IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: ***NO***
(2)	OF INTEREST TO OTHER JUDGES: ***NO***
(3)	REVISED:
Date:	11/07/2022 ***Signature***:

Case No. 25906/2020

In the leave to appeal application between

MACHINGWANE, SABELO VUSUMZI Applicant

and

NATIONAL AFRICAN FEDERATED CHAMBER OF COMMERCE AND INDUSTRY First Respondent

MOSENA, SEKWAMO GILBERT Second Respondent

JUDGMENT

MAHOMED, AJ

I granted an interim order on 19 April 2022, in terms of which the applicant was ordered to cease acting and posing as the president of the first respondent and to desist from making any media statements or appear in public as its president, pending the decision of the Supreme Court of Appeal. The applicant seeks leave, to the Full Bench of the High Court alternatively the Supreme Court of Appeals, to appeal that order. The application is opposed.

The applicant in casu appeals in terms of s17 (1) (a) (i) and (ii) of the Superior Courts Act 10 of 2013, which provides that leave to appeal may only be given where the court is of the opinion that, (i) the appeal would have a reasonable prospect of success or (ii) there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

My judgment sets out the requirements for an interim interdict and the facts which supported each of the requirements in detail. Only the basic points are repeated, herein.

1. The main facts I considered were:

    1.1. that the first respondent's members, voted in the second respondent as the president of the first respondent NAFCOC, a body which is established to promote and support Black business interests. The point in dispute here is that the meeting held was not lawfully convened in terms of its constitution and that point is now before the

Supreme Court of Appeals.

1.1.1. I heard no evidence on this point and therefore I did not determine that point.

1.1.2. The respondents supported their application for an interim interdict by reference to minutes, confirmatory affidavits, and correspondences by the leadership of NAFCOC. Those facts confirmed their prima facie right, although open to some doubt.

1.2. The evidence was that respondents demanded that the applicant desist from continuing with his behaviour. He refused to do so, as evidenced by correspondences between the attorneys and he did not deny that he posed as president at public meetings, media statements as its president and the like. He stated he would not accede to their demand and thereby implied that he would continue with his conduct. This established the reasonable apprehension of harm amongst other facts.[1]

1.3. The first respondent is NAFCOC, a body established to promote the business interests of Black business.

1.3.1. The balance of convenience favours that the order be

[1] Caselines P10 -11 par 29 to 35

granted in its favour to preserve its position and continue with its work until final determination by the SCA on the legality of the meeting and the outcome of the elections.

1.3.2. The applicant has a right to a hearing and is going to be heard. However, the applicant failed to demonstrate that he suffered any real prejudice or that the order would interfere with the continued working of the organisation or in any way prejudice the organisation.

1.4. The requirement of no other remedy was established on the evidence that the respondents have on two occasions demanded that the applicant desist from the offending conduct, and he has unequivocally refused to do so.

2. A court has a wide discretion in determining the granting of an interim order. In **R v BALOYI**,[2] the court held that there must be some substance to the argument advanced by the applicant. The applicant persists with his argument that the "status quo remains," but he has a different understanding of the status quo, that is, ignoring the outcome of an election and vote of no confidence, by members of NAFCOC. He advances no argument as to how the order granted prejudices him or the NAFCOC, nor presents any evidence to this court.

[2] 1949 (1) SA 523 AD at 524

3. The applicant in casu, attacks all of the judgment, inter alia, that the respondents' failed to prove all requirements for an interim interdict, that he heard of the Oudekraal principle and its application to voluntary associations as set out in the Cathcart judgment for the first time at the hearing of the matter, that the court should not have admitted hearsay evidence, the court made findings on issues not before it, the court failed to consider the parties failure to mediate the dispute, and so continued the grounds for leave to appeal. My reasons appear in the judgment and need not be repeated.

4. The applicant must satisfy the test for leave to appeal as set out in s17 (1) of the Superior Courts Act 10 of 2013.

5. His argument must demonstrate that another court, bearing in mind what I already set out in the paragraphs above and my judgment, "would" arrive at a different finding, and that the interim order should not have been granted. The threshold is higher than in the previous Act and the applicant must show that there is more of a certainty that another court would arrive at a different decision. The order I granted does not have the effect of a final order and the approach in the Cipla judgement has application.

6. **CIPLA AGRIMED (PTY) LTD v MERCK SHARP DHOME CORPORATION**[3], the court held that the order must be definitive of the issue and not susceptible of alteration by court of first instance: interim interdict in form and

[3] (972/16) ZASCA 134 (29 September 2017) headnoteSA 223 CC

effect, not appealable. I made no definite finding on the parties' dispute, I considered whether the applicant satisfied the requirements for an interim interdict and applied my discretion in the circumstances that the parties find themselves in.

7. I am of the view that on the basic facts set out above, my judgment explains more fully, that the respondents have satisfied the requirements for the interim order. The applicant has failed to counter the basic facts set out above.

8. Mr Kwinda argued that I made a finding in paragraph 62 of the judgment. He argues incorrectly, in that the paragraph is simply a restatement of "Farber AJ's finding," which if read together with the paragraphs 63-64, I set out the context which justified the grant of the interim order.[4]

8.1. It is not my finding. I did not hear evidence on the legality of the meeting and made no finding on the point.

9. Mr Kwinda alleged he heard new evidence for the first time with reference to the Oudekraal principle and its application to voluntary associations as held in the Cathcart Resident's Association judgment.

9.1. The applicant is incorrect as the founding papers stated that the

[4] Caselines P17 -18

Mosena "*remains president until a court decides otherwise*." [5]

10. The applicant repeats his attack on the admission of hearsay evidence. This point is fully addressed in the judgment. It must be noted that even if the reference to the statements and appearances were excluded, the applicant's failure to deny the statements or public appearances itself is an admission. The hearsay evidence is of no real consequence. The respondents did not address the content of those statements but merely referred to them. I exercised my discretion in allowing the evidence, particularly in that it was not denied, and the applicant was clear in his attorney's correspondence that he would continue with his conduct.

10.1. The evidence was that the respondents' attorneys wrote to applicant's attorneys and demanded that he desist from posing as its president. The applicant did not deny that he was so acting and furthermore through his attorneys "*refused to accede to your* (respondents) *clients' demands.*"[6]

11. Advocate Korf argued that the application is an abuse of process, and an appeal is pending on the point which is likely to be heard in September or October 2022, when the main issue would be determined. This application would only be heard in 2023, when the issue would become academic. He argued the application should never have been brought and must be

[5] Caselines P25 at 32

[6] Caselines A183 par 2

dismissed with costs.

12. Furthermore, it was argued that if the applicant feels as strongly, he is at liberty to call another meeting of the members to hold another vote, which he has failed to do.

13. Mr Kork argued that the applicant has not alleged and proved any prejudice he suffers. It is the organisation that suffers reputational harm.

14. The applicant acknowledged that no appeal lies in respect of an interim order and in his notice of appeal advised that the appeal of this interim order is based on the interest of justice.

14.1. The notice for leave to appeal reads, "*the basis of the appeal of the interim orders and/or judgment of Honourable Madam Justice Mahomed AJ, is based on the interest of justice."*[7]

15. Mr Kwinda relied **on CITY OF TSHWANE METROPOLITAN MUNICIPALITY v AFRIFORUM & ANOTHER** [8], where the court stated that an interim order is appealable based on the interest of justice, however counsel failed to set out the full principle in that judgment.

15.1. The principle, quoted as in the OUTA judgment by Moseneke DCJ,

[7] Caseline X2

[8] 2016 (6) SA 279 (CC) at 34

as he was then, states:[9]

> *"the court has granted leave to appeal in interim orders before. It has made it clear that the operative standard is "the interest of justice." To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has 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."*

16. This court has considered the conspectus of the evidence and noted that the applicant has not provided any evidence of any irreparable harm or prejudice he or NAFCOC may suffer because of this interim order. It in the interest of justice that the management of the organisation continue to function, until the issue is fully ventilated before the Supreme Court of Appeals.

17. I am not persuaded that another court would arrive at a different conclusion as to whether the respondents have met the requirements for an interim order.

18. The applicant argued that the court ought to have considered that the parties failed to mediate the dispute and therefor costs ought not be awarded against him. I considered this in my judgment when Mr Korf submitted that the parties in casu have been in a strained relationship for a long while, a mediation would not have assisted them.

[9] 2016 (6) SA 279 (cc) at par 40, [2012] ZACC 18; 2012 (6)

19. I am of the view that the applicant ought not to have brought this application and he incurred unnecessary legal costs.

Accordingly, I make the following order

1. The application for leave is refused.

2. The applicant shall pay the costs of the application on an attorney client scale.

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MAHOMED AJ

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 11 July 2022.

Date of hearing: 13 June 2022

Date of Delivery: 11 July 2022

Appearances:

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