OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2019/22791

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

SIGNATURE

06/09/2019
DATE

OLD MUTUAL LTD First Applicant

OLD MUTUAL LIFE ASSURANCE COMPANY

(SA) LTD Second Applicant

TREVOR MANUEL Third
Applicant

THE NON-EXECUTIVE DIRECTORS OF

OLD MUTUAL The Fourth to the Sixteenth
Applicants

and

PETER MTHANDAZO MOYO First Respondent

NMT CAPITAL Second Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] The Applicants seek a declaratory that the orders granted by this Court on 30 July 2019 are final despite their appellation as interim. Once so confirmed, they should be automatically suspended as contemplated in Section 18(1) of the Superior Court Act No. 10 of 2013 ("the Act"). In the alternative and only in the event that the declaratory is refused, they seek an order staying the operation and execution of the orders as envisaged in Section 18(2) as read with (3) of the Act. The Applicants do so in the belief that they will be irreparably harmed if the orders are not suspended whereas the First Respondent will not. The existence of exceptional circumstances, irreparable harm on the part of the Applicants and absence thereof on the First Respondent mentioned in Section 18 of the Act should be enough to vindicate the suspension.

[2] Before proceeding with the judgment, I deem it necessary to mention that while the Applicants believe that the matter is urgent, the Respondents did not necessarily concede that it was but refrained from challenging it because the outcome might mean the early return of the First Respondent to his position as a Chief Executive Officer of the First Applicant. Both parties therefore regarded the

matter as urgent albeit for different reasons. To proceed then with the judgment. In response to the Section 18(1) application, the Respondents have launched a conditional counter application in terms of Section 18(1) read with Section 18(3) in the event that I declare the orders of 30 July 2019 to be decisions as intended in Section 18(1) of the Act.

ISSUES

[3] At the Core of this matter is the determination of the orders of 30 July 2019. Are they final or interlocutory? A characterisation of the order as final will automatically suspend their operation and execution as contemplated in Section 18(1) of the Act. A fall-back position for the Applicants in case of failure to persuade this Court that the orders are final is the alternative application – that the operation and execution of the orders, as envisaged in Section 18(2) of the Act should be suspended. The success of that application lies in the Applicants convincing this Court that the requirements as laid down in Section 18(2) and (3) of the Act have been met.

LEGAL PRINCIPLES

[4] The primary legal principles other than case authority governing the suspension of court orders is Section 18 of the Act. The Section provides:

"(1) Subject to sub-sections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to sub-section (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in sub-section (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in sub-section (1) –

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal;

(v) for the purposes of sub-sections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or notice of appeal is lodged with the registrar in terms of the rules."

[5] An applicant pursuing an application in terms of Section 18(1) or (2) must satisfy three jurisdictional factors. These are that:

5.1 The existence of exceptional circumstances;

5.2 The applicant will suffer irreparable harm if the suspension in either subsection is not granted; and

5.3 The respondent will not suffer irreparable harm if relief in either subsection is granted to the applicant.

5.2 and 5.3 must be established on a balance of probabilities. The absence of anyone of the three requirements will be adequate to dismiss the application.

[6] An order will be at risk of appeal if it bears the following three attributes:

6.1 The decision must be final in effect and not susceptible of alteration by the court of first instance;

6.2 It must be definitive of the rights of the parties; and

6.3 It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

See, *Zweni v Minister of Law and Order* 1993(1) SA 523 (A).

[7] *In Phillips & Others v National Director of Public Prosecutions* 2005 (3) SA 1 (SCA) it was held that:

"[20] ... a restraint order is only of interim operation and that, like interim interdicts and attachment orders pending trial, it has no definitive or dispositive effect as envisaged in Zweni. Plainly, a restraint order decides nothing final as to the defendant's guilt or benefit from crime, or as to the propriety of a confiscation order or its amount. The crucial question, however,

is whether a restraint order has final effect because it is unalterable by the court that grants it. ...

[8] The Respondents have raised a preliminary point, which should be considered first and be disposed of. The preliminary point pertains to whether or not a court is at liberty to exercise discretion in circumstances where a party raises an issue which is 'hypothetical, abstract and academic *or where the legal position is clearly defined by statute. This question occupied this Court in the case of Proxi Smart Services (Pty) Ltd v The Law Society of South Africa and Others where it held as follows:*

> "*The court will not grant a declaratory order where the issue raised is hypothetical, abstract and academic or where the legal position is clearly defined by statute.*"

[9] Accordingly, the question that arises is whether the issue of finality raised by the Applicants has the features mentioned in the Proxi Smart Services case supra. The Respondents believe that it is speculative that the impending action to be instituted by the First Respondent will endure for the entire remaining working life of the First Respondent even taking into account that there could be interlocutory applications in between and that subsequent decisions may be subjected to appeals.

[10] Of course this is 'hypothetical, abstract and academic' because it cannot be predicted with certainty that the forthcoming action will last for more or less than the remaining years of the First Respondent's working life with the First Applicant before it is finalised. I would, on this basis alone dismiss the declaratory in terms of Section 18(1). However, I prefer to proceed to consider the other grounds on which the declaratory is sought in case my conclusion as aforesaid is incorrect.

EVALUATION

ARE THE ORDERS FINAL IN EFFECT

[11] For the declaratory order to succeed, this Court must be satisfied that the orders of 30 July 2019 to which I have made reference above are final in the sense envisaged in Zweni *supra.* The applicants have referred this Court to the case of Phillips to which I have referred above. The interpretation of the orders in particular, the one interdicting the board of the First Applicant from appointing a person in the position of the Chief Executive Officer can only be construed as suggested by the Applicants if one is oblivious of the pronouncement of the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) at para 18:

> *"…. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible*

meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", *read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

[12] The context and purpose of this application is that the First Respondent was dismissed in consequence of which he launched an urgent interim application seeking his temporary reinstatement pending Part "B" and that while Part "B" is pending the Board should be prohibited from appointing another person to the position of the Chief Executive Officer. An objective reading that is sensible in the context and purpose of the orders is that Order 3 cannot be interpreted to mean that despite the upshot of Part "B", the Board is permanently barred from appointing a person to the position of the Chief Executive Officer.

[13] The interpretation preferred by the Applicants is what is referred to in the Endumeni case *supra* as *'insensible or unbusinesslike' or one that 'undermines the apparent purpose of the document' And is inimical to what rationality dictates. A*

favoured interpretation that is consistent with the Endumeni case supra is one that respects the context and purpose of the orders, which I have already mentioned above. In the result, the facts In Phillips Supra tolerated the assigned interpretation WHEREAS IN CASU tools of interpretation had to be employed to make sense of the orders. The orders are therefore interim and this Court is not at liberty to declare them final.

SHOULD THE COURT APPLY THE INTEREST OF JUSTICE STANDARD HERE

[14] In my opinion, the answer should be in the negative. Without exception, the cases that applied the interest of justice did so in the context of establishing whether or not an interim order was appealable whereas In this case the court is occupied with the determination of the suitability of granting a declaratory to allow the automatic suspension of the operation and execution of its orders. Moreover, in considering whether to apply the interest of justice, the court only has to consider irreparable harm to an applicant but does not have to find that the other party to the proceedings will not suffer irreparable harm as required under Section 18(1) and (2). In consequence, I find it superfluous to comment on all those cases that dealt with the interest of justice.

THE ALTERNATIVE RELIEF TO THE DECLARATORY

[15] Given that ordinarily interim orders become immediately operational and executable upon being granted, the alternative relief sought by the Applicants in

terms of Section 18(2) seeks to stay their operation and execution pending the outcome of the appeal. To be successful, the Applicants still need to demonstrate the existence of all the three requirements that must be established in respect of Section 18 1 and (3). These are the existence of exceptional circumstances, that the Applicants will suffer irreparable harm and that the First Respondent will not. To establish whether or not exceptional circumstances are present, each case must be assessed on its own peculiar facts.

[16] I am in agreement with the First Respondent that in their endeavour to show exceptional circumstances, the Applicants rely heavily on the fact that the reinstatement of the First Respondent obliges them to co-operate with an employee who has publically referred to them as delinquent and against whom the board has lost all its confidence and trust caused directly by his public utterances. It is evident from case authority that historically, reinstatement in contracts involving personal relationship such as *in casu* would generally be refused.

[17] The advent of our new democracy ushered with it a different approach predicated on values and provisions of the Constitution of this Country. Thus, granting reinstatement has become so common that one can hardly regard it as exceptional as the Applicants would have this Court believe. If anything, the Applicants seem to be going all out to demonstrate that a relationship with the First Respondent is completely impossible. As has been shown, courts have ordered reinstatement in situations where one would have thought impossible. I am reminded

here of the *Cliff* matter that I have mentioned above and innumerable other similar cases. The attitudes and eagerness of parties to restore a relationship count inestimably.

[18] The Applicants also view the impending action or application for the declaration of the directors' delinquent as exceptional. As observed by Respondents, the provisions of section 162 of the Companies Act are normal provisions meant for the protection of the broader public, in particular the shareholders, and are not to be viewed as "drastic" or extraordinary. Section 162 of the Companies Act cannot be construed to allow defamation or disrespect of the intended directors. The litigation need not be protracted or hostile.

[19] It is correct that the order dealing with the appointment of the Chief Executive Officer cannot be read in isolation from the order for temporary reinstatement. If and when the temporary reinstatement lapses or expires, as the case may be, so will the prohibition on the appointment of a permanent Chief Executive Officer, which cannot be lawfully authorised before the final determination of the rights of the incumbent, in terms of the order of this Court. Accordingly, there is nothing exceptional about the prohibition unless one attaches an interpretation that is manifestly specious –the Applicants are permanently interdicted from appointing another Chief Executive Officer no matter the outcome of Part "B". That assertion, I have already stated, on the understanding of the Endumeni case *supra dealing with interpretation of documents,* is misguided.

[20] Although it is appropriate to dismiss on the basis that one of the three jurisdictional facts have not been fulfilled, I still deem it important to explore whether or not the Applicants have satisfied the other two requirements. Against that background, I proceed to assess the other two, beginning with the existence of irreparable harm to the Applicants. It is apparent that one of the most objectionable matters to the Applicants is being forced to work with an unwanted Chief Executive Officer. In the second place, all that the Applicants have done is to reduce the problem purely to the question of money to the exclusion of human dignity. I have dealt with both above; the Applicants have not satisfied the heavy onus to establish that it will suffer any irreparable harm if the default position is maintained.

[21] I turn now to the third requirement. Will the First Respondent suffer no irreparable harm if the order is stayed? I agree that the First Respondent has effectually physically been prohibited and evicted from his office. Other than the humiliation of being ejected from his office, the irreparable harm is plain for every day that he spends at home without work regardless of whether he has been paid for sitting or not. That harm persists until such time that the interim reinstatement is executed and operationalised. As an illustration of this, perhaps I should conclude with what was stated in *Minister of Home Affairs v Watchenuka and Another* 2004 (4) SA 326 SCA at para [27]:

"The freedom to engage in productive work – even where that is not needed to survive – is indeed an important component of human dignity ... for mankind is pre-eminently a social species. Self-esteem and sense of self-worth – the fulfilment of what it is to be human – is most often wound up with being accepted as socially useful."

[22] The alternative application launched in terms of Section 18(2) must, for lack of satisfaction of the requirements described in Section 18(1) as read with (3),fails.

[23] Mindful that the granting of leave to appeal is generally an allusion that an application in terms of Section 18 has reasonable prospects of success, as was stated in Afri Forum v the University of the Free State, it is the opinion of this Court that it does not necessarily follow as a matter of course. The fact that in granting leave I thought that another court would hold otherwise does not make it conclusive. Were that not to be the case, no court would be confirmed on appeal.

[24] In view of my conclusion on the Section 18(1(, including the alternative thereto, I am of the opinion that the need to deal with the conditional counter application of the Respondent has been obviated. Put differently, the Respondents have succeeded to persuade this Court that the operation and execution of the orders should not be suspended

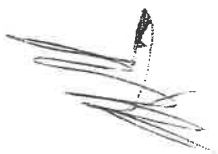
COSTS

[25] Both parties continue to make it fashionable to seek punitive costs in the event of the other failing. I still hold the view that, like in the other matters heard by this Court, no basis by either party exists for the granting of costs at a punitive scale. Accordingly, costs shall be assessed as at the scale between party and party.

ORDER

[26] Against that background, I make the following order

1. The application is dismissed in its entirety with costs.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

APPEARANCES:

Date Heard	: 16 August 2019
Date of Judgment	: 06 September 2019
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	: **A Freund SC**
	: **J G Dickerson SC**
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