

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



CASE NO.: 27609/2019

(1) REPORTABLE: YES / NO ☒ YES ☐ NO (2) OF INTEREST TO OTHER JUDGES: YES / NO ☒ YES ☐ NO (3) REVISED. <u>09/11/2019</u> DATE	 SIGNATURE
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In the matter between:

**THE PUBLIC PROTECTOR OF THE REPUBLIC
OF SOUTH AFRICA: ADV BUSISIWE MKHWEBANE N.O**

APPLICANT

**And
MINISTER GUGILE ERNEST NKWINTI
MINISTER OF WATER AND SANITATION**

FIRST RESPONDENT

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
MATAMELA CYRIL RAMAPHOSA N.O**

SECOND RESPONDENT

JUDGMENT ON THE APPLICATION FOR LEAVE TO APPEAL

SARDIWALLA, J:

Introduction¹

- [1] This is an application for leave to appeal against the whole order by the first respondent, in terms of which the interim interdict was granted against the first respondent. The background is the following.
- [2] On 6 May 2019, an application was before in the urgent court brought by the applicant against the first respondent interdicting the first respondent from publishing or making her report in connection with the acquisition and lease of the Farm Bekendvlei known to any person and section 8 (1) of the Public Protectors Act of 1994. On 6 May 2019 I handed down a judgment granting the relief that the first respondent had sought as follows:-
1. An interim interdict or *mandamus* against the first respondent prohibiting her from:
 - 1.1 making her report (Report No.20 of 2019/20) “An investigation into the allegations of a violation of the Executive Ethics Code by the former Minister of Rural Development and Land Reform, the Honourable Guile Nkwinti, MP (currently Minister of Water and Sanitation) in connection with the acquisition and lease for the Farm Bekendvlei: purportedly signed on 3 May 2019 known to any person as contemplated in section 8(1) of the Public Protectors Act, 1994;
 - 1.2 submitting the aforementioned report to the National Assembly as contemplated in section 8(2)(b) of the Act;
 - 1.3 making the aforementioned report available to the public as

¹ In the interest of brevity evidence led before the court a quo will not be repeated in this judgment in any great detail unless material to the conclusions reached. Readers of this judgment are referred to the judgment of the court a quo and the record if any additional details are required. To facilitate reading, the same terminology as adopted in the court a quo will be followed to ensure consistency and hopefully ease of understanding.

contemplated in the provision of section 8 (2A) (a) of the Act;

1.4making the aforementioned report available to the complainant

Thomas Walters;

1.5submitting the aforementioned report to the second respondent

with the purpose of taking any remedial action against the applicant and submitting to the National Assembly, and from

1.6releasing the aforementioned report on 6 May 2019 or thereafter to the Media

1.7Pending the outcome of the review application by applicant against the findings by the Public Protector in her aforementioned report in terms of the provisions of PAJA and/or in terms of Rule 53 of the Uniform Rules of Court.

2. An order in terms of which the applicant is directed to launch the review proceedings against the first respondent, referred to in paragraph 2 above, within 1 (one) month calculated from the date of this order;
3. An order, in the event that the aforementioned review proceedings are not launched within 1 (one) month from the date of the granting of this order, that this order shall lapse;
4. An order of costs against any of the respondents, only in the event of opposition to the relief sought herein and in the event of the first respondent opposing the application a cost order on a punitive basis against her.
5. Costs to be costs in the cause.

[3] As a consequence the first respondent brought an application for leave to appeal against the entire order. The appeal was before me on 30 August 2019.

First Respondent's grounds of appeal

[4] The first respondent disputes my findings, in that it disputes that the applicant is entitled to relief granted against it. The first respondents grounds of appeal in essence which are set out in the notice of application for leave to appeal are:-

1. The appealability of an interim order;
2. The findings of fact and or ruling of law;
3. Whether there is a reasonable prospect that another court may come to a different conclusion; and
4. The issue of leave to appeal and costs.

The appealability of interim orders

[5] In this matter before determining the grounds of appeal, the first question for determination is the appealability of the order made. It is not in dispute that the order was made pending the final determination of a review application to be instituted by the applicant within 30 days from the granting of the interim interdict. As such it is the general rule that such orders are not appealable.

[6] The law regarding the appealability of interim or interlocutory orders are trite and in *ATKIN v BOTES* 2011 (6) SA 231 (SCA) the Supreme Court of Appeal held as follows at 234B to C:

'In Metlika Trading Ltd and Others v Commissioner, South African Revenue Service 2005 (3) SA I (SCA) (2004) JTLR 73; [2004] 4 All SA 410) this court held that an interim interdict is appealable if it is final in effect and not susceptible to alteration by the court of first instance. The decision also emphasised that in determining whether an order is final in effect, it is important to bear in mind that 'not merely the form of the

order must be considered but also, and predominantly, its effect. The crucial question in the appeal is therefore whether the granting of the interim interdict was final in effect."

- [7] The definition of interlocutory orders was defined in ***SOUTH CAPE CORP. (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD*** 1977 (3) SA 534 (AD) where CORBETT JA said the following at 5490:

'In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper which do not.'

- [8] In the ***INTERNATIONAL TRADE ADMINISTRATION COMMISSION v SCAW SOUTH AFRICA (PTY) LTD*** 2012 (4) SA 618 (CC) said the Constitutional Court said following at 639F to 640A:

'The 'policy considerations' that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes.'

The Court added at 640G to 641C:

'As we have seen, the Supreme Court of Appeal has adapted the general principles on the appealability of interim orders, in my respectful view, correctly so, to accord with the equitable and the more context-sensitive standard of the interests of justice, favoured by our Constitution. In any event the Zweni requirements on when a decision may be appealed against were never without qualification. For instance, it has been correctly held that in determining whether an interim order may be appealed against regard must be had to the effect of the order rather than its mere appellation or form. In Metlika Trading Ltd & Others vs Commissioner, South African Revenue Service the court held, correctly so, that where an interim order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings it will generally be final in effect.'

- [9] It is evident that the order of the 6 May 2019 is susceptible to reconsideration by the review Court when final relief is determined. However, the issue was further decided in the Constitutional Court in ***TSHWANE CITY v AFRIFORUM AND ANOTHER*** 2016 (2) SA 279 (CC) which dealt with the appealability of interim orders and expressed the position as follows at 294B to C:

'Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability.'

- [10] The Court also referred with approval to the stance taken in the matter of ***NATIONAL TREASURY AND OTHERS v OPPOSITION TO URBAN TOLLING ALLIANCE AND OTHERS*** 2012 (6) SA 223 (CC) as follows at 231D:

'This court has granted leave to appeal in relation to interim orders before. It has made clear that the operative standard is the 'interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relative and important consideration ...It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.'

- [11] It can be safely concluded that the interests of justice standard becomes the operative standard. In this regard in alluding to the interest of justice standard the Constitutional Court in ***OUTA*** and in ***AFRIFORUM*** made specific reference to the question of whether the order has immediate and substantial effect including whether the harm that flows from it is serious, immediate, ongoing and irreparable.

- [12] Applying this standard it is in my view clear that the order of the 6 May 2019 is firstly interim in nature in that it is not final in effect and is susceptible to variation either by the Court that will hear the main dispute, or by any other Court prior to that upon good cause shown. As to whether the order results in irreparable harm, this court concluded in

granting interim relief that there was a well-grounded apprehension of irreparable harm if relief to the applicant if the interim order was not granted. The applicant contended that the first respondent's refusal to afford him an opportunity to comment on her findings of her report would result in irreparable harm being caused to his reputation and therefore warranted the interim relief sought. The first respondent however in this appeal avers that the Deloitte's draft report was published by the Sunday Times newspaper under the heading "*Minister helped friends take over R97 million farm*", the media have long been aware of the allegations against the applicant and therefore the harm had already been suffered at the time of the granting of the interim order. I think the point has been lost on the first respondent to which I referred in paragraph 35 of my judgment that it is prudent in a fact finding investigation to inform and interact with a person whose rights may be adversely affected. Not to mention that the interim relief was not sought against Deloitte but against the first respondent and her failure to afford the applicant the simple courtesy of a conversation in keeping with the principle of natural justice and fair procedure before releasing her report for remedial action to the second respondent. The report by Deloitte can be summed up as mere speculation but the first respondent's report to the second respondent recommending remedial action makes the issue decisive and irreparable.

- [13] Finally on this aspect it must be emphasised that the nature of the interim relief granted is simply to prevent remedial action from being taken until the determination of the review Court on the main issue in dispute. As to whether ultimately the Public Protector in her discretionary refusal to engage with the applicant during the investigate stage of or preliminary findings of her report was lawful will be a question for future determination.

- [14] The first respondent avers that *“the interim order restrains the Public Protector from exercising her constitutional/statutory powers and in particular her power to investigate the complaint and to publish her report as provided in section 182 (1)(a) and (b) of the Constitution including section 8(2A) of the Public Protector Act”*. This submission, and I agree with the applicant, is incorrect. The first respondent has already completed her investigation; it is only the publication of the report that is being temporarily interdicted pending the outcome of the review application. The first respondent in the event of the review being unsuccessful would be able to publish her report, it is just a question then of timing. In any event the first respondent avers that the report has already been submitted to the second respondent for remedial action and therefore by her own version she has executed the constitutional mandate conferred upon her.
- [15] Accordingly I have not been convinced that the interests of justice standard comes to the assistance of the first respondent as there is with respect nothing in substance advanced as to why the circumstances attendant upon the granting of interim relief will result in irreparable harm to the first respondent.
- [16] For these reasons I must conclude that the order of 6 May 2019 is not appealable. However even if I am wrong on this conclusion then when I have regard to the grounds of appeal advanced by the first respondent, they do not convince me that the appeal would have a reasonable prospect of success as stated in paragraph 36 of my judgment in the urgent application.

[17] I accordingly make the following order:

The appeal is dismissed with costs.



SARDIWALLA J

JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	:	29 May 2019
Date of judgment	:	16 October 2019

Appearances:

For the Applicant	:	Adv. E S J VAN GRAAN
Instructed by	:	De Swart Myambo Attorneys
For the First Respondents	:	Adv.: B TSHABALALA
Instructed by	:	Seanego Attorneys Inc.
For the First Respondents	:	
Instructed by	:	State Attorney Pretoria