



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

Case No: 115576/2023

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

15 December 2023

DATE

Robin Pearse AJ

SIGNATURE

In the application for leave to appeal between

PAMODZI GROUP PROPRIETARY LIMITED

First Applicant

NDABA ALLAN NTSELE

Second Applicant

And

NATIONAL EMPOWERMENT FUND

First Respondent

SINDISWE DLAMINI NO

Second Respondent

In re: the matter between

NATIONAL EMPOWERMENT FUND

First Applicant

SINDISWE DLAMINI NO

Second Applicant

And

PAMODZI GROUP PROPRIETARY LIMITED	First Respondent
NDABA ALLAN NTSELE	Second Respondent
PAMODZI UNIQUE ENGINEERING PROPRIETARY LIMITED	Third Respondent
SIBUSISO PHANGELA	Fourth Respondent
SABELO MKHWANAZI	Fifth Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

PEARSE AJ:

1. This is an application for leave to appeal against my order of 04 December 2023 and reasons of 08 December 2023. The applicants in this application – the first and second respondents in the main application – are referred to as PG and Mr Ntsele. The respondents in this application – the applicants in the main application – are referred to as the NEF and Ms Dlamini. The reader of this judgment is taken to be familiar with the order and reasons.
2. I heard the main application on Friday 01 December 2023 and granted the order on Monday 04 December 2023. On the following day PG and Mr Ntsele requested reasons for and applied for leave to appeal against the order. I delivered my reasons on Friday 08 December 2023 and PG and Mr Ntsele supplemented their grounds of appeal on Wednesday 13 December 2023. Both

parties were represented at a virtual hearing before me at 14:30 yesterday afternoon.

3. An immediate difficulty for this application is that an interim order is seldom appealable. PG and Mr Ntsele invoke *Lebashe*¹ in preference to *TWK*² in support of the submission that it is in the interests of justice that the order and reasons be reconsidered on appeal. That invocation is however to be found in a letter as opposed to their notices outlining the grounds on which leave to appeal is sought. In addition, why the interests of justice are said to be engaged by the facts of this case is not a matter to which PG or Mr Ntsele devotes attention³ and there is no assertion of any basis why the parties should not proceed to have their disputes determined whilst the holding position provided for in the order is in place. I am therefore of the view that the order and reasons are not appealable and it is only out of caution that I continue to assess the merits of this application.

4. I should add that a misdirection at the heart of this application is that the grounds of appeal for which PG and Mr Ntsele contend take issue with aspects of the

¹ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2022 (12) BCLR 1521 (CC)

² *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* 2023 (5) SA 163 (SCA)

³ Mr Ndlovu, who appeared for PG and Mr Ntsele, submitted that it would be inappropriate for Ms Dlamini to retain a position of power and influence whilst undergoing investigation (a state of affairs that has passed) but could not explain why, in the circumstances of the case, an appointee or nominee of his clients could not remain in her position, under the scrutiny of the board, pending the outcome of further proceedings. He was not able to dispel this court's impression that *Lebashe* is distinguishable on the facts.

reasons for the order rather than attacking the exercise of discretion in the grant of the (interim) order or striking at the terms of the order itself. There is no focused challenge to any aspect of the order; only generalised criticisms of certain of the building blocks contained in the reasons. Whilst the application should fail for this reason too, I proceed briefly to address each of PG's and Mr Ntsele's purported grounds of appeal.

5. The first ground of appeal is that this court erred in finding that the NEF and Ms Dlamini had satisfied the requirements of urgency in terms of rule 6(12)(a) in circumstances where the application papers were voluminous and presented complex issues not readily determinable on an urgent basis.⁴

6. The circumstances in which I granted condonation for procedural non-compliance are set out in paragraph 15 read with paragraphs 18, 19 and 20 of the reasons and I do not consider there to be a reasonable prospect that an appeal court would interfere with that exercise of discretion.⁵ The expedited basis on which PG and Mr Ntsele have requested reasons for and applied for leave to appeal against the order is supportive of my judgement that the matter is to be dealt with without delay.

⁴ Paragraphs 1 to 3 of application for leave to appeal dated 05 December 2023

⁵ Whilst Mr Ndlovu submitted that the exercise of discretion had not been judicial, he was not able to articulate why hearing and deciding the matter without delay was a misdirection by the court.

7. The second ground of appeal is that this court “*erred in ignoring the glaring evidence pointing at dispute of facts which are so serious that the court ought to have applied the Plascon Evans Rule and find in favour of the Appellants.*”⁶
8. It is notable that the application for leave to appeal identifies no such dispute of fact.⁷ A proper reading of the papers in this matter confirms that matters of fact are largely common cause between or not pertinently contested by the parties. The primary disputes between the parties are matters of legal interpretation of provisions of the SLFA, the SHA, the MOI and the Act. In any event, given that this court was minded to grant only interim relief on an urgent basis, the test of application to matters of fact is that established in *Webster v Mitchell*⁸ rather than in *Plascon-Evans*.⁹ There is therefore little if any force to this ground of appeal.
9. The third ground of appeal is to the effect that this court failed to strike a fair balance between the parties’ respective arguments.¹⁰
10. This ground of appeal is vacuous inasmuch as it fails to identify any argument for the NEF and Ms Dlamini to which undue weight was accorded or for PG and Mr

⁶ Paragraph 4 of application for leave to appeal dated 05 December 2023

⁷ Although Mr Ndlovu alluded to disputes of fact in the course of his argument, none was identified in his submissions.

⁸ *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189; *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA) 189F-I

⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E-635D; *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) 235E-G

¹⁰ Paragraph 5 of application for leave to appeal dated 05 December 2023

Ntsele to which inadequate weight was accorded. The allegation of an absence of even-handedness is unarticulated let alone substantiated. The order is interim in nature – affording PG and Mr Ntsele a fresh opportunity to persuade an arbitrator or judge of their factual and legal position – and the core arguments for and against each side to the litigation are traversed in the reasons. I do not believe there to be a reasonable prospect that an appeal court would find there to have been unfairness in the manner in which the urgent application was heard and decided by this court.

11. The fourth ground of appeal is that this court “*erred in failing to decide the non-joinder argument which was raised by the appellants as a point of Limine.*”¹¹
12. As explained in paragraph 16 of the reasons, I did not consider it necessary – for purposes of granting urgent interim relief – to decide the non-joinder preliminary point and deemed it preferable to postpone the point such that both sides may address it more fully, to the extent considered appropriate, in arbitration or ordinary-course judicial proceedings. In my judgement, the non-citation of the share trusts was not fatal to an application for interim relief on an urgent basis. Notably, it is not suggested by PG or Mr Ntsele that the interests of the trusts were or are in any way prejudiced by the terms of the order. The point is purely dilatory in nature. I do not regard there to be a reasonable prospect that an appeal court would differ with my inclination to maintain the *status quo ante* on

¹¹ Paragraph 1 of supplementary grounds of appeal dated 13 December 2023

the substance of the parties' disputes pending their determination in further proceedings.

13. The fifth ground of appeal is to the effect that this court erred in suspending and provisionally reversing the impugned conduct insofar as it related to Ms Dlamini “on [the basis] that there was no board resolution and/or the second respondent was not given an opportunity to make representation as to why she should not be suspended.”¹²

14. This ground of appeal – which challenges the first element of interim interdictory relief in respect of Ms Dlamini – fails to have meaningful regard to the full content of paragraph 17.2 of the reasons, criticising only a single component of my reasoning. Even then, PG and Mr Ntsele do not say why, in their submission, the impugned conduct was lawful in circumstances in which PG appears to have asserted an entitlement to discipline an employee of PUE and/or to remove Ms Dlamini from the board without evidence of compliance with section 71 of the Act.¹³ Having regard to the full content of paragraph 17.2 of the reasons, I am unpersuaded of any reasonable prospect that an appeal court would find a *prima facie* right not to have been established in respect of Ms Dlamini.

¹² Paragraph 2 of supplementary grounds of appeal dated 13 December 2023

¹³ The submission by Mr Ndlovu that PUE is a division of PG is inconsistent with what is alleged in paragraphs 6, 10 and 12 of the founding affidavit and noted (not denied) in paragraph 15 of the answering affidavit. Mr Ndlovu could not point to a contractual or other basis for the proposition that PG was entitled either to discipline an employee of PUE or to remove Ms Dlamini from the board without compliance with section 71 of the Act. And counsel for the parties were agreed that the papers contain no evidence of any PUE board resolution to such effect.

15. A related sixth ground of appeal is that this court “*erred in finding that the appellant did not set out facts, and circumstances underpinning the allegations of financial malfeasance on the part of second respondent notwithstanding the fact that it was made clear in the answering affidavit that it was a precautionary suspension pending the finalization of the investigation and the investigation and the subsequent disciplinary action.*”¹⁴
16. Whilst it was for Ms Dlamini to demonstrate a *prima facie* right to the suspension and provisional reversal of the impugned conduct *vis-à-vis* her, PG’s and Mr Ntsele’s apparent reliance on a need to act immediately and unilaterally in suspending (and thereafter terminating) Ms Dlamini as director and CEO (employee) of PUE required, in my view, a degree of particularisation and/or substantiation that went beyond a mere assertion of “*serious allegations of financial malfeasance*”.¹⁵ I regard it as insufficient for PG and Mr Ntsele to assert that the exigencies of the matter were such as to entitle them to act without due process whilst contending that the nature and/or extent of such exigencies would form the subject matter of an investigation to be conducted in due course. I reiterate the conclusion to paragraph above.

¹⁴ Paragraph 3 of supplementary grounds of appeal dated 13 December 2023

¹⁵ Mr Ndlovu and Mr Tshetlo, who appeared for the NEF and Ms Dlamini, confirmed at the hearing of this application that the papers before court did not offer any such particularisation and/or substantiation.

17. The seventh ground of appeal is that this court “*erred in finding that [I] was not persuaded that the National Empowerment Fund has ceased to be a shareholder for the reasons advanced in the answering affidavit and in argument.*”¹⁶
18. Again, this ground of appeal is devoid of content in that PG and Mr Ntsele do not identify any respect in which this court erred in being unpersuaded that they are right in contending that the NEF has relinquished its 39% equity interest in PUE. This application discloses no meaningful engagement with the court’s reasoning detailed in paragraph 17.1 of the reasons¹⁷ and I do not consider that there is a reasonable prospect that an appeal court would find that a *prima facie* right to the suspension and provisional reversal of the impugned conduct was not established in respect of the NEF.
19. The eighth ground of appeal is that I misdirected myself in finding that “*there was no dispute of facts which warranted the referral of the matter for oral evidence to determine the different versions of the parties, in so far as it relates, to the shareholding of Pamodzi Unique Engineering.*”¹⁸

¹⁶ Paragraph 4 of supplementary grounds of appeal dated 13 December 2023

¹⁷ Mr Ndlovu accepted that there is no contractual provision before court that states that the NEF’s shareholding in PUE would be converted, repurchased, transferred or otherwise extinguished on repayment of the loan under the SLFA. He could place his submission no higher than that that would be a commercially logical bargain for the parties to have struck. In rebuttal, Mr Tshetlo pointed to provisions of the SHA that regulate the terms of any proposed exit by the NEF, at market value, from its investment in PUE.

¹⁸ Paragraph 5 of supplementary grounds of appeal dated 13 December 2023

20. Neither side to the litigation requested that there be a referral of the matter to trial or evidence on any issue. Nor was such a referral necessary in respect of the interim relief granted by this court. I am therefore of the view that this final ground of appeal provides no sound basis for the grant of this application.
21. In my view, therefore, none of the eight grounds of appeal exposes any material error in the order or even the reasons such that it would have reasonable prospects of success on appeal.¹⁹ Nor do PG and Mr Ntsele contend for any other compelling circumstances that warrant the attention of an appeal court.²⁰
22. This application for leave to appeal was initiated before the furnishing of reasons for the order and persisted with after the furnishing of reasons for the order without any discernible effort to engage with the court's order or reasons. Its motivation appears to be to suspend the operation of the order rather than to correct any error in the order.
23. In the result, the application is dismissed with costs, on the attorney and client scale, to be borne by PG and Mr Ntsele, jointly and severally, the one paying the other to be absolved.
24. Towards the end of the hearing of this application, I was invited by Mr Tshetlo to include in my order a clarification of the effect of a dismissal of this application on

¹⁹ Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 (“**the SCA**”)

²⁰ Section 17(1)(a)(ii) of the SCA

the operation or suspension of my order of 04 December 2023. The invitation was aimed at forestalling envisaged further disputes regarding the interpretation and application of the provisions of section 18 of the SCA. I am not persuaded that it would be competent or appropriate for this court to provide what amounts to advice on the proper construction of that section. In the circumstances, I confine myself to the order set out in paragraph above.

PEARSE AJ

This judgment, which is unsigned due to the circumstances in which the application was head and decided, is handed down electronically by uploading it to the file of this matter on Caselines. It will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is deemed to be 15 December 2023.

Counsel for PG and Mr Ntsele:	Advocate Ndlovu
Instructed By:	Peter Zwane Attorneys
Counsel for the NEF and Ms Dlamini:	Advocate R Tshetlo
Instructed By:	Norton Rose Fulbright South Africa Inc
Date of Hearing:	14 December 2023
Date of Judgment:	15 December 2023