CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 39/21

In the matter between:

UNITED DEMOCRATIC MOVEMENT	First Applicant
BANTUBONKE HARRINGTON HOLOMISA	Second Applicant
and	
LEBASHE INVESTMENT GROUP (PTY) LIMITED	First Respondent
HARITH GENERAL PARTNERS (PTY) LIMITED	Second Respondent
HARITH FUND MANAGERS (PTY) LIMITED	Third Respondent
WARREN GREGORY WHEATLEY	Fourth Respondent
TSHEPO DUAN MAHLOELE	Fifth Respondent
PHILLIP JABULANI MOLEKETI	Sixth Respondent

Neutral citation:	*United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34
Coram:	Zondo ACJ, Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgment:	Madondo AJ (unanimous)
Heard on:	2 November 2021
Decided on:	22 September 2022

Summary: Appealability of Interim Interdicts — Interests of Justice — Section 16(1)(a) of the Superior Courts Act 10 of 2013

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal against the order of the Supreme Court of Appeal striking the appeal from the roll is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:

   "The appeal against the order of the High Court of South Africa, Gauteng Division, Pretoria, is dismissed with costs of two counsel."
4. The applicants shall pay the costs of the respondents in this Court, including costs of two counsel.

JUDGMENT

MADONDO AJ (Zondo ACJ, Madlanga J, Majiedt J, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

Introduction

[1] The applicants seek leave from this Court to appeal against the order of the Supreme Court of Appeal striking their appeal off its roll on the grounds that it was

interim and therefore not appealable.[1] This occurred notwithstanding the fact that the High Court of South Africa, Gauteng Division, Pretoria (High Court), had granted the applicants leave to appeal to the Supreme Court of Appeal against same. The striking off of the appeal had the effect of preventing the applicants from having their case determined.

[2] This application has its origin in an interim interdict granted by the High Court against the applicants on 16 July 2018 pending a defamation action that was to be instituted by the respondents against the applicants. The applicants complain that such order has since restrained and prohibited them from exercising their right to freedom of expression and from performing their duties as political actors in terms of the Constitution. If the application for leave is granted, on appeal the applicants will seek an order from this Court setting aside the order of the Supreme Court of Appeal and replacing it with an order that the appeal is upheld with costs, thus setting aside the High Court's interim interdict and replacing it with an order that the application is dismissed with costs.

Parties

[3] The first applicant is the United Democratic Movement (UDM), a political party duly registered in terms of the Electoral Act[2] and the fifth largest opposition party represented in the National Assembly. The UDM is also represented in the Provincial Legislatures and various municipalities. The UDM says that its primary role as an opposition party is to strengthen democracy, highlight instances of maladministration and corruption within the public service and hold the Executive accountable. The second applicant is Mr Bantubonke Harrington Holomisa, a member of Parliament and President of the UDM.

[1] *United Democratic Movement v Lebashe Investment Group (Pty) Ltd* [2021] ZASCA 4 (Supreme Court of Appeal judgment).

[2] 73 of 1998.

[4] The first respondent is Lebashe Investment Group (Pty) Limited, a company incorporated as such and carrying on business as an investment holding company. The first respondent is 100% black owned and is a shareholder in several companies in the financial sector. The second respondent is Harith General Partners (Pty) Limited, a registered company which conducts business as a fund manager and invests funds on behalf of its investors in infrastructure projects in Africa. Its investors are pension funds, private banks, companies and development finance institutions. The third respondent is Harith Fund Managers (Pty) Limited. The second and third respondents are, for the purposes of this judgment, collectively referred to as the "respondent companies". The fourth respondent is Mr Warren Wheatley, a director and Chief Investment Officer of the first respondent. The fifth respondent is Mr Tshepo Daun Mahloele, a director and Chief Executive Officer of the respondent companies, and Chairman of the first respondent. The sixth respondent is Mr Phillip Jabulani Moleketi, a non-executive director of the first respondent and the Chairman of the respondent companies.

Background

[5] On 31 May 2018 Mr Holomisa addressed a letter to the President of the Republic of South Africa, Mr Cyril Matamela Ramaphosa (the President), titled "The Public Investment Corporation, the Government Employee Pension Fund and Suspected Corruption; a Scandal Bigger than the Gupta-Family's State Capture". On 26 June 2018, another letter titled "Unmasking Harith and Lebashe's Alleged Fleecing of the Public Investment Corporation" was addressed to the President. The letter was delivered and received by the President's office on the same date. Subsequently, Mr Holomisa caused a copy of the letter of 26 June 2018 that had been forwarded to the President to be published on the official website of the UDM and his Twitter account.

[6] The latter publication was in sensational terms as follows:

> "BREAKING: State capture of a different kind as the ultra rich elite allegedly plunder [the Public Investment Corporation] through companies Lebashe & Harith. Read more on this nauseating tale on udm.org.za."

Upon such publication on the said platforms, members of the public read the letter and commented on it.

[7] On 30 June 2018 Mr Holomisa gave an interview on the South African Broadcasting Corporation's (SABC) Morning Live, the SABC's biggest and longest running TV breakfast show, and said that he would not back down and retract statements he made in his letter to the President regarding "dodgy deals between the Public Investment Corporation [PIC] and two investments companies, Lebashe and Harith General Partners". The respondents state that on 1 July 2018 Mr Holomisa published a further defamatory statement on social media labelling the fourth to sixth respondents as "trusted indunas" and "hyenas" of the President and the PIC. According to the respondents, Mr Holomisa demonstrated that he wanted to have the contents of the letter published as widely as possible.

[8] The PIC is a state-owned investment vehicle and asset management company established in terms of section 3 of the Public Investment Act.[3] The PIC's clients are mostly public sector entities that focus on the provision of social security. These include the Government Employees Pension Fund and Unemployment Insurance Fund. The PIC is a national government business enterprise governed by the Public Finance Management Act[4] (PFMA).

[9] The respondents construed Mr Holomisa's letter of 26 June 2018 as intended to mean that the respondents were unlawfully and intentionally engaged in a number of schemes which entailed: fraudulent acts, conspiracies and subterfuges with the result that funds from the PIC were being misappropriated by them or at their instance. And

[3] 23 of 2004.

[4] 1 of 1999.

to also mean that innocent members of the public, whose moneys are invested with the PIC, were victims of a series of thefts perpetrated by the respondents on "a grand scale; so grand, in fact, it rivals and indeed exceeds the bounds of the Gupta state capture scandal of recent times". They also contended that the letter could only be reasonably understood to bear this meaning.

[10] The respondents contend that, from an ordinary reading of the letter, it is obvious that much of its content is per se defamatory and injurious to them. They contend that in addition, the manner in which the allegations were stated was provocative, sensational, scandalous and at odds with the stated purpose of the letter, namely, to persuade the President to expand the terms of reference of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the State Capture Commission) headed by (then) Deputy Chief Justice Zondo. According to the respondents, Mr Holomisa had no valid reason to make such explosive and inherently inflammatory allegations at that stage. Mr Holomisa used these allegations to further his and the UDM's political interests at the expense of the respondents' good names and dignity.

[11] The respondents also state that, as a result of the offending letter, adverse publicity and its sequelae in the media, certain investment opportunities were lost, including amongst others, Vele Asset Managers (Pty) Limited, which terminated the funding arrangement which was in place between it and the first respondent. On 29 June 2018, Chetan Jeeva of Investec Private Bank (Investec) made an enquiry expressing concerns about the allegations and wished to consult the second and fifth respondents before taking action. Investec also demonstrated fear due to a developing and potentially lethal mistrust and suspicion in the market. According to the respondents, this came about as a consequence of Mr Holomisa's letter of 26 June 2018.

[12] The respondents state that the industry in which they function is extremely sensitive to one's perception of integrity and trustworthiness. They state that companies are in the habit of placing enormous sums of money in their hands to invest wisely and

properly as far as they are able to do so and many people's lives and livelihoods depend on the respondents' decisions.

[13] The UDM states that it regards the lack of transparency and accountability in the manner in which public funds are utilised in South Africa as one of the greatest threats to the rule of law and the country's democratic establishment itself. As a result, the UDM points out that it regards it as of great importance that, where corruption is suspected, it must be exposed publicly and formal steps must be taken to investigate and eradicate it.

[14] The applicants contend that the letter they addressed to the President was dealing with matters of public interest. They point out that public officials were accused of abusing their positions at a public entity for private gain. The UDM points out that in the discharge of its duties as the opposition party of holding public entities and institutions accountable, it addressed a letter to the President alerting him to the information the applicants had gathered about what was happening at the PIC and requested the President to inquire into the matter. Subsequently, Mr Holomisa tweeted about it.

[15] The applicants state that the fiduciary duties of accounting authorities,[5] as set out in section 50 of the PFMA, include the duty to:

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[5] Section 1 of the PFMA defines an accounting authority as any person or body mentioned in section 49 of the Act. Section 49 in relevant part provides:

> "(1) Every public entity must have an authority which must be accountable for the purposes of this Act.
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> (2) If the public entity—
>
> (a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or
>
> (b) does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority.
>
> (3) The relevant treasury, in exceptional circumstances, may approve or instruct that another functionary of a public entity must be the accounting authority for that public entity."

(a) exercise utmost care in order to ensure reasonable protection of the assets and records of the entity;

(b) act with fidelity, honesty, integrity and in the best interests of the entity in managing its financial affairs;

(c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the entity is accountable, all material facts which may influence the decisions or actions of the executive authority[6] or the legislature; and

(d) prevent any prejudice to the financial interests of the state.

[16] The applicants also contend that in terms of the Constitution,[7] members of the Cabinet and Deputy Ministers may not act in any way that is inconsistent with their office or expose themselves to any situation involving the risk of a conflict of interests between their official responsibilities and private interests. This section also provides that such members and Deputy Ministers may not use their position or any information entrusted to them to enrich themselves, or improperly benefit any other person. According to the applicants, when the funds were advanced to the first and third respondents, the sixth respondent was Deputy Minister of Finance and now sits as a non-executive director of the first respondent and chairperson of the third respondent. According to the applicants, this constitutes a breach of section 96 of the Constitution. The section does not only deal with a conflict of interests but also the risk of a conflict of interests. The applicants contend that the sixth respondent, as former Deputy Minister of Finance, has placed himself in a position where the risk of conflict of interests has arisen and they say that that is what they asked the President to investigate.

[6] See section 1 of the PFMA.

[7] Section 96(2)(b):

"Members of the Cabinet and Deputy Ministers may not—

. . .

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests."

Litigation history

High Court

[17] Fearing that irreparable harm would be caused to their dignity and reputation, the respondents approached the High Court for an interdict restraining the applicants from making or repeating any defamatory allegations defaming or injuring their dignity pending the institution of an action for damages for defamation and injuria. For this relief, the respondents relied on the conduct of the applicants in addressing the letter to the President and publishing it on social media platforms. The respondents argued that the contents of the letter were untrue and defamatory, and the continued publication thereof would cause them further harm. The respondents also stated that they had suffered financial loss due to the applicants' publication of the letter. They further argued that the longer the letter remained in the public domain, the greater the harm to their dignity and reputation. They submitted that the applicants' conduct infringed their right to dignity and defamed their names. They contended that the applicants' conduct was not justified in any way.

[18] The applicants stated that the fourth respondent is the founding principal and executive director of the first respondent. He is a director at Rain Fin and serves on the boards of Petra Touch and Aluwani Capital Partners. The focal point, according to the applicants, is that a former employee of the PIC and former chairperson of the PIC board now derives financial aid from entities they were involved with when the decisions to fund them were taken.

[19] The applicants further contended that the flow of the funds and the respective roles of the personalities were sufficient to create the perception that the funds of the PIC had been used in a manner that is in conflict with the PFMA and, indeed, the Constitution. The applicants requested that the state of affairs at the PIC should be investigated by the State Capture Commission. The applicants submitted that they had provided information that went beyond mere suspicion and furnished names of the

individuals, transactions and indeed the names of the entities that were involved in instances of suspected breaches of the law.

[20] In his answering affidavit, Mr Holomisa emphasised that, as a member of Parliament and leader of the opposition party, he was under a special duty to take steps to ensure that instances of corruption were duly investigated. He said that he discharged that duty by referring a complaint relating to the allegations of corruption and conflict of interests to the President. He contended that he could not be gagged from making these allegations public in the discharge of his duties as a public representative. He further argued that members of the public are entitled to the information on the ground that section 1 of the Constitution encompasses a duty, where public funds are involved, to act transparently and to promote accountability. He said that they are also entitled to information by virtue of section 16 of the Constitution, which provides that the right to freedom of expression includes freedom to receive or impart information or ideas.

[21] Mr Holomisa further contended that an interdict would infringe the rights of the public as protected by section 16(1)(b) of the Constitution as well as his political rights as enshrined in section 19 of the Constitution. He argued that no basis had been laid for limiting these rights and that the information was already in the public domain. The applicants contended that the respondents were not entitled to interdictory relief as they had an alternative remedy to claim damages. The parties agreed in the High Court that it was in both their interests that the matter should be disposed of without delay.

[22] At the conclusion of the motion proceedings, the High Court granted the respondents an interim interdict pending the determination of an action for damages for defamation. The High Court ordered the applicants to forthwith cease and desist from making or repeating the allegations against the respondents or from defaming or injuring the respondents' dignity, and to remove and delete the letter from the UDM's website and from Mr Holomisa's Twitter account. The order was made on the grounds that the applicants had failed to show that the information contained in the letter was true and in the public interest. The applicants sought leave to appeal against the interim

interdict to the Supreme Court of Appeal on the grounds that the contents of the letter were not defamatory, that the allegations were true and that the publication thereof was in the public interest. They submitted that the High Court ought to have considered their constitutional obligation to hold the Executive accountable in terms of section 55 of the Constitution.[8] The applicants argued that even though the interdict was interim in form, it was final and definitive in effect as it directed them to remove the contents of the letter from their website and social media accounts. The applicants, therefore, argued that it was in the interests of justice to grant them leave to appeal. The High Court granted leave to appeal to the Supreme Court of Appeal.

Supreme Court of Appeal

[23] When the matter came before the Supreme Court of Appeal, in a three-two split the application was struck off the roll on the grounds that the interdict was interim in nature and therefore unappealable. It was argued on behalf of the applicants that the interdict was appealable in that it was final and definitive in effect. Furthermore, the applicants argued that the interests of justice warranted an appeal against the interdict. In determining the appealability of the interim interdict, Sutherland AJA, with Cachalia and Mbha JJA concurring, (the majority of the Supreme Court of Appeal) held that the applicants were not in fact precluded from repeating the allegations in Parliament, because section 58(1)(a) of the Constitution secures their right to do so in Parliament with impunity. The majority found that the applicants did not make out a case that the UDM is "a one-issue-organisation and that it will wither if its opinions about the respondents' alleged skulduggery are not constantly heard, while in the meantime, the

[8] Section 55(2) provides:

> "The National Assembly must provide for mechanisms—
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> (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
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> (b) to maintain oversight of—
>
> (i) the exercise of national executive authority, including the implementation of legislation; and
>
> (ii) any organ of state."

two parties shuffle their way towards trial".[9] This finding was in response to the counter-argument that the Constitution confers a right to engage in advocacy outside Parliament.[10]

[24] The majority described the applicants' persistence in appealing against the interim order as an attempt to convince that Court to decide issues which would lie within the purview of the trial court when determining the final relief. The majority went on to hold that the applicants could not demonstrate any irreparable harm to support their contentions. It also held that the applicants' allegations that the balance of convenience favoured them because allegations of corruption ought to be ventilated added no strength to the argument. The majority concluded that the interim order was valid and not appealable. In reaching that conclusion, the majority held that the interests of justice did not require the appeal to be entertained.

[25] The minority judgment of the Supreme Court of Appeal by Molemela JA, with Makgoka JA concurring (the minority) came to a different conclusion, namely, that while interim orders are ordinarily not appealable, in this instance the interests of justice rendered the interim interdict appealable. Furthermore, they found that the High Court had already exercised its discretion to determine that it was in the interests of justice to grant leave despite the interim nature of the interdict, and that "it was not open to this court to second-guess the reasons advanced by the [High Court] simply because it held a different view on the matter".[11] The minority held that the majority should have held the interim interdict appealable and heard the appeal in the interests of justice.

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[9] Supreme Court of Appeal judgment above n 1 at para 23.

[10] See section 19(1) of the Constitution which provides that:

> "Every citizen is free to make political choices, which includes the right—
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> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause."

[11] Supreme Court of Appeal judgment above n 1 at para 32.

Before this Court

Applicants' submissions

[26] The applicants submit that the High Court carefully took into account the interests of justice in reaching the conclusion that the interim order was appealable and that leave to appeal should be granted. They argue that the order directing that the letter be taken down from the UDM's website and social media accounts was final and definitive in effect. They contend that it is the minority judgment of the Supreme Court of Appeal which correctly summarises this Court's test for the appealability of interim orders, namely that an interim order may be appealed if the interests of justice so dictate. Relying on the minority judgment, the applicants submit that it was not open to the majority of the Supreme Court of Appeal to second-guess the decision of the High Court in granting the applicants leave to appeal simply because it held a different view on the matter. Furthermore, it was not shown that the High Court had not exercised its discretion judicially. The applicants contend that the Supreme Court of Appeal's power to interfere with the High Court's order granting leave to appeal should be used sparingly and only in the clearest cases of an error or misdirection. According to the applicants, the majority did not meet that test at all. The applicants submit that it is in the interests of justice for this Court to hear and determine these issues.

[27] On the majority of the Supreme Court of Appeal's findings that Mr Holomisa can repeat the allegations in question with impunity in Parliament, the applicants contend that, if it is permissible to repeat the allegations in Parliament despite the High Court's order, there is no need for an interdict. The applicants further submit that a temporary silence in public discourse causes irreparable harm to the applicants as political actors and is at odds with this Court's jurisprudence on free speech. Finally, the applicants submit that this appeal raises arguable points of law relating to interim interdicts pending defamation actions and the appealability of interim orders generally, which need to be considered by this Court. They also submit that the merits of the appeal relate to matters which are in the public domain and pertain particularly to the abuse of public office for personal gain.

Respondents' submissions

[28] The respondents submit that this matter does not raise any arguable point of law of general public importance which ought to be considered by this Court. They further submit that this matter does not raise a constitutional issue and, therefore, this Court has no jurisdiction to entertain it. The respondents contend that, in any event, even if this Court's jurisdiction is engaged, the application has no prospects of success and that the minority judgment, upon which the applicants place considerable reliance, is wrong.

[29] The respondents submit that the correct test for determining the appealability of an interim order is set out in *Zweni*.[12] They argue that the order made by the High Court does not satisfy any part of the *Zweni* test insofar as it is not final in effect and not susceptible of alteration by the court of first instance, not definitive of the rights of the parties, and does not have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. For that reason, the respondents submit that the majority of the Supreme Court of Appeal was correct in concluding that the interim order was not appealable.

[30] Finally, the respondents also raise concerns about the possibility of this matter amounting to a direct appeal in the event of this Court concluding that the majority of the Supreme Court of Appeal erred in striking the appeal off the roll. In this regard, the respondents argue that the majority limited their enquiry to the appealability of the interim order and did not consider the merits. They, therefore, submit that it is not in the interests of justice for this Court to entertain this matter as a direct appeal as there are no exceptional circumstances.

Jurisdiction and leave to appeal

[31] Section 167(3)(b) of the Constitution provides that:

[12] *Zweni v Minister of Law and Order of the Republic of South Africa* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532I-533A.

> "The Constitutional Court—
>
> . . .
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[32] In terms of section 167(7) of the Constitution, a constitutional matter includes any issue which involves the interpretation, protection or enforcement of the Constitution. In this matter, it is alleged that the impugned interim interdict constitutes a limitation of the applicants' right to freedom of expression and the exercise of their political rights as protected by the Constitution.[13] Section 16 of the Constitution grants freedom to receive and impart information or ideas and, as a consequence, on that ground alone, the matter engages the jurisdiction of this Court. The applicants contend that the interim order unjustifiably infringes their right in terms of section 16 of the Constitution. They also submit that they were entitled to publish the statements that they published by reason of section 16.

[33] With regard to the question whether this Court may entertain an appeal against a decision of the Supreme Court of Appeal, the powers of this Court do not originate from any discretionary power, but are derived from the Constitution. The touchstone, in this regard, is whether it is in the interests of justice for a prospective appellant to be granted leave to appeal.[14]

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[13] See sections 16 and 19 of the Constitution, respectively.

[14] *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at para 40; *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*) at paras 23-5; *MEC for Health, Kwazulu-Natal v Premier, Kwazulu-Natal: In re Minister of Health v Treatment Action Campaign* [2002] ZACC 14; 2002 (5) SA 717 (CC); 2002 (10) BCLR 1028 (CC) at para 6; and *Cape Metropolitan Council v Minister of Provincial Affairs and Constitutional Development* [1999] ZACC 12; 2000 (1) SA 727 (CC); 1999 (12) BCLR 1353 (CC) at para 12.

[34] Whether this Court should grant leave turns on what the interests of justice require. Whether it is in the interests of justice to hear and determine the matter involves a careful balancing and weighing-up of all relevant factors.[15] However, there is no concrete and succinct definition of the phrase "interests of justice" and what it really entails.

[35] What is in the interests of justice will depend on a careful evaluation of all the relevant factors in a particular case.[16] Herein there are two different hurdles as to whether this Court should grant leave: (a) whether the Supreme Court of Appeal's order is appealable; and (b) whether, if the order is appealable, this Court should entertain the merits of the appeal despite the fact that the Supreme Court of Appeal did not determine the merits of the appeal.

[36] It would not be in the interests of justice that the issues in this matter are determined in a piecemeal fashion.[17] Moreover, the issues in this matter are of such a nature that the decision sought will have a practical effect if the application for leave to appeal is granted.

[37] This matter raises issues that are of a constitutional nature and arguable points of law of general public importance such as whether the Supreme Court of Appeal was correct to hold that the interim interdict was not appealable to it. The public interest will be best served by their prompt resolution. Such resolution will help to correct the wrong decision before it has further consequences, on one hand, and to avoid delay and inconvenience resulting from the failure of this Court to hear the appeal, on the other hand. The evidence is sufficient to enable this Court to deal with and dispose of the matter without referring it back to the Supreme Court of Appeal for reconsideration. It goes without saying that the interests of justice require this Court to entertain the matter

[15] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*SCAW*) at para 55. See also *OUTA* id at para 25.

[16] *SCAW* id.

[17] *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA) at para 17.

as remitting it to the Supreme Court of Appeal for reconsideration will give rise to considerable inconvenience, prejudice and impede the attainment and administration of justice.

Issues

[38] The issues which arise in the present matter, and incidental to the grant of the interim order, are—

(a) whether the Supreme Court of Appeal has the power to interfere with the decision of the High Court to grant leave to appeal;
(b) whether the interim order is appealable; and
(c) whether the High Court should have granted the impugned interim order.

Analysis

Powers of the Supreme Court of Appeal to interfere with the decision of the High Court to grant leave to appeal

[39] In terms of section 168(3) of the Constitution, the Supreme Court of Appeal has jurisdiction to hear and decide appeals on any matter arising from the High Court. When a matter comes before the Supreme Court of Appeal, it has jurisdiction to determine whether the lower court's ruling in the proposed appeal is a "decision" within the meaning of section 16(1)(a) of the Superior Courts Act.[18] The Supreme Court of Appeal is not bound by the lower court's assessment and is entitled to reach its own conclusion on the question.[19] The word "decision" is given a meaning equivalent to the

[18] See section 16(1)(a) of the Superior Courts Act 10 of 2013.

[19] In *Minister of Safety and Security v Hamilton* [2001] ZASCA 27; 2001 (3) SA 50 (SCA), the respondent had instituted an action for damages in the High Court against the appellants. The appellants excepted to the respondent's particulars of claim as amended. The Court dismissed the exceptions on the ground that it was inappropriate to decide the issues raised by way of exception without hearing all the evidence in the matter. The Court concluded that it would be inappropriate for it to determine whether the legal duty on which the respondent relied existed or not. However, the High Court granted leave to appeal against the dismissal of the exceptions. When the appeal was called, the Court raised the question whether the order was appealable. The Supreme Court of Appeal held that the decision of the High Court that the matter had to go to trial precluded it from deciding the issue that the second defendant wished to bring on appeal; namely the merits of the exception's challenge to the legal foundation of the claim. The High Court's ruling deferred the very determination the excipients sought to obtain, with the result that there is no "judgment or order to appeal against".

meaning given to the words "judgment or order".[20] The word "judgment" is used to refer to the decision of a court as well as its reasoning.[21]

[40] In answering the question whether an order is a decision, the Supreme Court of Appeal does not exercise a discretion but rather makes a finding of law according to the test determining appealability. The majority of the Supreme Court of Appeal concluded that the interim interdict is not a decision as contemplated in section 16(1)(a) of the Superior Courts Act and accordingly struck the matter off its roll. As a consequence, the applicants' appeal in the present matter lies against a finding of law, not of discretion. When the Supreme Court of Appeal struck the matter from the roll it was not exercising an appellate power but simply striking the matter from the roll as a matter which was not within its jurisdiction to entertain. The Supreme Court of Appeal was not only entitled but obliged to determine whether the matter was an appeal against a "decision" and thus an appeal within its jurisdiction. The High Court's granting of leave to appeal did not bind the Supreme Court of Appeal on that issue. I can thus turn to the next issue, which is whether the Supreme Court of Appeal was correct in concluding that the appeal against the interim interdict was not appealable.

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[20] In *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others* [2017] ZASCA 47 at paras 12–3, where the Court held that—

> "[t]he appellant correctly conceded in argument that there was no difference in the meaning that was assigned to the phrase 'judgment or order' in [section] 20 of the Supreme Court Act and a 'decision' in [section] 16(1)(a) of the Superior Courts Act. This has been held to be so.
>
> If a decision did not constitute a 'judgment or order' the decision was not appealable under the Supreme Court Act. Since there is no conceptual difference between such a judgment or order and the 'decision' contemplated in [section] 16(1)(a) of the Superior Courts Act, the same would hold true under the Superior Courts Act. The 'judgment or order' was held to refer to a substantive judgment or order in terms of which the court granted or refused the relief sought. The same meaning has to be given to the 'decision' contemplated in [section] 16(1)(a) of the Superior Courts Act." (Footnotes omitted.)

See *S v Van Wyk* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) at 591 footnote 6; *Firstrand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169 paras 10-15.

[21] *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 714J-715A.

Appealability of an interim order

[41] In deciding whether an order is appealable, not only the form of the order must be considered but also, and predominantly, its effect.[22] Thus, an order which appears in form to be purely interlocutory will be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action. By the same token, an order which might appear, according to its form, to be finally definitive in the above sense may, nevertheless, be purely interlocutory in effect.[23] Whether an order is purely interlocutory in effect depends on the relevant circumstances and factors of a particular case. In *Zweni*, it was held that for an interdictory order or relief to be appealable it must: (a) be final in effect and not susceptible to alteration by the court of first instance; (b) be definitive of the rights of the parties, in other words, it must grant definite and distinct relief; and (c) have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[24]

[42] An interim order may be appealable even if it does not possess all three attributes but has final effect or is such as to dispose of any issue or portion of the issue in the main action or suit, or if the order irreparably anticipates or precludes some of the relief which would or might be given at the hearing, or if the appeal would lead to a just and reasonable prompt resolution of the real issues between the parties. In *Von Abo*, this Court said:

> "It is fair to say there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the right of the parties, disposed of a substantial portion of the relief claimed, aspects

[22] *SCAW* above n 15 at para 53; and *Metlika Trading Ltd v Commissioner for the South African Revenue Service* [2004] ZASCA 97 (*Metlika*) at para 23.

[23] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 535G-536A; and *Metlika* id.

[24] *Zweni* above n 12 at 532I-533A. See also *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (*Khumalo*) at para 6.

> of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice."[25]

[43] Whether an interim order has final effect or disposes of a substantial portion of the relief sought in a pending review is merely one consideration.[26] Under the common law principle as laid down in *Zweni*, if none of the requirements set out therein were met, it was the end of the matter. But now the test of appealability is the interests of justice, and no longer the common law test as set out in *Zweni*.[27]

[44] In the present matter, the majority of the Supreme Court of Appeal struck the appeal off the roll on the grounds that the interim order in question was simply an interlocutory order which was not appealable. This means that, according to the majority, the removal and deletion of the contents of the letter complained of from the internet, all social media posts as well as from the UDM's website and Mr Holomisa's social media account were not final and definitive in effect. The takedown order was simply an interdict against continuing to publish the defamatory material on the platforms pending the determination of the defamation action. By allowing the defamatory material to remain accessible on these platforms, the applicants are in fact continuing to publish it. However, it has always been open to the applicants to approach the High Court for the discharge of the impugned interim order on the grounds of changed circumstances, discovery of further evidence and that the impugned interdict has endured longer than it was anticipated. It therefore follows that the impugned interim order is capable of being reconsidered by the High Court which issued it. If the plaintiffs failed in the defamation action, the present applicants would be at liberty to place the material again on the social media platforms.

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[25] *Von Abo* above n 17.

[26] *OUTA* above n 14 at para 25.

[27] *SCAW* above n 15 at para 52. See also *Philani Ma-Afrika v Mailula* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) at para 20; and *S v Western Areas* [2005] ZASCA 31; 2005 (5) SA 214 (SCA) at paras 25-8.

[45] What is to be considered and is decisive in deciding whether a judgment is appealable, even if the *Zweni* requirements are not fully met, is the interests of justice of a particular case and whether or not an order lacking one or more of the factors set out in *Zweni* constitutes a "decision" for the purposes of section 16(1)(a) of the Superior Courts Act.[28] Over and above the common law test, it is well established that an interim order may be appealed against if the interests of justice so dictate.[29] It is thus in the interests of justice that the impugned interim interdict is appealable on the allegation that the interdictory relief in question resulted in the infringement of the right to freedom of expression.

[46] The majority of the Supreme Court of Appeal erred in holding that the interests of justice did not render the impugned interim interdict a "decision" within the meaning of section 16(1)(a) of the Superior Courts Act. An interdict restricting free speech constitutes a grave intrusion on a constitutional right. Since there was a likelihood that the life of the impugned interim interdict, granted pending the outcome of the defamation trial, might be extended even longer than it had already existed, it was sufficiently invasive and far-reaching that it was in the interests of justice for the grant of the impugned interim order to be treated as a "decision". The Supreme Court of Appeal in *Health Professions Council of South Africa*[30] held that, where a litigant may suffer prejudice or even injustice if an order or judgment is left to stand, leave to appeal against orders or judgments made during the course of the proceedings should be granted. In determining whether the impugned interim interdict was appealable, the Supreme Court of Appeal was not exercising a discretionary power; it was making a value judgment. Accordingly, this Court is entitled to make its own assessment and conclude that the impugned interim interdict was a "decision" and thus within the Supreme Court of Appeal's jurisdiction.

[28] *Western Areas* id at paras 26-8; and *Khumalo* above n 24.

[29] *Philani Ma-Africa* above n 27.

[30] *Health Professions Council of South Africa v Emergency Medical Supplies and Training CC t/a EMS* [2010] ZASCA 65; 2010 (6) SA 469 (SCA) at para 25.

Justification for the granting of an interim interdictory relief

[47] An interdict is an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right, which is threatened by continuing or anticipated harm. As indicated above, an interdict may be temporary or final. Temporary interdicts are referred to as interim or interlocutory interdicts or interdicts *pendente lite*.[31] An interim interdict pending an action is an extraordinary remedy within the discretion of the court. For an order to be said to be interim, it must be susceptible to alteration and capable of being reconsidered at the pending trial on the same facts by the court of first instance. According to the respondents, the impugned interim interdict is a carefully crafted, narrow ban, designed to prevent the applicants from repeating the defamatory statements contained in the letter addressed to the President and from causing ongoing harm until the matter is determined at the trial. The requisites for the right to claim an interim interdict are: (a) a prima facie right even if it is open to some doubt; (b) injury actually committed or reasonably apprehended; (c) the balance of convenience; and (d) the absence of similar protection by any other remedy.[32]

[48] In granting an interdict, the court must exercise its discretion judicially upon a consideration of all the facts and circumstances. An interdict is "not a remedy for the past invasion of rights: it is concerned with the present and future".[33] The past invasion should be addressed by an action for damages. An interdict is appropriate only when future injury is feared.[34]

[49] In democratic societies, the law of defamation lies at the intersection of freedom of speech and the protection of reputation or a good name. The law does not allow the

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[31] Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (Juta & Co Ltd, Cape Town 2009) at 1063.

[32] See *OUTA* above n 14 at para 41, citing with approval *Setlogelo v Setlogelo* 1914 AD 221 at 227; and *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1187.

[33] *Tau v Mashaba* [2020] ZASCA 26; 2020 (5) SA 135 (SCA) at para 26.

[34] *Philip Morris Inc v Marlboro Shirt Co SA Ltd* 1991 (2) SA 720 (A) at 735A-B. See also *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) (*NCSPCA*) at para 20.

unjustified savaging of an individual's reputation. The right of freedom of expression must sometimes yield to the individual's right not to be defamed. In striving to achieve an equitable balance between the right to speak your mind and the obligation not to harm or injure someone else's name or reputation, the law has devised defences such as fair comment, and truth and in the public interest.

Common law defamation

[50] The law of defamation is based on the *actio injuriarum*, a flexible remedy, which affords the right to claim damages to a person whose personality right has been impaired by the unlawful act of another. One of the personality rights is the right to reputation (*fama)* and the other is *dignitas*, and both are protected by the law of defamation.[35]

[51] The most commonly raised defences for defamation to rebut the presumption of unlawfulness are that the publication was true and in the public interest or that it constituted fair comment.[36] The two defences have crystallised in our case law. The common law of delict requires a plaintiff in a defamation action for damages to show that a defamatory statement has been published. If this is established, it is presumed that the publication was with intent to injure with knowledge of wrongfulness, and that it was unlawful. In the present case, since publication of defamatory statements is admitted by the applicants, there is a presumption that the publication was unlawful, for which the applicants would then bear the onus to show that the publication of the statements constituted fair comment or that the statements were true and in the public interest.

[52] A factual foundation for a defence of fair comment or truth and in the public interest must be laid in evidence.[37] The mere say-so of a deponent who alleges a defence

[35] *Khumalo* above n 24 at paras 17 and 27-8.

[36] *National Media Ltd v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA) at 1208I; *Argus Printing and Publishing Company Ltd v Esselen's Estate* [1993] ZASCA 205; 1994 (2) SA 1 (A) at 25C-D; and *Khumalo* id at para 26.

[37] *Herbal Zone (Pty) Ltd v Infitech Technologies (Pty) Limited* [2017] ZASCA 8 at paras 38-9.

of justification should not be accepted at face value; the facts on which it is based must be analysed to determine its weight and whether or not it is established that the statement was true and in the public interest.[38]

Was the impugned statement defamatory?

[53] Whether a statement is defamatory is subjected to a two-stage inquiry. The first is to determine the meaning of the publication as a matter of interpretation and the second is whether that meaning is defamatory.[39] In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have regard not only to what is expressly stated but also what is implied.[40] In the present matter, it is not in dispute that the reasonable reader would have understood the letters as being defamatory of the respondents. In the present case, the ordinary meaning of the statement Mr Holomisa made was that the respondents are thieves, fraudsters, corrupt and dishonest. It goes without saying that such a statement is defamatory of the respondents. The applicants' defence was that the statements were the truth and in the public interest, but they failed to prove it.

[54] In addition, it was contended on behalf of the respondents that the manner in which the allegations were stated was provocative, sensational and scandalous. The passage complained of here is the allegation by the applicants in the letter that the respondents are—

> "double and triple dipping into the public funds, are hyenas intent upon fleecing the PIC. The companies are fronts for a selected group of super rich people to syphon money from [the] PIC and this dwarfs the state capture by the Gupta family."

[38] Id.

[39] *Le Roux v Dey* (*Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae*) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 38.

[40] Id at para 89.

It is correct that the tone in which the statements were written or the way in which they were presented provided an unnecessary sting as they were drafted in an outlandish and exaggerated manner.

Wrongfulness

[55] In the present case, the High Court had to determine whether there was prima facie evidence to sustain an action for defamation and consider whether the applicants' conduct in publishing a defamatory statement was wrongful and whether there was an intention to defame the respondents. The applicants contended that their conduct was lawful in that they were acting in terms of section 16 of the Constitution, which entitled them to receive and impart the information, and that they were acting in the exercise of their political rights, as contained in section 19 of the Constitution, and within the ambit of their political activities. They also submitted that they had a duty and responsibility as political actors to ferret and root out corruption in the Executive and public institutions. Further, they contended that their intention was not to defame the respondents, but to bring the information to the notice of the President and request him to investigate and verify it. The applicants further argued that it was in the public interest that such information should also be disseminated to the public.

[56] In a defamation action, once it is shown that the statement complained of is defamatory of the plaintiff, the wrongfulness of the defendant's conduct is presumed. This places a burden of proof on the defendant to prove that his or her conduct was not wrongful. In the present matter, there were allegations of impropriety, corruption and conflicts of interests against the respondents. The sixth respondent, a former Deputy Minister of Finance, was accused of using his position to improperly enrich himself and the other politically connected respondents. The applicants state that they have a constitutional duty to ensure that corruption in state institutions or entities is exposed, hence they solicited the President to investigate and verify the allegations. The applicants state that, on those grounds, their conduct was not wrongful.

Truth and in the public interest

[57] For the applicants' allegations relating to corruption and conflict of interests to be accepted, it must be supported by proof of truth and in the public interest. The applicants have not disclosed facts that would sustain a defence of truth and in the public interest.

[58] It is well settled that what is required of a respondent is that "a sustainable foundation be laid by way of evidence that a defence such as truth and in the public interest or fair comment is available to be pursued by the respondent".[41] The applicants advanced comprehensive details of the people involved in the alleged scheme and about funding and related transactions and shareholding. But, those allegations in themselves do not come close to establishing the truth of the defamatory material – corruption; double dipping, fraud, theft and conflict of interests. The applicants then argued that the flow of the funds and the respective roles of the personalities are sufficient to create the perception that the funds had been used in a manner that was in conflict with the PFMA and the Constitution. They went on to state that the respondent companies were the recipients of funding from the PIC. However, the mere fact that the respondents had received funding from the PIC itself could not provide proof that such funding had corruptly been received, regard being had to the fact that the respondents were not the only companies that had received funding from the PIC. Furthermore, the circumstances under which such funding was received by the respondent companies were not disclosed. That the sixth respondent had at some stage, by virtue of his position as the Deputy Minister of Finance, been the chairperson of the PIC as well as that he is the non-executive director of the first respondent and the chairperson of the second and third respondents, could not in itself justify the conclusion that he had conflict of interests. These incidents were not sufficient to justify a perception that the funds of the PIC had been used in a manner that was in conflict with the PFMA and the Constitution.

[41] *Herbal Zone* above n 37 at para 38.

[59] The applicants' description of various relationships between the sixth respondent, the PIC and the other respondents only gives rise to a perception of possible conflict of interests. But, there are allegations of corruption, fraud, theft and dishonesty which such relationship does not cover. The applicants cannot therefore be said to have laid an adequate factual foundation for the defence of truth and in the public interest. I am of the view that the burden of proof placed on the applicants does not pitch the level of proof for the defence of truth and in the public interest so high as to unduly stifle freedom of expression and the public interest. There must be evidence and truth to a defamatory statement one makes about another. By arguing that they were merely relaying allegations of corruption, not based on their knowledge, coupled with the fact that they requested the President to inquire into the allegations, the applicants admitted that they themselves did not know the truth of the allegations in question. They did not provide any shred of evidence of actual misconduct, corruption and self-dealing.

[60] According to the applicants, they were acting on the allegations of impropriety, corruption and conflict of interests in the State or public entity. They argue that the public interest requires that members of the public should be informed or know about allegations of the theft of public funds, fraud and looting of a public entity. The applicants contend that they have a constitutional duty to ensure that corruption in state institutions is exposed. They contend that in keeping with the Constitution, the UDM's role is to ensure that democracy is strengthened and that the rule of law is observed and to insist upon accountability and transparency and to expose corruption and maladministration in the State, the public service, state institutions and parastatals. They also contend that Mr Holomisa, as a public representative, has a special duty to take steps to ensure that corruption is exposed and eradicated.

[61] In the execution of their constitutional duty to expose and ferret out corruption, the applicants were, in my view, required to act within the ambit of the law. The applicants allegedly received defamatory information from the whistle-blowers, and then they went and published it under a mistaken belief that it was for the benefit of the

public to do so, without having ascertained the correctness and truthfulness of the information they had received. They did not even make a feeble attempt to ascertain the truth of the allegations before publishing the defamatory material, notwithstanding the fact that they had asked the President to inquire into the allegations. The applicants claimed to have been acting in good faith when they published the defamatory material, but the utterances and embellishments, namely "in bed with", "the iceberg of corruption", "there seems to be a concerted effort to hide", "double and triple dipping into the public funds", "hyenas intent upon fleecing the PIC", and "the companies are fronts for a selected group of super rich people to syphon money from the PIC", betray them and demonstrate that the converse was true instead. Such utterances and embellishments, in my view, could not have emanated from the alleged whistle-blowers or any other persons other than the applicants themselves. In doing so, the applicants put their imprimatur on the allegations and ceased to be mere conduits but owners of the information. The inevitable conclusion is that, when publishing the defamatory material, the applicants were reckless in failing to ascertain whether the publication of the defamatory information in question would injure the dignity and reputation of the respondents. The applicants had at that time already requested the President to investigate and verify the allegations, and the President was working on their request.

[62] The applicants did not, at the time when they published the defamatory statements, have a lawful basis for so doing. The applicants admittedly stated that the allegations were not yet investigated and confirmed and they, therefore, had no valid reason to believe in the truth of such allegations. The applicants were not entitled to wantonly defame the respondents under the pretext that they were executing a constitutional duty. In the same breath, in my opinion, it was not for the public benefit to publish the unverified defamatory information. When a public figure plainly defames members of the public while admitting that he or she does not know the truth of what he or she says, his or her right to freedom of expression may justifiably be limited. In the premises, the applicants failed to discharge the onus which rested on them to lay a basis for the defence that the allegations were true and in the public interest.

The publication of the letter on the internet, social media and conventional media sites was, in the circumstances of the present case, unwarranted.

[63] The applicants' conveying of the information about the alleged corruption and conflict of interests to the President for investigation was, in my view, appropriate and lawful. However, their publication of the defamatory statement elsewhere before the verification and confirmation of the alleged corruption and conflict of interests rendered the applicants` conduct wrongful.

Balance of convenience

[64] The right to freedom of expression embraces the right to receive expressions transmitted by others.[42] Section 16(1) of the Constitution provides:

> "Everyone has the right to freedom of expression, which includes—
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research."

[65] The Bill of Rights which entrenches among others the right to freedom of expression is the cornerstone of our democracy. The right to freedom of expression is important in facilitating the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions freely on a wide range of matters.[43] This Court, in *Laugh It Off*,[44] held that freedom of expression is a vital incident of dignity, equal worth and freedom, and serves a collection of constitutional ends in an open and democratic society based on

[42] *Case v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 165 (CC); 1996 (5) BCLR 608 (CC) at para 30.

[43] *South African National Defence Union v Minister of Defence* [1999] ZACC 17; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 7.

[44] *Laugh It Off Promotions CC v SAB International* (*Finance*) *BV t/a Sabmark International* (*Freedom of Expression Institute as Amicus Curiae*) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC).

the values of equality, freedom and human dignity,[45] and advances the public's right to receive information.[46]

[66] The applicants' right to freedom of speech and to impart information, and the public's right to receive such information conflicts directly with the respondents' right to dignity and reputation. When freedom of expression does conflict with other rights, a court must carefully balance the conflicting rights or interests of the parties proportionally,[47] with the view to ensuring protection of the rights of both parties. A court must give due weight to both the right to freedom of expression and the protection of the right to dignity and reputation. This requires a balancing exercise between the competing rights or interests of the parties.

[67] Even under the common law, in deciding whether to grant an interim interdict, when a prima facie right and reasonable apprehension of irreparable harm have been established, the court will take into account the balance of convenience between the parties.[48] A court weighs up the likely prejudice to the applicant if the temporary interdict is refused and the refusal is later shown to be wrong in the sense that the applicant's disputed conclusions are ultimately upheld, against the likely prejudice to the respondent if the temporary interdict is granted and the grant of the interdict is later shown to have been wrong, in the sense that the applicant's disputed contentions are ultimately dismissed.[49]

[68] Irreparable harm or loss may be defined as the loss of property, including incorporeal property and money in circumstances where its recovery is impossible or improbable. The loss need not necessarily be financial. It will occur when a person

[45] Id at para 45.

[46] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 120.

[47] Id at para 133.

[48] *Harnischfeger Corporation v Appleton* 1993 (4) SA 479 (W) at 491B-D.

[49] *Inkatha Freedom Party v African National Congress* 1994 (3) SA 578 (EN).

entitled to a particular thing is forced to take merely its value or is obliged to expend money which he or she cannot possibly recover. A court must decide whether there is any basis to entertain a reasonable apprehension of injury by the applicant.[50]

[69] An anticipated threat to the respondents constitutes an injury reasonably apprehended. If the infringement is one that prima facie appears to have "occurred once and for all, and is finished and done with" then the claimant should allege facts justifying a reasonable apprehension that the harm is likely to be repeated.[51] According to the applicants, the publication had occurred and finished and was not likely to be repeated.

[70] The High Court found that the impugned letter was defamatory of the respondents and that, as a result, they suffered irreparable harm. The respondents submitted that they did not to have any other adequate remedy to prevent the ongoing financial and reputational harm and loss to them caused by the applicants' persisting defamatory statement pending the determination of the defamation action. The respondents argued that the mere fact that the letter continued to appear on the UDM's website and Mr Holomisa's social media account, and remained accessible through links for anyone to read at any time, meant that, even if the applicants were not to repeat their utterances, further harm was, nevertheless, a very real prospect for as long as access to the letter remained possible. For as long as any member of the public, investment partners and prospective clients had access to the letter, the defamation would be inflicted on the respondents afresh. They needed an order to prevent the further and continuing harm.

[71] The respondents also contended that the harm they were facing was irreparable, as they would unlikely be able to ascertain with any degree of certainty how many clients they would lose as a result of the ongoing defamation. If the interim relief was

[50] *NCSPCA* above n 34 at para 21; and *Minister of Law and Order v Nordien* [1987] ZASCA 24; 1987 (2) SA 894 (A) at 896H-I.

[51] *Performing Right Society Ltd v Berman* 1966 (2) SA 355 (R) at 357F.

not granted, it would be extremely difficult, if not practically impossible, to pursue a claim for damages which would adequately remedy the wrongs committed. The respondents went on to contend that their industry is extremely sensitive to the perception of one's integrity and trustworthiness. Companies place enormous sums of money in the respondents' hands for them to invest wisely and properly as far as they are able to do so and that many people's lives and livelihoods depend on the respondents' decisions. According to the respondents, the effect of the order is to regulate the applicants' conduct in a circumscribed, specific and limited manner for a certain period pending the finalisation of the defamatory claim.

Other alternative satisfactory remedy

[72] On the evidence of the respondents, there was no other alternative satisfactory remedy to prevent the ongoing financial and reputational harm and loss caused to them by the applicants' persistent conduct pending the determination of the action for damages. The applicants contend that an award of damages for defamation action would provide an alternative satisfactory remedy in this regard. Such contention, in my view, does not hold any water since by the time the defamation trial is finalised, great harm would have already occurred. The respondents, therefore, succeeded in establishing a prima facie right, injury actually committed and reasonably apprehended, and the lack of adequate alternative remedy. Accordingly, the interim interdict was the only appropriate remedy that could be granted to protect the respondents' rights and reputations pending the final determination of the action for damages. The present respondents were thus correctly granted an interim interdict.

[73] Ordinarily, this conclusion would mean that we should remit the matter back to the Supreme Court of Appeal to enable that Court to determine the appeal on the merits. However, it seems to me that, in the circumstances of this case we should not follow that route but we should determine the appeal ourselves. This is because this Court does entertain direct access appeals from the High Court in appropriate cases. The matter has dragged on for a long time and, if we remit it to the Supreme Court of Appeal, it is likely to end up back with us again in any event. We have already heard full argument

and we should avoid having to hear the matter for the second time. The route I propose to follow will avoid a duplication of costs. In my view this Court is justified in determining the appeal in the same way it would have done if it was a direct appeal.

Costs

[74] While the applicants have attained some success in this Court in having the Supreme Court of Appeal's order striking the matter from the roll reversed, the respondents have succeeded in respect of the main relief, the interim interdict. The respondents' success is substantial when compared to that of the applicants. For that reason, the respondents are consequently entitled to their costs in this Court, as well as in the Supreme Court of Appeal. The matter does not justify the use of three counsel. Costs of two counsel is justified.

Order

[75] The following order is made:

1. Leave to appeal is granted.
2. The appeal against the order of the Supreme Court of Appeal striking the appeal from the roll is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:

   "The appeal against the order of the High Court of South Africa, Gauteng Division, Pretoria, is dismissed with costs of two counsel."
4. The applicants shall pay the costs of the respondents in this Court, including costs of two counsel.

For the Applicants:	D Mpofu SC, T Ngcukaitobi SC, and J Mitchell instructed by Mabuza Attorneys
For the Respondents:	D I Berger SC, B M Slon and T B Makgalemele instructed by Nicqui Galaktiou Incorporated