**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 2019/22791**

DELETE WHICHEVER IS NOT APPLICABLE

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

17.3.2020.
DATE

SIGNATURE

In the matter between:

| | |
|---|---|
| **PETER MTHANDAZO MOYO** | Applicant |
| And | |
| **OLD MUTUAL LIMITED AND OTHERS** | First Respondents |
| **OLD MUTAUL LIFE ASSURANCE COMPANY SA LIMITED** | Second Respondent |
| **TREVOR MANUEL** | Third Respondent |
| **THE NON-EXECUTIVE DIRECTORS OF OLD MUTUAL LIMITED** | Fourth to Fifteenth Respondents |

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**JUDGMENT**

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**LAMONT, J:**

[1] The applicant brought an urgent application against the respondents claiming: –

> "pending the determination of the relief set out in part B of the main application and/or the appeal processes currently underway in respect of Part A thereof:
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> 1 directing that this matter be heard as one of urgency...
>
> 2 .interdicting the respondents from taking any further steps in the ongoing advertisement and/or recruitment process in respect of the position of Chief Executive Officer of Old Mutual,
>
> 3 consolidating and hearing the present application with the urgent contempt of court application currently before this court under the same case number, in terms of Rule 11 of the Rules,
>
> 4 punitive costs in the event of opposition on the attorney and client scale."

[2] The matter came before me as a matter of urgency on a day when there were many other urgent matters to be heard. All parties at that stage had filed heads of argument. I ruled that each party would be limited to 15 minutes of argument. I decided that the matter was urgent and that the merits should be heard. The applicant made submissions concerning the consolidation portion of the application. It was my view that the application which it was sought to consolidate with the present hearing, namely, the contempt application should not be consolidated with the present matter. The

reason was that the contempt application is subject to case flow management. It involves an application of some 500 pages and concerns voluminous issues which are not germane to the present application. It was my view that the consolidation would result in a lengthy hearing concerning wide-ranging issues of fact and law which are not yet ready to be heard and which should not be heard with the present matter which involves a crisp issue. The escalation of both the costs and time delay made the hearing of both matters inconvenient and undesirable. In particular the present application is one for interim relief whereas the contempt application is for final relief. The interests of the first respondent are also not coextensive with the interests of the respondents in the contempt application.

[3] In order to understand the present application it is necessary to traverse some of the history. The fist respondent employed the applicant as its Chief Executive Officer ("CEO") during June 2017. During May 2019 the first respondent decided to suspend the applicant. The applicant believes that his suspension is unlawful. Subsequently during June 2019 the first respondent terminated the employment of the applicant relying upon a six month no-fault termination provision contained within the contract. The applicant instituted urgent proceedings to declare the suspension and termination unlawful and sought to be temporarily reinstated. That application was contained within two parts; Part A seeking interim relief pending the finalization of Part B. The interlocutory application was heard and an order made during July 2019. The relevant portion of the order which reads:

1. Pending the hearing of Part B the Applicant is temporarily reinstated in his position as Chief Executive Officer of the first Respondent;
2. The first to seventeenth Respondents are interdicted from taking any steps towards appointing any person into the position of CEO of the first Respondent..."

[4] Within a few days of the judgment being delivered the respondents launched an application for leave to appeal. The applicant relying on Section 18 (2) of the Superior Courts Act No 10 of 2013 (hereafter "the Act") was of the view that as the decision was for interlocutory relief the decision was enforceable notwithstanding the existence of the appeal proceedings. He returned to work notwithstanding the application for leave to appeal. He was not permitted to work.

[5] In due course during August 2019 the first respondent's applications for leave to appeal and for an order suspending the operation of the interlocutory order were heard together with the applicant's counter application seeking a committal for contempt of court. During the period wherein judgment was reserved, the first respondent delivered a letter to the applicant notifying the applicant that notwithstanding what had happened before that date and irrespective of what might happen in the legal proceedings a continued employment relationship between the applicant and the first respondent was highly untenable and for that reason a further notice to terminate the contract of employment was given.

[6] During September 2019 the first respondent was given leave to appeal, its application in terms of section 18 of the Superior Courts Act was dismissed and the contempt application was postponed. The first respondent maintained its attitude that it was entitled to prevent the applicant from working for it and continued to prevent him from doing so. In the interim the applicant's application for committal proceeded. That application still is pending.

[7] On 14 January 2020 the full bench handed down its decision in the appeal. The order made by the full court is as follows:

> "(a) The appeal is upheld with costs, including those of two counsel for the first and second appellants and of two counsel for the third to sixteenth appellants.
>
> (b) The order of the *court a quo* is set aside and substituted with the following order:
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> "The application is dismissed with costs including those of two counsel."

[8] In the course of the judgment the court considered the fact that the order made by the *court a quo* was interlocutory and decided that the interests of justice demanded that, that order notwithstanding its interlocutory nature, it was appealable. The reasoning of the court was

> "The interim interdict should not have been granted in the first place by reason of a failure to meet the first requirement for the granting of an interim interdict.... The interdict although interim has an immediate and substantial effect. The irreparable harm which [the first respondent]... Shareholders employees and other stakeholders stand to suffer if the

> interim interdict is allowed to stand requires no imagination or elucidation. The reality of the order is that [the first respondent] is forced to live with its adverse effects as long as the main action is pending or remains inconclusive by reason of appellate processes. It is forced to be governed by a Chief Executive and a board, to whom the Chief Executive is supposed to report and obliged to maintain its ongoing trust and confidence, who have lost complete trust and confidence in one another and who are involved in ongoing litigation. The interests of justice in the particular circumstances of this case demand that the order should be corrected forthwith before the proceedings have run their full course and before it has any further adverse consequences."

[9] Fundamental to the finding that the interim order was appealable is the finding that there is a total breakdown of the relationship between the applicant and first respondent. The applicant himself appears to recognize that there is this breakdown. Indeed the breakdown is, as was stated by the full court, obvious.

[10] The appeal court has ruled against the applicant in respect of his claim for reinstatement and related relief set out in Part A as well as (by implication) Part B to the extent that that relief is claimed in Part B.

[11] Subsequent to the appeal court order the applicant took steps to appeal it. The applicant believed the state of law to be that the effect of the appeal process he was undertaking was to suspend the appeal decision and

restore the status *quo* as it was prior to the appeal order, i.e that the interim order revived.

[12] The first respondent took steps to find an employee to perform the work of CEO. It is this conduct that the applicant seeks to interdict in the application which serves before me.

[13] The steps taken by the first respondent constitute at best for the applicant preliminary steps with a view to ascertaining who the incumbent should be. The steps do not constitute an appointment of an incumbent. They of themselves constituted no irreparable harm to the applicant. The applicant submitted during the course of argument that notwithstanding that the notice of motion was limited in its ambit, that it was intended to encompass also employment of a new CEO.

[14] The appeal court in allowing the appeal made the order that the *court a quo* should have made. Its order became the order of the *court a quo*. It was held that this was the position in *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* (CCT 12/12) [2012] ZACC 9; 2012 (9) BCLR 951 (CC)

> "7 It is usual that in a successful appeal, the appellate court may make the order that the court of first instance should have made. That order then becomes the order of the court of first instance. Execution and enforcement of the order should then take place in that court."
>
> The Court relied on:-

*General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey NO* 1988 (4) SA 353 (A) at 360B.

In that case it was held:-

"Die gevolgtrekking waartoe ek geraak, is dat die Verhoorhof se uitspraak van 9 November1981 ,waarkragtens skadevergoeding ten bedrae van R118 696 aan die respondent toegestaan is, vervang is deur die uitspraak van hierdie Hof op 30 September 1983 wat die skadevergoeding na R93 012 verminder het; dat hierdie Hof se uitspraak in die plek gestel is van dié van die Verhoorhof; dat die vonnisskuld van R93 012 die bedrag verteenwoordig wat die Verhoorhof moes toegestaan het; en dat dit geag moet word betaalbaar te wees vanaf die datum van die Verhoorhof se uitspraak, en gevolglik rente van daardie datum af dra. Dit dien daarop gelet te word dat dit nie hier gaan oor die beginsel neergelê in sake soos *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 op 32 dat rente nie betaalbaar is op 'n ongelikwideerde bedrag nie, en dus nie betaalbaar is voordat skadevergoeding finaal bepaal is nie. Dit gaan hier oor die uitwerking van 'n uitspraak op appèl, en die toepassing van die bepalings van art 2(1) van Wet 55 van 1975 in so 'n geval."

[15] The consequence of the appeal court order is accordingly that there is no interim order interdicting any conduct on the part of the first respondent and that there is deemed never to have been any such order by reason of the fact that the appeal court order is the original order.

[16] The next question for decision is whether or not the fact that the applicant has instituted proceedings appealing the appeal court order has any impact. The submission of the applicant was that once the appeal process was commenced the status quo prior to the appeal order resumes, i.e. the interim order revives.

[17] The provisions of the Act provide in section 18 as follows:-

"18 Suspension of decision pending appeal:-

(1) Subject to subsections (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 subsection (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 subsection (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 subsection (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.

(5) For the purposes of subsections (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 a notice of appeal is lodged with the registrar in terms of the rules."

[18] It is apparent that the section deals with suspension of the rights of a person to execute upon an order granted in his favour. The section does not deal with the position such as the present where the rights of the applicant no longer exists due to the appellate court's order and where the first respondent is prosecuting rights which exist independently of any court order. Section 18 of the Act has no bearing on this matter.

[19] The effect of the dismissal of an application on the existence of an order which is interlocutory and dependent upon the existence of the application for its existence has been considered in numerous authorities which were cited to me. In *MV Snow Delta* 2000 (4) SA 746 (SCA) it was held in paragraph 6 that once an interim interdict is not confirmed in the

proceedings in which it is an interlocutory order the interdict "is effectively dismissed". The relevant portion of the judgment is as follows

> "When an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same court... In the same proceedings after having heard the other side.... Any other conclusion gives rise to an unacceptable anomaly"

The underlying reasoning is apparent from the following passage

> "It is convenient at the outset to say something about the judgment of Selikowitz J. The ratio of the decision was based on *SAB Lines (PTY) Limited v Cape Tex Engineering Works (PTY) Limited* 1968 (2) SA 535 (C) where Corbett J had held that the granting of interim relief as an adjunct to a rule nisi is to provide protection to a litigant pending a full investigation of the matter by the court of first instance. Once that interim order is discharged, it cannot be revived by the noting of an appeal. This approach was and still is generally accepted as correct."
>
> The reasoning in MV Snow Delta has been followed and applied see *Kelly Group Limited and Another v Solly Tshiki and Associates* 2010 (5) SA 224 (GS J) at paragraph 19; *National Director of Public Prosecutions Rautenbach and Another* [2005] 1 All SA 412 (SCA) at paragraph 11 where it was held
>
> "when an appeal is sought to be brought against the discharge of an order there is nothing to revive for it is as if no order was made in the first place";

*See also Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others* 2017 (6) SA 90 (SCA) at paragraph 71; *Quits Aviation Services Limited v Empire Engineering (PTY) Limited and Others* [2016] ZAGPJHC 218 which held that provisions of section 18 substantially re-enact the earlier provisions and that the reasoning of Snow Delta remains of application; *Huayou (Hong Kong) Co Limited v C.Steinweg (propriety) Limited and Others* [2017 ZAGPJHC 472 which contains a collection of many of the authorities.

[20] The fact that there are appeal proceedings pending does not revive the interim order. The submission made by the applicant that there was a restoration of the status quo ante the order is accordingly fallacious.

[21] The applicant submitted that this was not the end of the matter as in any event the application contained a freestanding new application for relief. The applicant submitted the application to constitute a fresh application pending the determination of the relief set out in Part B of the main application and all the appeal processes in which it is sought to appeal against the decision of the full court. I shall assume that the applicant did set out a case claiming fresh relief.

[22] The relief sought in prayer two in my view cannot naturally be interlocutory relief in the Part B application for the simple reason that the relief for which it was based has been dismissed in the appeal.

[23] The relief sought in prayer two cannot naturally be interlocutory relief in the appeal proceedings which are pending in a different court and in respect of which there is no procedure for interlocutory relief to be granted. When the appeal is heard a final decision will be made overruling the appeal court's order or reinstating the order of the *court a quo.*

[24] This application seeks the reinstatement of the applicant as the CEO of the first respondent. The ordinary remedies for breach of contract are either reinstatement or full payment of benefits for the remaining period of the contract. Even if the contract of employment were terminated unlawfully, the employee is not entitled to reinstatement as a matter of contract. Reinstatement is a discretionary remedy in employment law which should not be awarded without proper consideration being given to the effect of reinstatement on the parties. If there is an irretrievable breach of trust this will be a good reason not to give effect to a reinstatement request. See: *Masetlha v The president of the republic of South Africa* [2007] ZACC 20

> "[88] Although it is clear that there has been a break-down in trust that alone is not a sufficient ground to justify a unilateral termination of a contract of employment. It must however be said that the irretrievable breach of trust will be relevant for purposes of remedy. The ordinary remedies for breach of contract are either reinstatement or full payment of benefits for the remaining period of the contract. In my view, even if the contract of employment were terminated unlawfully, Mr Masetlha would not be entitled to re-instatement as a matter of contract. Reinstatement is a discretionary remedy in employment law which should not be awarded here

because of the special relationship of trust that should exist between the head of the Agency and the President.

[25] The requirements for the granting of an interim interdict are set out in *Setlogelo v Setlogelo* 1914 A.D. 221. The applicant is required to establish a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; that the balance of convenience favours the grant of the interdict; that the applicant has no other remedy. See also: *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at paragraphs 41 to 47 and *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (9) BCLR 1133 (CC) at paragraph 49.

[26] To the extent that the applicant relies upon the judgment of the *court a quo* that reliance is met by the finding of the appeal court that failed to establish the first requisite for an interim interdict. (Full court paragraph 95).

[27] To the extent that the applicant relies on a right to work and inherent rights to dignity self-worth and Ubuntu there is no case made out of the facts and in any event as set out above this is not one of the considerations in the application of the test. There is no constitutional interference with his right of work dignity or self-worth inasmuch as he is available to obtain such work as he may find and is not entitled as a matter of constitutional law to employment at a particular employer.

[28] To the extent that the applicant relies on reputational rights being infringed this does not establish a *prima facie* right to be employed. This complaint relates to the question of the applicant's employment being terminated not to the right for reinstatement.

[29] To the extent the applicant relies upon irreparable harm flowing from the termination of his employment contract this reliance is ill placed as in due course it will either be held that the full court has decided the issue or the fresh appeal court will decide the issue. A failure to decide the issue at present does not result in irreparable harm to the applicant.

[30] The balance of convenience is against the applicant inasmuch as it is apparent that there is an irretrievable breakdown of the relationship between the applicant and first respondent. The first respondent is unable to work properly with the applicant. This issue has been considered in the appeal court and I agree with the reasoning set out therein.

[31] An alternative remedy exists for the applicant in the form of the prosecution of the appeal proceedings which he lodged against the full court's decision.

[32] This court should not exercise the discretion which it has in favour of the applicant in circumstances where specific performance should not be granted by reason of breakdown of the relationship between the applicant and respondent. In addition any order made at present will be of a short effective

duration by reason of the fact that the full court has already decided the issue and the appeal court will shortly decide whether the full court decision was correct or not.

[33] As far as costs are concerned respondents are entitled to payment of the costs including the costs of senior and junior counsel. I do not believe that a special costs order is warranted. I accept as set out in the applicant's affidavit that he was advised that there were prospects of success on the basis of the revival of the status quo ante.

[34] I would accordingly dismiss the application and direct the applicant to pay the costs of the respondents who employed counsel such costs to include the costs of senior and junior counsel where employed.

**G G LAMONT**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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| **RESPONDENT'S ATTORNEYS:** | Bowman Gilfillan Inc |
| **DATE OF HEARING:** | 10 March 2020 |
| **DATE OF JUDGMENT:** | 17 March 2020 |

## LEGAL SUMMARY

An appeal court upheld a contention that the present applicant was not entitled to relief he had obtained in the court a quo and set aside that court's order. The applicant prosecuted proceedings to appeal against the appeal court order. Relying on S 18 (2) of the Superior Court Act 10 of 2013 as authority for the proposition that the fresh appeal proceedings restored the status quo ante the appeal order and that an interlocutory order which had been made in the court a quo was revived he sought urgent relief interdicting the respondent from performing acts the interim order had directed should not be performed. It was held that S18 did not have that effect and that the interim order had lapsed as it had no independent existence of its own. It depended for its existence on the existence of the main application which the appeal court had dismissed.

The court held that to the extent the application contained a fresh application seeking interim relief that no case had been made out as inter alia the balance of convenience was against the applicant as the relationship between the applicant and first respondent had broken down irretrievably.