OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

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

SIGNATURE 06/09/2019 DATE

CASE NO: 22791/2019

OLD MUTUAL LIMITED	FIRST APPLICANT
OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED	SECOND APPLICANT
TREVOR MANUEL	THIRD APPLICANT
THE NON-EXECUTIVE DIRECTORS OF OLD MUTUAL	FOURTH TO THE 16TH APPLICANTS

And

PETER MTHANDAZO MOYO	FIRST RESPONDENT
NMT CAPITAL	SECOND RESPONDENT

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This is a leave to appeal application following the granting of interim order on 30 July 2019 in favour of the First Respondent pending Part B. Part B concerns the finalisation of an action to be instituted within 60 days of the order of this Court. In terms of the interim order, this Court on urgent basis:

1.1 **Directed the Applicants to reinstate the First Respondent in his position as Chief Executive Officer of the first Applicant;**

1.2 **Interdicted the First to 17th Applicants from taking any steps towards appointing any person into the position of CEO of the First Applicant;**

1.3 **Ordered the Applicants to pay the costs of the First Respondent including those occasioned by the employment of two Counsel;**

1.4 **Granted leave to the First Respondent to supplement the papers in respect of Part B.**

[2] Dissatisfied with the interim order as described above, the Applicants launched this application for leave to appeal. At the heart of this matter is the appealability of interim orders. To resolve that issue this Court must decide whether or not the orders are final. If they are not, is it nonetheless in the interest of justice to grant leave to appeal?

BACKGROUND

[3] Separate but related to this leave to appeal matter is an application in terms of Section 18(1) of the Superior Courts Act No. 10 of 2013. In that application, the Applicants seek to have the orders of this Court dated 30 July 2019 declared final as envisaged in Section 18(1) of the Superior Courts Act No. 10 of 2013 and as such, have the effect of automatically suspending their operation and execution pending the outcome of the appeal.

[4] In the event of this Court concluding that the orders are interlocutory, the Applicants in the alternative seek a declaratory that the operation and execution of the orders of 30 July 2019 be suspended pending the results of the leave to appeal or the appeal itself. The Respondents oppose this application and have launched two counter applications.

ASSERTIONS OF THE APPLICANTS

[5] In the leave to appeal application, the Applicants contend that notwithstanding that the orders have been characterised as interim, they are still final in their effect and therefore appealable. If their argument fails in that regard, they assert that the orders should be appealable because it is in the interest of justice that the court should grant them leave to approach another court.

[6] On the merits of the judgment, the Applicants maintain that the First Respondent has failed to establish that he had a prima facie right that required protection from being irreparably harmed by the Applicants. Insofar as the balance of convenience is concerned, the Applicants argue that the court completely failed to consider the irreparable harm that would ensue on the part of the Applicants in the event that it granted relief in favour of the First Respondent.

[7] The Applicants continue that the reputational harm which the court said was persisting on the part of the First Respondent is not as catastrophic relative to the economic loss that the Applicants would suffer. The Applicants conclude their argument on merits of the judgment by stating that that the impending action by the First Respondent constitutes a perfect adequate alternative remedy to address his continuing reputational damage.

ASSERTIONS OF THE FIRST RESPONDENT

[8] The First Respondent is unwavering that the orders granted by this Court are interim in nature and therefore not automatically susceptible to appeal. An order is interlocutory if it remains vulnerable to modification by the court that granted it. This is so if one has regard to the orders of the court dated 30 July 2019. The reinstatement of the First Respondent is temporary pending the court deciding in Part "B" whether he should be permanently reinstated or not.

[9] The order interdicting the Applicants from taking any steps to appoint another person into the position of Chief Executive Officer, asserts the First Respondent, ought not to be read and understood as it stands because doing so may lead to preposterous results. It could not have been intended that if the order of this Court is reversed in Part "B" then the Applicants should remain interdicted from appointing another Chief Executive Officer permanently. The suggestion that without the introductory words such as, 'Pending Part "B", the order should be left to convey the superficial meaning is hypocritical and should not be entertained.

[10] The Respondents are satisfied that despite the assertions of the Applicants, there is nothing In the judgment that would lead another court to overturn the decision. Generally, it should suffice that the Respondents support the judgment of this Court dated 30 July 2019. For that reason, they implored this Court not to grant leave to appeal.

ISSUES

[11] This Court must decide whether or not the order that it granted on 30 July 2019 is appealable. That question can only be resolved by reference to two further issues - were the orders of 30 July 2019 final? If yes, the orders are appealable. Conversely, if not, this Court is required to consider the second question. Is it in the interest of justice that it be nonetheless appealable? Assuming that it is appealable, the court should determine whether or not on the merits leave should be granted.

LEGAL PRINCIPLES – APPEALABILITY OF INTERIM ORDERS

[12] The appealability of the orders of 30 July 2019 depends on whether or not they are final and definitive as opposed to being interlocutory. The parties are at variance on this question with the Applicants arguing that they are final and the Respondents contending for the contrary view. In *Zweni v Minister of Law and Order* 1993(1) SA 523 (A) it was held that an order would be prone to appeal if it bares the following three features:

> *"The decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."*

[13] Courts have been consistent in applying the principles articulated in the Zweni case supra but subsequently there have been indications intimating that, in appropriate circumstances, where the requirements laid down in Zweni may yield dissatisfactory results, the interest of justice would be applied to determine whether an order should be appealable or not. Thus, in *FirstRand Bank Limited t/a First National Bank v Makaleng, [2016] ZASCA 169* para 15 it was emphasised that the three attributes do not necessarily constitute a closed list.

[14] It was stated in the Makaleng case supra that even where a decision does not bear all the attributes of a final order it may nevertheless be appealable if some other worthy considerations are evident, including that the appeal would lead to a just and reasonable prompt solution of the real issues between the parties. Furthermore, the interests of justice may be a paramount consideration in deciding whether a judgment is appealable or not.

[15] Earlier in *S v Western Areas Ltd and Others 2005 (5) SA 214 (SCA),* the SCA held as follows on the applicability of the interest of justice albeit that it was in the sense of a criminal case:

> "[28] I am accordingly of the view that it would accord with the obligation imposed by s 39(2) of the Constitution to construe the word 'decision' in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings. The scope which

this extended meaning could have in civil proceedings is unnecessary to decide. It need hardly be said that what the interests of justice require depends on the facts of each particular case."

[16] It is evident that depending on the facts of each case, courts have applied the interest of justice to decide whether or not orders that are interlocutory in nature should be appealable or not. There is a host of case authority both in the SCA and the Constitutional Court where this has been done. In the case of the latter, the interest of justice has not been confined to instances where it had to decide whether or not to entertain a matter being referred directly to it for hearing as contemplated in Section 167 of the Constitution.

APPLICATION OF LEGAL PRINCIPLES AND EVALUATION

[17] Notwithstanding the Applicants' assertions to the contrary, the orders must be construed in a manner that ascribes meaning to the words used in the document, the orders in this instance. One must endeavour to give context when reading the provisions concerned as a whole and the circumstances attendant upon its coming into existence. The current position of the law in this regard has been stated 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."*

[18] The interpretation that the Applicants want to assign to the reinstatement order is manifestly farcical. I am at a complete loss why anyone would want to read a sentence that states that the First Respondent is temporarily reinstated pending the finalisation of Part "B" to be final. A plain reading of that sentence is clear. Even with the interdict relating to the prohibition of the appointment of another Chief Executive Officer, it is apparent when reading it against the background of all the papers in the application that the intention is for it to apply until the finalisation of Part "B". An interpretation that is in stark contrast with the quoted passage from Endumeni Municipality case supra stands to be rejected as bereft of reason and the orders that this Court granted on 30 July 2019 cannot accommodate a construction that they are final and definitive.

[19] I turn now to the question of whether or not the interest of justice directs that the orders should be appealable, notwithstanding that they are interlocutory. In this regard, the parties have respectively supplied persuasive arguments why it is, or it is not, in the interest of justice that the orders be appealable.

APPLICANTS' ASSERTIONS ON THE INTEREST OF JUSTICE

[20] In support of their argument that it is in the interest of justice that the orders be appealable, the Applicants referred this Court to the Director General, Department of Home Affairs and Another v Islam and Others (459/2017) [2018] ZASCA 48 (28 March 2018) where the SCA after referring to the traditional common law position as set out in cases such as Zweni supra, stated that this position remained pertinent but added that:

> *"The test has since evolved. So whilst the traditional requirements are still important considerations, the court may in appropriate circumstances dispense with one or more of those requirements if to do so would be in the interests of [justice], having regard to the court's duty to promote the spirit, purpose and objects of the Constitution e.g. where the interim order 'has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, on-going and irreparable."*

[21] The Applicants have contended that the First Applicant will suffer prejudice by the retention of the First Respondent as a Chief Executive Officer in circumstances where he is involved in on-going litigation with the Applicants. The prejudice is even more palpable, so continues the argument, when one considers that whichever of

the parties becomes successful, the other may take the matter forward on appeal. The prejudice that the First Applicant will suffer will be 'serious, immediate, ongoing and irreparable.' The Applicants conclude that it is thus in the interest of justice that the order be appealable.

[22] A further contention advanced by the Applicants is that the First Respondent is the most senior employee of the First Applicant on whose shoulders rests its entire management. Whilst he obtains intermittent directions from the board of the First Applicant, he has no superior to whom he accounts for his decisions. This, argues the Applicants, sets him apart from those cases where courts have granted reinstatement as a solution. For this reason, it is maintained, that the interest of justice prescribes that the orders be appealable.

[23] The Applicants are also adamant that whatever the rights and wrongs of the two opposing sides respective allegations against each other, one objective indubitable fact is that the relationship of trust and confidence required to exist between the Board and the First Respondent has evaporated. Accordingly, conclude the Applicants, a forced retention of the First Respondent in his position will irreparably prejudice the First Applicant *in its ability to manage its affairs*. The prejudice is an immediate effect of the order granted and will continue for so long as it takes to dispose of Part "B". The irreparable nature of the prejudice is in the fact that it will be suffered regardless of which of the two sides triumphs in Part "B".

[24] It has also been contended that the judgment of this Court has brought with it an intrinsic dysfunctional state of affairs, which is in turn causing irreparable harm to

the First Applicant, especially if it can be found in the end that the dismissal was lawful or if it can be found that there is no merit in the First Respondent's delinquency application. The lack of trust and confidence of the two sides in each other renders the reinstatement order pending finalization of Part "B" unsuitable. This is worsened by the fact that the First Respondent is or will be pursuing litigation against the Applicants, the company at whose helm he will be sitting.

[25] The Applicants continued that it will be in the interest of justice that the orders be appealable because the court had misdirected itself, or if it had not, it had accorded inadequate evaluation of the balance of convenience. In this regard the Applicants point to the fact that where the court deals with the subject in the judgment, no reference is made to the prejudice that the First Applicant would suffer if the First Respondent was reinstated and continues to be at the helm until the conclusion of Part "B" litigation.

ASSERTIONS OF THE RESPONDENTS ON THE INTEREST OF JUSTICE

[26] It has been contended on behalf of the First Respondent that the Applicants have failed to satisfy the requirements of the interest of justice. The interest of justice requires the existence of serious, immediate, enduring and irreparable harm to the Applicants. Taking the submissions of the Applicants to their logical conclusion, no employee may achieve a temporary reinstatement of their contract of employment, where they have been unlawfully dismissed.

[27] The First Respondent argues further that the mere fact that temporary reinstatement is competent in law, it ought to follow that the law envisages situations

where employers would be compelled to reinstate employees that they claim not to trust. Behind this is a large deeper principle based on the rule of law. It cannot be the law, continues the argument, that once employers declare that they no longer trust their employees, courts are not allowed to order reinstatement because doing so would force the parties to work together.

[28] The First Respondent also referred this Court to the case of *Santos Professional Football Club (Pty) Ltd v Ingesund & Another* 2003 (5) SA 73 (C) where the court recognized the primacy of reinstatement despite an acrimonious working environment. The same happened when this Court in *Cliff v Electronic Media Network (Pty) Ltd* 2016 (2) ALL SA 102 (GJ) noted that the employer was reluctant to reinstate the employee BUT held at Paragraph 35 that:

> *"Insofar as it is argued that temporary reinstatement of Cliff as an Idols judge would be an unsuitable remedy where the relationship between the parties has soured, our courts now recognize that, in principle, specific performance may be ordered in contractual disputes. This is so, even in instances where the services are of personal nature and it means compelling an unwilling employer to reinstate his or her erstwhile employee".*

[29] The First Respondent states further that it is not up to the Applicants to say that they find it unbearable to tolerate a situation where they have to put up with an employee who is essentially the power behind the First Applicant yet have a hostile relationship with him. The decision to reinstate him in that position has been made

by the court. The First Respondent continues to state that this, on its own, does not grant the Applicants the right, in the interests of justice, to lodge a leave to appeal.

[30] Were this to be the case, each case where there has been a temporary reinstatement would be susceptible to appeal. The First Respondent concludes that the consequence would be that each employee who has been successful in obtaining a temporary reinstatement can be frustrated through the strategy of lodging an appeal, and then claiming that it is in the interest of justice to pursue the appeal to finality, prior to reinstating such employee.

EVALUATION

[31] This Court dealt with the balance of convenience and, in doing so, could only assume that any injury that may occur to the First Applicant would have been anticipated. One would think that the decision that the board took to dismiss the First Respondent would have been thoroughly deliberated and its possible ramifications fully weighed. In short, the resultant harm was self-inflicted. On reflection, however, the court should perhaps have elucidated its thoughts on the subject of irreparable harm more comprehensively.

[32] That being so, it should be in the interest of justice for another court to reconsider that point. The blame game aside, the current position is that the relationship between the parties is unwholesome. The nature of that relationship

would potentially have a 'serious, immediate, on-going and irreparable' damaging weight on the management of the First Applicant.

[33] I agree with the Respondents that theoretically it is possible that an employer can thwart an employee's temporary victory of reinstatement by lodging an appeal. Ordinarily, however, there should be nothing sinister in lodging an appeal as such a right extends to every party that feels aggrieved by an order of a court. Accordingly, it is incumbent upon courts to give a full consideration of the circumstances surrounding appeals of interlocutory orders. I part ways with the First Respondent's belief that in matters involving appeals of interim orders, one should routinely perceive them as a stratagem to ensure that an employee's temporary triumph is short lived. There will also be those appeals that are lodged in good faith

[34] As a general principle, it must be correct that an employer cannot arbitrarily claim absence of trust and confidence in a relationship between it and an employee, the real objective being to demonstrate that they cannot work with such an employee. The declaration of lack of confidence and trust in an employer-employee relationship ought to be assessed objectively. That said, is there no substance in stating that the First Respondent's senior position as a Chief Executive Officer somewhat puts him in a different category from any other? Besides and mindful that the First Respondent has the right to sue the First Applicant, the impending action that the First Respondent intends to institute will no doubt muddy the already troubled waters. For that reason, I conclude that it has to be in the interest of justice that the orders should be appealable regardless of their interlocutory nature.

MERITS OF THE APPEAL

[35] Perhaps it could be pertinent here to begin by making reference to Section 17(1) of the Superior Courts Act that governs applications for leave to appeal. It provides as follows:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
>
> (a)(i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
>
> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[36] Having the provisions of Section 17(1)(a) as described in the preceding paragraph, the Applicants contend that there are reasonable prospects that another court would reach a different conclusion from that of this Court. The Applicants do not believe that the First Respondent had made out a *prima facie* right to the relief sought. It is argued that on a proper reading of the employment contract, the Applicants were entitled to terminate the First Respondent's contract of employment on notice.

[37] The attitude adopted by the Applicants towards the interpretation of Clause 25.1.1 of the contract of employment was proved to be misguided. The Applicants contended that it is manifest that on a proper reading of the contract of employment, Clause 25.1.1 was inserted for the sole benefit of the employer to choose which clause between 24 and 25 to use in situations like the present. However, that interpretation is not borne by the plain reading of the text. The Clause provides:

> "Where allegations of misconduct or incapacity have been raised against the Executive, the Employer will be entitled, within its sole discretion, to decide whether or not to hold an internal disciplinary enquiry, or to proceed instead via the pre-dismissal arbitration procedure, contemplated in Section 188A of the Labour Relations Act number 66 of 1995 ..."

[38] Thus, the discretion that the employer has, mentioned in the second line of the clause, pertains to making a decision whether to hold an internal disciplinary hearing or to proceed instead via the pre-dismissal arbitration procedure, contemplated in Section 188A of the Labour Relations Act number 66 of 1995 ... In the result, I do not believe that another court would interpret it the same way as the Applicants do.

[39] Insofar as the Protected Disclosures Act 26 of 2000 is concerned, the Applicants state that this Court confined itself to the question of causation when it was evident that the issues raised went far beyond. There are thus reasonable prospects that another court would traverse the subject thoroughly and reach a different conclusion. Moreover, the question pertaining to the PDA in fact had to do

with Part "B" and did not therefore technically belong to the interim order sought by the First Respondent. For that reason, the Applicants believe that another court would find that the First Respondent did not make out a case under the PDA.

[40] The question pertaining to PDA was the most insignificant part of this Court's judgment because the court had at that stage already concluded that the Applicants had repudiated the contract of employment by the dismissal of the first respondent. It is correct that the court confined itself to causation, which was only one aspect of the PDA issue but that was made clear in the judgment anyway. While the PDA issue could be perceived as a matter falling under Part "B", it was also relevant under Part "A". The First respondent claimed reinstatement on the basis that his dismissal, although branded as emanating from a conflict of interest, was in fact arising from the disclosures that he made about the chairperson.

[41] Contrary to what the Applicants would have this Court believe, I am satisfied that the First Respondent has shown that reasonable apprehension of irreparable harm would ensue if the interim relief was not granted to him. The Applicants seem to disregard the enormity of the harm to the First Respondent's reputation. The fact that it was the only harm that he raised does not make it less important and/or less harmful. In the end, this is intricately connected with the balance of convenience. The views of this court thereon are expressed immediately below.

[42] I have already touched on the subject of the balance of convenience, albeit under a different topic altogether. This Court acknowledges that, although it thoroughly considered the balance of convenience, perhaps the manner in which it

articulated the issue could be found to have been insufficient. As such, reasonable prospects exist that another court would conclude otherwise.

[43] I am somewhat at loss why the Applicants persist that another court would hold that Part "B" may be the adequate alternative remedy that the First Respondent seeks. The court in the Cliff case *supra*, by reference to other case authority, fully covered this subject and demonstrated that unless an interim relief is granted the reputation of an employee, such as the First Respondent will continue to suffer. I therefore do not think that the Applicants are correct that another court will find differently insofar as adequate alternative remedy is concerned.

CONCLUSION

[44] On a proper reading of the order of this Court dated 30 July 2019 and having regard to what was held in Endumeni Municipality case supra on how documents should be construed, the relief sought and granted was interim in nature. Despite it being interlocutory, it was in the interest of justice that the order should nonetheless be appealable. This Court has thoroughly reconsidered its order and believes that reasonable prospects exist that another court will find differently on how this Court assessed the balance of convenience.

[45] Lastly, I note that the Applicants hold the view that the appeal should be heard by the Supreme Court of Appeal. I am not sure of the reasons for wishing it to be referred directly to the Supreme Court of Appeal. I am mindful that it was argued previously that the judgment went against established case authority, but I have clarified that those cases said to be contrary to the judgment of this Court dealt with

the sanctity of contract. Without exception, the contracts of employment referenced in those cases did not contain a clause such as 25 in the contract of employment of the parties albeit that they did have a clause similar to 24. For that reason, I do not believe that there are conflicting judgments which would cause the appeal to lie with the Supreme Court of Appeal.

Against that background, I make the following order:

1. **Leave to appeal to the Full Court of this Division is granted; and**

2. **Costs including those consequent upon the employment of two Counsel shall be in the appeal.**

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
Counsel for the Applicants	: **V Maleka SC**
	: **J G Dickerson SC**
	: **A Freund SC**
	: **R Tulk**
	: **N Mayosi**
Instructed by	: **Bowman Attorneys**
Counsel for the Respondent	: **D C Mpofu SC**
	: **T Ngcukaitobi**
	: **S Gaba**