They are not clearly and succinctly set out.

[12] Regarding the general principle on for appeals, Justice Hendricks *in Doorewaard v S*[1] explains,

> "The law governing a notice of appeal (and also notice of application for leave to appeal) is trite. The grounds of appeal in a notice of application for leave to

[1] *Doorewaard v S* [2019] ZANWHC 25.

appeal must be clearly and succinctly set out in unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. The notice should not contain arguments. Therefore, heads of argument must also be filed and served in which the points to be argued will be set out in much more detail."[2]

[13] Counsel for the applicants fiercely argued that the respondents notice of application for leave to appeal is so ambiguous that the applicants were not fully and properly informed of the case the respondent ought to make out. She argued, correctly in my view, that the respondents were attacking the reasons of the judgement. This is in bad law and the matter stood to be dismissed on that point.

[14] the notice of application for leave to appeal is both inelegant and in gross dereliction of any formalities, let alone, substantive principles governing notices to and applications of leave to appeal. Unlike an ordinary appeal, the respondents are appealing an interim order. These orders are generally not appealable. That is settled law. But the bar to their appealability is not absolute. It can never be but that open door to their appealability, albeit narrow and somewhat prescriptive, requires for an applicant to pass the *Zweni* test[3]. Secondly to clothe themselves with an interest of justice certificate. The respondents' dereliction not bringing forth any of these prescripts is unfortunate.

[15] Although I agree with the counsel's arguments that the notice of appeal is laden with legal argument attacking the reasons of my judgement, I allowed the respondents to proceed to address me on their appeal in the interest of justice.

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[2] *Also* see *Songono v Minister of Law-and-Order 1996 (4) SA 384 (E); S v Mc Kenzie 2003 (2) SACR 616 (C); Xayimpi and Others v Chairman Judge White Commission and Others [2006] 2 ALLSA 442 (E); S v Van Heerden 2010 (1) SACR 539 (ECP).*

[3] Footnote 16.

[16] I do stress that even if had this been a normal appeal against a decision or final ruling of an ordinary judgement, the non-compliance with the rules and general principles of appeals in procedure, form and substance command censure.

Appealability of interim interdict

[17] The issue of appealability of an interim order is well traversed and its law settled.by There are array of decisions emanating from the Supreme Court of Appeal and the Constitutional Court regarding this issue.

[18] The foundational principles governing the appealability of interim orders was laid down by Harms AJA in *Zweni v Minister of Law and Order*[4]

> '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"

[19] In the *City of Tshwane Metropolitan Municipality v Afriforum and Another*[5] Mogoeng CJ said

> 'The appealability of interim orders in terms of the common law depends on whether they are final in effect. . .

[20] At paragraph 40 of that judgement, he states:

> 'The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with

[4] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533B.
[5] City of Tshwane Metropolitan Municipality v Afriforum and Another [2016] ZACC 19, para 39.

but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability. The principle was set out in *OUTA*[6] by Moseneke DCJ in these terms:

> "This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is 'the interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable."[7]

[21] Mogoeng CJ continues he continues:

'What the role of interests of justice is in this kind of application, again entails the need to ensure that form never trumps any approach that would advance the interests of justice. If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. This

[6] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*)
[7] *OUTA* above n 3 at para 25.

is especially so where, as in this case, the interim order should not have been granted in the first place by reason of a failure to meet the requirements. The Constitution and our law are all about real justice, not mere formalities. Importantly, the constitutional prescript of legality and the rule of law demand that nobody, not even a court of law, exercises powers they do not have. Where separation of powers is implicated and forbids the grant of the order sought to be appealed against, the interests of justice demand that even an order that is not of final effect or does not dispose of a substantial portion of the issues in the main application, nevertheless be appealable.[8]

Consequently, although the final effect of the interim order or the disposition of a substantial portion of issues in the main application are not irrelevant to the determination of appealability and the grant of leave, they are in terms of our constitutional jurisprudence hardly ever determinative of appealability or leave.[9]

Discussion

[22] In spite of Section 17.1 of the Superior Courts Act and the general principles regulating notices to appeal, and of application of leave to appeal, the respondents have not complied with any of those formalities nor with the general principles. For instance, the notice for application for leave to appeal is laden with legal argument that should have been best placed in heads of argument but this did not happen because no heads of argument were filed.

[8] City of Tshwane Metropolitan Municipality v Afriforum and Another [2016] ZACC 19, para 41
[9] Ibid, 42.

[23] Secondly, no submission was made in oral argument nor in the filed notice of application for leave to appeal to address the court with regard to the generally accepted principle and dictum of interim orders not being generally appealable.

[24] I propose to deal with the grounds of appeal separately

Misjoinder of the third respondent

[25] The respondents made a point in *limine* that the third respondent was not a party to the agreements between the parties. Orders were nonetheless made against it. Upon reconsideration, I am inclined to agree with the respondents on this aspect. As such, I allow leave to appeal in respect of those orders.

Reasonability; constitutionality, and enforceability of the restraint of trade agreement

[26] Perhaps, the summary of the crux of the respondents' notices of application for leave to appeal is best characterised in their own words. They aver, *'another primary issue to be determined was whether the restraint of trade agreement is unreasonable, unconstitutional and therefore unenforceable.'* This repetitive issue was fiercely debated in the initial proceedings and pronouncements made on it in the covering judgement.

[27] With regard to the reasonableness of the restraint of trade agreement between the parties, I expansively dealt with this contention in paragraphs 41; 42; 53; 54; and 56 – 62 of the interim judgement. I do not intend to repeat legal analysis and the application exercised therein as it would amount to a purposeless reiteration.

[28] With regard to the constitutionality of the restraint of trade agreement, this too is dealt with in paragraphs 63 to 68 of the judgement. On this ground, the respondents averred there, as they do here, that the restraint of trade agreement is unconstitutional for it infringes on their constitutional right to trade, occupation and profession. They argue that the restraint of trade clauses in their respective contracts are unconstitutional and that because they have raised the constitutional issue, I should have pronounced

on the constitutionality of the restraint of trade. This is the most absurd arguments advanced by the respondents. The restraint of trade clauses is not as a general rule unconstitutional. It is its effects that can be found to be unreasonable and unenforceable.

[29] In fact, these contracts have since time immemorial been upheld and enforced by Courts including the Constitutional Court. Therefore, determination of whether any restraint of trade agreement is contrary to public policy and interest of justice is not found by a frontal attack of the constitutionality of these agreements in general, but rather, on the reasonableness the agreement. I have dealt with this issue in my judgement.

[30] An invitation was made that I venture into a section 36 analysis (limitation of rights) of the Constitution. Failure to have done so, goes the argument, is a profound error of law and application. Again, another untenable contention. I found the restraint of trade agreement to be reasonable. By implication, any limitation of the respondents' section 22 (trade, occupation, and profession) rights was found to be constitutional.

[31] In the present application for leave to appeal, the respondents persist on the very same merit contentions of the reasonability, constitutionality, and enforceability of the restraint of trade agreement between them and the applicants. Retaining this persistence in an interim, more so where heads of arguments are absent, is in bad law.

[32] I am not convinced that the other court will come at a different conclusion.

Effect of finality of order [7.2] and [7.4.]

[33] A short summary of orders [7.2] and [7.4.], respectively, is that the first to the third respondent are ordered to return any proprietary information to the applicants within 3 days from date of the judgement. Alternatively, to delete and/or destroy the

same. The respondents argue that I ignored their counsel's submission that the material is easily available on the internet; the applicants have not trademarked their material; and the alternative order to delete and/or destroy the same is carries the effect of being a final interdict.

[34] In my view, the applicants have on their part shown that the respondents have been using their material, in direct competition with the applicants' business, by promoting their own side business. The materials were attached, and comparisons were made for similarity. The respondents on the other side failed to show that material is readily available on the internet. Save for change of party names in the material, for example, the materials were profoundly similar, if not a creche plagiarism.

[35] However, I am inclined to agree with respondents' counsel that to the extent the *alternative* orders the respondents to delete and/or destroy any material content defined thereunder pending arbitration proceedings carries an effect of being a final interdict. I interpose, a finality effect which may be inadvertent an interim interdict is not grounds alone for allowing an application for leave to appeal against such provided interim relief. Though the potential effect is considered in the determination of the application of success or not of the leave to appeal shall be considered in the fulcrum of interests of injustice. I will deal with more about this later.

Effect of finality effect of order [7.5]

[36] The final ground in the notice of application for leave to appeal is that order [7.5] has the effect of being a final interdict. That order reads as follows:

> "to the extent that the respondents fail, refuse and/or neglect to proceed with arbitration proceedings as is required in terms of the consultancy agreements entered into between the first and second respondents and the first and second Applicants to have this dispute finally determined on or before, but no later than, **30 October 2021**, that any interim relief herein granted against the respondents

shall become final and remain in place for a period of **1 (one) year** from the date on which the consultancy agreements were terminated, being for the avoidance of doubt **16 August 2021**"

[37] The argument advanced by the applicants in prayer of that relief is they could not wait for the arbitration process due to the fact that the parties have failed to agree on urgent arbitration proceedings and the arbitration clause does not necessarily provide for urgent arbitration. The applicant further argued that although the respondents' legal representatives advised of his availability for urgent arbitration on 22 September 2021, no agreement was reached between the parties regarding the terms of the urgent arbitration. Furthermore, the respondents may frustrate the process in that by the time the matter is finally determined the applicants will be out of business. The respondents are vigorously marketing their business to the detriment of the applicants' losing clients.

[38] I have not been appraised as to whether, in fact, arbitration proceedings are underway, if so, at which stage they are or whether any outcome has come of them.

[39] Undoubtedly, the applicant made a case for reasonable apprehension of irreparable and imminent harm if the interim interdict was not granted. I was satisfied, as still am now, that the plaintiff adduced sufficient detail to satisfy the Court that they have prima facie right to a proprietary interest worthy of protection.

[40] Secondly, not only did they have a reasonable apprehension of irreparable and imminent harm, but the harm was in actual fact, manifest as the respondents have been trading as direct competitors of the applicants' business for a period of no less than ten (10) months whilst under the applicants employ.

[41] After confirming that the interests of justice were paramount in assessing the appealability of an interim order, the Constitutional Court in *National Treasury and*

Others v Opposition to Urban Tolling Alliance and Others[10] went on to set out what factors a court should consider in assessing where the interests of justice lay:

> '. . . To that end, [a court] must have regard to and weigh carefully all the germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.'[11]

[42] Regarding order [7.5], I am of the view that it would be in the interest of justice to allow leave to appeal against this order due the fact that it has a final effect because of the final dates of arbitration that were placed on the order.

[43] I should however remark, I am not convinced that the respondents enjoy any reasonable prospects of success envisaged under section 17(1)(a)(i) of the Superior Courts Act. In my view, the applicants compellingly demonstrated that they have prima facie right, though in doubt; and a proprietary interest worthy of protection; to which, if an interim interdict were not to be granted, they would suffer irreparable harm, or at the very least, they have a reasonable apprehension of the same to imminently arise.

[44] Harms AJA in *Zweni v Minister of Law and Order*[12] puts it elegantly,

> '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

[10] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*)
[11] Ibid, para 25.
[12] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533B.

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" ***(my emphasis)***

[45] I am satisfied that the first leg of the test has been met. Therefore, I grant the respondents leave to appeal under section 17(1)(a)(ii)[13] (that there is some other compelling reason why the appeal should be heard) in terms of the Superior Courts Act.

ORDER

[46] In the circumstance the following order is granted.

1. Application for leave to appeal to the Supreme Court of Appeal is granted
2. The costs of the application for leave to appeal will be the costs in the appeal.

FLATELA L
ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 21 January 2022

Date of Hearing:	9 December 2021
Date of Judgment:	21 January 2022
Applicants' Counsel:	Adv H Barter
Instructed by:	Barter Mckellar, 89 5th Street, Linden, Randburg
Respondent's Counsel:	Adv Vimbi

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

Instructed by: N Gawula Inc, 482 Chopin Street, Constantia Park, Pretoria